THE
Clergy-Man's LAW:
OR, THE Clergyman's
Complete Incumbent,

COLLECTED

From the Thirty-nine Articles, Canons, Decrees in Chancery and Exchequer, as alſo from all the

STATUTES
AND
COMMON-LAW CASES,
Relating to the
CHURCH and CLERGY
OF
ENGLAND:

Digeſted under proper Heads for the Benefit of *Patrons* of *Churches*, and the *Parochial Clergy*;

And will be Uſeful to all STUDENTS, and PRACTITIONERS of the LAW.

By WILLIAM WATSON, L.L. D. late Dean of *Battel.*

With a TABLE of the Contents of the Chapters, and another of the Principal Matters.

To which are added the Names of the preſent Biſhops, and other Chief Dignitaries of the Church of *ENGLAND.*

The Fourth Edition, with large Additions and Alterations.

Divos caſtè adeunto, Pietatem adhibento, Opes amovento; Qui ſecus faxit, Deus ipſe Vindex erit. Leg. xii. Tabular'.

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FR
MVSEVM
BRITANNICVM

Printed by Henry Lintot, (Address to Stationers' Hall, Price) for
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MDCCXLVII.

TO THE READER.

Altho' it might ſeem needleſs to Preface a new Edition of the enſuing Treatiſe with any preliminary Diſcourſe, (the former having ſo ſucceſsfully paſſed the Preſs, and received from the learned Part of Mankind that Applauſe they juſtly merited); yet to comply with the Requeſt *of ſome Perſons of eminent Conſideration, and to ſatisfy the* Curioſity *of others, we have thought fit in this Place to give the Reader ſome brief Account both of the Author and alſo of the Work; eſpecially of its additional Contents ſince the firſt Impreſſion.*

First, *As to the Author, the Title-Page informs you of his Name and Titles, and the excellent Matter and Method of the Work ſhews him to be of great Learning and Experience therein, and every Way qualified to write on ſo important a Subject; and indeed both the Method of his Education and the Courſe of his Studies had fully prepared him for that End.*

He had long been converſant in contemplating the Laws of God and Nature, the Rules of Reaſon, the Precepts of Morality, the Foundations of Property, the Diſtinctions of Right and Wrong, and whatever elſe is neceſſary for the Profeſſion and Practice of the CIVIL LAW; *and was accordingly admitted to the higheſt Degree therein,* viz. LL. D. *But ſoon after, declining Courts and judicial Clamours, he choſe rather to wait at the* Altar, *and devoted his future Life to* Religion *and the Service of God.*

Our Author being thus employed in a dignify'd parochial Cure, viz. *the* Deanery *of* Battel *in* Suſſex, *he was ſoon apply'd to by his* Neighbours, *as a Perſon able to* adviſe *them in the many* Doubts *and* Difficulties *that daily occurred to them; when finding many of his* Brethren *moleſted by* dubious Titles, *and exerciſed with a Multitude of* vexatious Diſputes, *he thought it* Charity *and* Juſtice *to ſpend ſome vacant Hours in ſtating the Tenure of* Eccleſiaſtical Benefices, *the* Capacities *and* Incapacities

cities *of* Incumbents, *with the Method of* Admiſſions, Inſtitutions *and* Inductions; *and in ſhort, the whole Conſtitution of our* Church *and* Kingdom, *relating to the Rights and Properties of our* Engliſh Clergy, *and the Means of obtaining and defending them, more eſpecially of the Fruits and Profits of Benefices; to whom they belong, and how recovered if detained. Of Leaſes made by Biſhops, Parſons, Vicars and others, of Eccleſiaſtical Benefices; Of void Leaſes, and how made Good; Of Tithes; And of the Payment of them in* London; *Of Prædial, Perſonal and Mixed Tithes, and in what Manner payable; Of great and ſmall Tithes; How they and other Church Duties are to be recovered; Of Actions for not ſetting forth of Tithes; Of Evidences, Verdicts and Judgments in ſuch Actions, &c.*

He had read and conſidered the many Tracts writ upon this Argument by Doderidge, Degge, Godolphin *and others, but found them either ſo tedious and immethodical in one Reſpect, or ſo obſcure and imperfect in another, that it induced him to undertake a more methodical, clear and perfect Account of thoſe Matters, with ſuch a full Reference to all Statutes, Common Law Caſes, and binding Authorities, as to render it a complete Body of* the Clergyman's Law.

Secondly, *As to the Work, as now enlarged, it is moſt certain, that no Performance of this Nature can be a full and conſummate Piece in any one Edition, or indeed in any one Age, but it muſt of Neceſſity admit of continual Alterations and Improvements; for that in every Reign, nay almoſt every Seſſion of Parliament, the Rights and Cuſtoms of the Church and Clergy may have received ſome Reſtriction or Amplification. The Proprietors therefore prevailed on a Gentleman, to inſert ſuch Matters in the third Edition as might be uſful and Satisfactory to the Reader; and he made ample Additions accordingly; but at the ſame Time could not forbear to interſperſe ſome favourite Notions of his own, which were never in the Contemplation of the Proprietors, nor ſuitable to the Work, nor acceptable to the Publick. Of theſe this Volume is now purged in this Fourth Edition, and there are above Two Hundred Inſertions from choice Reports and Statutes publiſhed in the laſt Twenty Years.*

So that this Treatiſe being now as near as poſſible adapted to the preſent State and Circumſtances of Things, we may without Vanity recommend it as the moſt perfect Work of this Kind, and as the moſt uſeful and beneficial of all others, both to the Biſhops and their Clergy, to the Magiſtrates and their People, to the Patrons and their Clerks, to Common Lawyers, Civilians and Divines; and in brief to all Profeſſions, Orders and Degrees of Men, who are willing to underſtand the Laws and Conſtitution of the Church *and* Clergy *of* England.

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Province of CANTERBURY.

Dioceſe of CANTERBURY.

LOrd Archbiſhop, Dr. *John Potter*, Primate and Metropolitan of All *England*, tranſlated from the See of *Oxford* 11 *March* 1736.
Dean of *Canterbury*, *John Lynch*, D. D.
Archdeacon of *Canterbury*, *Samuel Liſle*, now Biſhop of *St. Aſaph.*
Vicar General, *George Paul*, L. L. D.

Dioceſe of LONDON.

Lord Biſhop, Dr. *Edmond Gibſon*, tranſlated from the See of *Lincoln*, 16 *May* 1723.
Dean of St. *Paul's*, *Joſeph Butler*, D. D. now Biſhop of *Briſtol.*
Archdeacon of *London*, *Edward Cobden*, D. D.
Archdeacon of *Middleſex*, *Fifield Allen*, D. D.
Archdeacon of *Eſſex*, *William Gibſon*, A. M.
Archdeacon of *Colcheſter*, *Thomas Cartwright*, D. D.
Archdeacon of *St. Albans*, *John Cole*, A. M.
Chancellor of the Dioceſe, *John Andrew*, L. L. D.

Dioceſe of WINCHESTER.

Lord Biſhop, Dr. *Benjamin Hoadley*, tranſlated from the See of *Salisbury* 15 *Oct.* 1734.
Dean of *Wincheſter*, *Zachary Pearce*, D. D.
Archdeacon of *Winton*, *Robert Eden*, A. M.
Archdeacon of *Surrey*, *Richard Furney*, A. M.
Chancellor of the Dioceſe, *John Hoadley*, L. L. B.

Dioceſe of ELY.

Lord Biſhop, Dr. *Robert Butts*, tranſlated from the See of *Norwich* 8 *July* 1738.
Dean of *Ely*, *Peter Allix*, D. D.
Archdeacon of *Ely*, *Robert Eden*, D. D.
Chancellor of the Dioceſe, *Wharton Peck*, L. L. D.

Dioceſe of LINCOLN.

Lord Biſhop, Dr. *John Thomas*, conſecrated 9 *April* 1744.
Dean of *Lincoln*, *Thomas Cheyney*, D. D.
Archdeacon of *Lincoln*, *George Reynolds*, L. L. D.
Archdeacon of *Leiceſter*, *David Trimnell*, D. D.
Archdeacon of *Huntingdon*, *Timothy Neve*, D. D.
Archdeacon of *Bucks*, Honourable *William Carmichaell*, L. L. D.
Archdeacon of *Bedford*, *John Taylor*, A. M.
Archdeacon of *Stow*, *Squire Payne*, A. M.
Chancellor of the Dioceſe, *John Taylor*, L. L. B.

A Table of the chief Dignitaries

Dioceſe of LITCHFIELD *and* COVENTRY.

Lord Biſhop, Dr. *Richard Smalbroke*, tranſlated from the See of *St. Davids*, 26 *Feb.* 1730.
Dean of *Litchfield*, *John Addenbrook*, A.M.
Archdeacon of *Coventry*, *Thomas Smalbroke*, A. M.
Archdeacon of *Derby*, *Henry Rider*, A.M.
Archdeacon of *Stafford*, *James Brookes*, A. M.
Archdeacon of *Salop*, *William Vyſe*, A.M.
Chancellor of the Dioceſe, *Richard Smalbroke*.

Dioceſe of SALISBURY.

Lord Biſhop, Dr. *Thomas Sherlock*, tranſlated from the See of *Bangor* 29 *Nov.* 1734.
Dean of *Sarum*, *John Clarke*, D. D.
Archdeacon of *Sarum*, *Samuel Rolleſton*, A. M.
Archdeacon of *Berks*, *John Spry*, A.M.
Archdeacon of *Wilts*, *Henry Stebbing*, D. D.
Chancellor of the Dioceſe, *Henry Stebbing*, D. D.

Dioceſe of BATH *and* WELLS.

Lord Biſhop, Dr. *Edward Willes*, tranſlated from the See of *St. David's* 17 *Jan.* 1742.
Dean of *Wells*, *Samuel Creſwell*, D. D.
Archdeacon of *Wells*, *George Shakerley*, A. M.
Archdeacon of *Taunton*, *George Atwood*, A. M.
Archdeacon of *Bath*, *Samuel Squire*, A.M.
Chancellor of the Dioceſe, —— *Eyre*, A. M.

Dioceſe of EXETER.

Lord Biſhop, Dr. *George Lavington*, 26 *Feb.* 1746.
Dean of *Exeter*, *William Holmes*, D. D.
Archdeacon of *Exeter*, Lord Biſhop of *Exeter*.
Archdeacon of *Cornwall*, *John Sleech*, A. M.
Archdeacon of *Totnes*, *George Baker*, A.M.
Archdeacon of *Barnſtaple*, *William Hoole*, A. M.
Chancellor of the Dioceſe —— *Blackall*, A. M.

Dioceſe of NORWICH.

Lord Biſhop, Dr. *Thomas Gooch*, tranſlated from the See of *Briſtol* 31 *Oct.* 1738.
Dean of *Norwich*, *John Baron*, D. D.
Archdeacon of *Norwich*, *John Berney*, D. D.
Archdeacon of *Norfolk*, *Samuel Salter*, D. D.
Archdeacon of *Sudbury*, *John Chapman*, D. D.
Archdeacon of *Suffolk*, *Richard Warren*, D. D.
Chancellor of the Dioceſe, —— *Naſh*, L. L. D.

Dioceſe of WORCESTER.

Lord Biſhop, Dr. *Iſaac Maddox*, tranſlated from the See of *St. Aſaph*, 29 *Nov.* 1743.
Dean of *Worceſter*, *Edmond Marten*, L. L. D.
Archdeacon of *Worceſter*, *John Tottie*. A. M.
Chancellor of the Dioceſe, —— *Smalridge*, D. D.

Dioceſe of HEREFORD.

Lord Biſhop, Honourable and Reverend Dr. Lord *James Beauclerk*, conſecrated 30 *May* 1746.
Dean of *Hereford*, *Edward Creſſet*, D. D.
Archdeacon of *Salop*, *Egerton Leigh*, A. M.
Archdeacon of *Hereford*, *Robert Breton*, A. M.
Chancellor of the Dioceſe, *Samuel Croxall*, D. D.

Dioceſe of CHICHESTER.

Lord Biſhop, Dr. *Matthias Mawſon*, tranſlated from the See of *Landaff*, 7 *Nov.* 1740.
Dean of *Chicheſter*, Honourable *William Aſhburnham*, A. M.
Archdeacon of *Chicheſter*, *Thomas Ball*, A. M.

Arch-

Archdeacon of *Lewes*, *Edmund Bateman*, D. D.
Chancellor of the Dioceſe, *George Jordan*, A. M.

Dioceſe of ROCHESTER.

Lord Biſhop, Dr. *Joſeph Wilcox*, tranſlated from the See of *Glouceſter* 25 *Oct.* 1731.
Dean of *Rocheſter*, *John Newcome*, D.D.
Archdeacon of *Rocheſter*, *John Denne*, D. D.
Chancellor of the Dioceſe, *Edmund Lewen*, L. L. D.

Dioceſe of OXFORD.

Lord Biſhop, Dr. *Thomas Secker*, tranſlated 6 *June* 1737.
Dean of Chriſt-Church, *John Coneybeare*, D. D.
Archdeacon of *Oxford*, *John Potter*, D. D.
Chancellor of the Dioceſe, —— *Burton*, D. D.

Dioceſe of GLOUCESTER.

Lord Biſhop, Dr. *Marten Benſon*, conſecrated 17 *Feb.* 1734.
Dean of *Glouceſter*, *Daniel Newcome*, D. D.
Archdeacon of *Glouceſter*, *William Geekie*, D. D.
Chancellor of the Dioceſe, Sir *Henry Penrice*, L. L. D.

Dioceſe of PETERBOROUGH.

Lord Biſhop, Dr. *Robert Clavering*, tranſlated from the See of *Landaff* 14 *April* 1729.
Dean of *Peterborough*, *Robert Lamb*, L. L. D.
Archdeacon of *Peterborough*, *John Brown*, A. M.
Chancellor of the Dioceſe, *George Reynolds*, L. L. B.

Dioceſe of BRISTOL.

Lord Biſhop, Dr. *Joſeph Butler*, conſecrated 23 *Dec.* 1738.
Dean of *Briſtol*, *Thomas Chamberlayne*, D. D.
Archdeacon of *Dorſet*, *Edward Hammond*, A. M.
Chancellor of the Dioceſe, Dr. *Walker*.

Dioceſe of St. DAVID.

Lord Biſhop, Dr. *Richard Trevor*, conſecrated 9 *April* 1744.
Precentor, *Joſeph Hill*, A. M.
Archdeacon of *Brecknoch*, *Thomas Payne*, A. M.
Archdeacon of *St. David's*, *Richard Davies*, A. M.
Archdeacon of *Carmarthen*, *Rice Williams*, A. M.
Archdeacon of *Cardigan*, *Edward Yardley*, A. M.
Chancellor of the Dioceſe, *Edward Jones*, L. L. D.

Dioceſe of LANDAFF.

Lord Biſhop, Dr. *John Gilbert*, conſecrated 9 *Jan.* 1740.
Archdeacon of *Landaff*, *John Evans*, A. M.
Chancellor of the Dioceſe, *Henry Johnſon*, L. L. D.

Dioceſe of BANGOR.

Lord Biſhop, Dr. *Matthew Hutton*, conſecrated 29 *Nov.* 1743.
Dean of *Bangor*, *Peter Maurice*, D. D.
Archdeacon of *Bangor*, } *Matthew* Ld.
Archdeacon of *Angleſey*, } Bp. of *Bangor*.
Archdeacon of *Merioneth*, *Hugh Wynn*, L. L. D.
Chancellor of the Dioceſe, *John Owen*, A. B.

Dioceſe of St. ASAPH.

Lord Biſhop, Dr. *Samuel Liſle*, conſecrated 9 *April* 1744.
Dean of *St. Aſaph*, *William Powell*, D. D.
Archdeacon of *St. Aſaph*, *Samuel*, Lord Biſhop of *St. Aſaph*.
Chancellor of the Dioceſe, *Thomas Salisbury*, L. L. D.

A Table of the chief Dignitaries, &c.

Province of YORK.

Dioceſe of YORK.

Lord Archbiſhop, Dr. *Thomas Herring*, Primate and Metropolitan of *England*, tranſlated from the See of *Bangor* 30 *April* 1743.
Dean of *York*, *Richard Osbaldiſton*, D.D.
Archdeacon of *York*, *Thomas Hayter*, D. D.
Archdeacon of *Eaſt Riding*, *Heneage Dering*, D. D.
Archdeacon of *Cleveland*, *Jaques Sterne*, L. L. D.
Archdeacon of *Nottingham*, *Robert Marſden*, D. D.
Vicar General, *William Herring*, L. L. D.

Dioceſe of DURHAM.

Lord Biſhop, Dr. *Edward Chandler*, tranſlated from the See of *Litchfield* 27 *Nov.* 1730.
Dean of *Durham*, —— *Cowper*, D. D.
Archdeacon of *Durham*, *George Sayer*, L. L. D.
Archdeacon of *Northumberland*, *Thomas Sharp*, D. D.
Chancellor of the Dioceſe, *Richard Chandler*, Eſq;

Dioceſe of CARLISLE.

Lord Biſhop, Dr. *George Fleming*, conſecrated 17 *Feb.* 1734.
Dean of *Carliſle*, *Robert Bolton*, L. L. D.
Archdeacon of *Carliſle*, *Edmund Law*, L. L. D.
Chancellor of the Dioceſe, *John Waugh*, D. D.

Dioceſe of CHESTER.

Lord Biſhop, Dr. *Samuel Peploe*, conſecrated 29 *April* 1726.
Dean of *Cheſter*, *Thomas Brooke*, L. L. D.
Archdeacon of *Cheſter*, *Lewis Stephens*, A. M.
Archdeacon of *Richmond*, *Samuel Peploe*, D. D.
Chancellor of the Dioceſe.

THE

THE

Clergy-Man's LAW:

OR,

The Complete Incumbent.

CHAP. I.

Of the Original of Eccleſiaſtical Benefices, their Kinds, &c. *by what Means they become void. Of Voidance by the Act of* GOD. *From what Time Lapſe ſhall incur upon ſuch Avoidances.*

Eccleſiaſtical Benefices.

THE Subject Matter of the enſuing Treatiſe more eſpecially relating to the Laws of Eccleſiaſtical Benefices, it may not be thought improper in the firſt Place to give the Reader the proper Senſe of the Word *Beneficium*, with a general View of the Original Inſtitution and Erection of Eccleſiaſtical Benefices, and ſhew their ſeveral Kinds, Natures and Qualities with their reſpective Incidents, Privileges and Appendixes.

Beneficium explained. Vide Conſuetudines Feudor. Lib. 1. Tit. 1. & Strikii Examen. Jur. Feud. c. 2. §. 19. Feudum ſæpius Beneficium dicitur. Vide Cowell in verbo & Spelman of Feuds, c. 2. & ejus Gloſſarium in verbo Benef.

I ſhall therefore begin with a Definition or Explanation of the Word *Beneficium* or Benefice. Tho' now properly reſtrained to ſignify an Eccleſiaſtical Living, Dignity or Preferment, yet its Uſe originally ſeems to have been founded on the *Feudal* Law, and therein to ſignify ſuch a Portion of Lands or other immoveable Things, as were freely granted by Lords and great Men to their Vaſſals or Dependants for their Stipends or Maintenance; and at firſt were called *Munera* or Rewards, while revocable at the Will of the Lord, but *Beneficia* or Benefices, when Temporary, or held for a certain limited Time, as for Life or Years, *&c.* But when by Degrees thoſe Temporal Tenures became Perpetual and Hereditary, they then left their former Name of *Beneficia*, (which were only Temporary for Life,) as more peculiarly adapted to the Eccleſiaſtical Livings, and retained to ſuch Temporal Tenures the proper Name of *Feuds*.

Eccleſiaſtical Benefices.

But as to Eccleſiaſtical Benefices we may obſerve, That no ſuch Thing, as the Word is now underſtood, could be in Being in the earlier Times of Chriſtianity. For (as Biſhop *Barlow* and others have obſerved) Tythes or Eccleſiaſtical Benefices were never heard of for many Ages in the Church, and that no Mention is made of them in the Grand Codex of Canons, which ended in the Year 451, and next the Bible is the moſt authentic Book in the World. And it thereby appears, That both Churches and Churchmen, during that whole Time, were maintained by Free Gifts and Oblations only.

Barlow's Remains, pag. 169. Selden of Tythes 82, &c. Preface thereto 18. Vide Codicem Juſt. p. 1610, & 1661.

'Tis further obſervable, that in the Beginning of Chriſtianity, the Church of *Jeruſalem* had all Things in Common, they ſold their Goods and Eſtates, and brought the Money into a common Cheſt or Treaſury, and by a peculiar Bond of Charity contributed all they had to the Support of the Church and their Holy Religion: they made at firſt the Apoſtles themſelves Overſeers and Superintendants of ſuch Cheſt or Treaſury, who diſtributed to all Men according to their Wants; but as the Number of Believers increaſed, the Apoſtles found they could not well execute their Offices of a higher Calling, *i. e.* Praying, Preaching, Baptizing, *&c.* and likewiſe attend on thoſe daily, perhaps hourly, Diſtributions; whereupon, with Conſent of the whole Church, they created ſeven Deacons, whoſe Office was to attend on and relieve the Neceſſities of the Believers, out of the Stock depoſited in ſuch common Cheſt, which Stock we may well eſteem the firſt Inſtance of an Eccleſiaſtical Benefice.

Acts c. 4. & 4.

Acts c. 6.

Rom. c. 12. v. 13. 1 Cor. c. 6. v. 67. Gal. c. 6. v. 10. Epheſ. c. 4. v. 28. Phil. c. 4. Colloſ. c. 4. 1 Theſ. c. 2. 4. 2 Theſ. c. 3.

'Tis true we have no Authority from Scripture or Eccleſiaſtical Hiſtory, That this Practice of the Church at *Jeruſalem*, as to a Community of Goods, *&c.* was comply'd with by the Churches of other Places. On the contrary, 'tis very certain, that the Churches at *Rome* and elſewhere kept up a Propriety in Things, even in the earlieſt Times, as will abundantly appear from the Texts cited in the Margin; and that other Churches practiſed the like, appears from 1 *Tim. c.* 6. where the Rich are exhorted how to uſe their Riches, and St. *John* alſo approves of the like Propriety in his firſt Epiſtle, *c.* 3. *v.* 17. ſo does St. *Paul*, *Heb. c.* 13. *v.* 5. 16. and St. *James* in the 2d Chapter of his Epiſtles, *v.* 15, 16.

Acts c. 11. Rom. c. 15. Gal. c. 3. 1 Cor. c. 16. 2 Cor. c. 8.

But it muſt be confeſſed, That thoſe other Churches had alſo, like that of *Jeruſalem*, a general Cheſt or Treaſury, whereto ſuch Chriſtians, as reſorted to their Aſſemblies, brought their voluntary Gifts and Oblations. This is Evident both from divers Texts of Scriptures, and the Writings of the elder Fathers; for *Juſtin Martyr* in his 2d Apology, and *Tertullian* in his Apology, ſpeak of ſuch *Gazophylacium*, or Treaſury-Cheſt, wherein were depoſited the monthly Oblations, and thereout were the Prieſthood maintained, which were the only Benefices they then enjoy'd.

Vide Hoſpinian de Origine bonor. Eccleſiaſticor'.

Theſe monthly Collections (though ſomewhat varied in the Form and Manner of collecting) ſeem to have continued both in the Eaſtern and Weſtern Churches down to the Time of St. *Cyprian*, (who mentions them) *i. e. circa Annum* 240. about which Time *Fabian* Biſhop of *Rome* (as 'tis ſaid) ordained, that the Oblations of Bread, Wine, *&c.* which formerly uſed to be every monthly *Sunday*, ſhould thenceforth be made weekly, *i. e.* every Lord's-Day, and it is probable, that other Churches ſoon followed this Order, whereby the Clergy became better ſupply'd.

But we have no good Authority to prove that they had then any other Manner of Benefices than thoſe before-mentioned.

Origen Hom. 31. in Matthæum, c. 16.

Indeed *Origen* (who lived about 215) mentions Church Revenues; and the Church of *Rome* pretends to have Lands and Poſſeſſions in the Time of *Antoninus Pius*, *i. e. circa Annum* 140, and to prove it produces a Decretal

Epiſtle of Pope *Pius* II. but 'tis plain *Origen* meant no more than the voluntary Oblations before-mentioned; and the Epiſtle of Pope *Pius* has been long ſince proved to be forged and ſpurious. And both *Origen* and St. *Cyprian* ſhew that the Clergy of their Times, *i.e. circ.* 250. were maintained by Free Gifts and Oblations only. *Vide Orig. Hom.* 11. in *Numb.* and *Cyprian*, *Lib.* 1. *Epiſt.* 7.

Eccleſiaſtical Beneficeſ.

Vide Hoſpinian. ut ſupra.

But not long after, *i. e.* in the Reign of the Emperor *Valerian*, who began *Anno* 256, we have good Proof of the Churches being poſſeſſed of Houſes and Lands; Pope *Urban* about that Time decreeing, *ut Eccleſia prædia ac Fundos a fidelibus oblatos reciperet, hac tamen lege, ut divideretur proventus Clericis omnibus viritim, nihilque cujuſpiam privatum eſſet, ſed in Commune Bonum.* Hereby the Church was firſt enabled to take Grants and Donations of Lands, but on this expreſs Condition, That the Rents and Profits thereof ſhould be applyed to the Maintenance and Support of the whole Body of the Clergy in common; and this may be denominated a ſecond kind of Church Benefices.

Note, ſome refer this Decree to the Time of Philip I. Chriſtian Emperor.

'Tis obſervable from Hiſtory, That under this Pope *Urban*, the Church, (now abounding with Superfluities) began to affect Pomp and Grandeur, and uſed in the Adminiſtration of the Lord's Supper, Veſſels of Gold and Silver which hitherto had been only of Wood or Glaſs.

And although from this Time to that of the Emperor *Conſtantine* the Great, the State of the Church was very uncertain, by reaſon of the different Affections of the ſeveral Emperors towards it, yet we find both the Power and Profits thereof were ſtill increaſing.

For tho' *Valerian*, towards the End of his Reign for about two Years, (*i. e. Annis* 258, 259.) perſecuted the Chriſtians, yet his Son and Succeſſor *Gallienus* reſtored Peace to the Church, under whom it flouriſhed near ten Years; beſides which *Aurelian* (who began *Anno* 269.) was firſt well affected thereto; and when he afterwards became a Perſecutor, he within two Years ended his Life, *circa Ann.* 275. and there is ſo little ſaid of his four next Succeſſors, *i. e. Tacitus*, *Florianus*, *Probus* and *Carus*, that we may well conclude they did little harm to the Church, nor indeed had they Time or Leiſure to effect it, their Reigns being tumultuary, and ſcarce extending in the whole to nine Years.

Diocleſian ſucceeded *Anno* 284. and for his firſt eighteen Years the Church enjoyed a tollerable Quietneſs. Indeed in his 19th Year, 'tis ſaid he commenced Tyrant and Perſecutor, ſo that he ſubverted the Chriſtian Church, burnt their Bibles, confiſcated their Goods, *&c.* and this ſevere Perſecution by him and *Maximinus*, laſted ſome ſay ten Years, but by others it laſted not much above two Years. For *Anno* 302. both thoſe Emperors abdicated their Government, and in the Year 306. *Conſtantius* dying at *York*, his Son *Conſtantine* the Great ſucceeded, and from the Beginning was favourable to the Chriſtians. Indeed at the ſame Time *Maxentius* tyrannized over and perſecuted the Chriſtians, but in the Year 311. *Conſtantine* overcame and ſlew him, and thereupon publiſhed his Edicts in Favour of the Chriſtians, which licenſed the Building and Endowment of Churches, and thereby eſtabliſhed that Species of Eccleſiaſtical Benefices which the Church is at this Time poſſeſs'd of.

But though this was the Original of Eccleſiaſtical Benefices, yet the Method of conferring the ſame by Admiſſion, Inſtitution and Induction, was not introduced till long afterwards; for many Ages after *Conſtantine*'s Time, whoever founded a Church had the Power of conferring the ſame by Donation only; or if it were erected in a City or populous Town, the ſame was often conferred by Election of the People, of which *Euſebius* gives ſome Inſtances in the Eaſtern Church, and divers of the Ancient Canons

Eccleſiaſtical Benefices.

Canons ſhew the like to have been practiſed in the Weſtern Church; and *Mezeray* ſpeaking of the Practice of the *Gallican* Church about the 10th Century ſays, That till that Time the Voice of the People in conferring Church Benefices was eſteemed the Voice of God.

And as to the Ancient Practice here in *England*, it may be proved by good Authority, that the Patrons of Churches did originally either grant the ſame by Donation only, or (which is of like kind) confer them on their Clerks by Collation and Livery, in like Manner as they ſtill do to free Chapels and Donatives. *Vide* 3. *Salk.* 195. And that Patrons here in *England* continued ſo to do, till this Right of Donation or Collation was extorted from them by Papal Canons and Decretals, appears from the Authorities cited by Mr. *Selden* in his Hiſtory of Tythes. *Chap.* 6. *par.* 2. *& chap.* 9. *par* 4. *&c.*

Seld. of Tythes, p. 86, &c.

Ibid. p. 198, 204, 209.

And as the ſaid Mr. *Selden* has alſo ſhewn us, that Tythes were not eſtabliſhed here in *England*, till towards the End of the 8th Century, *i. e. circa Ann.* 786. ſo I take it no Eccleſiaſtical Benefice could properly, as the Word now ſignifies, be erected here, till about the ſame Time. For as Tythes and Eccleſiaſtical Benefices appear then to be *Correlata*, and that one could not exiſt without the other, ſo it alſo appears, whenever any Eccleſiaſtical Perſon had any Portion of Tythes granted to him out of certain Lands, this naturally conſtituted an Eccleſiaſtical Benefice; the Granting of the Tythes of ſuch a Manor (or Pariſh) being in Fact a Grant of the Benefice, as a Grant of the Benefice does imply a Grant of the Tythes, And thus the Relation between Patrons and Incumbents, where the Church was of the Lord or Patron's Foundation became analogous to that of Lord and Tenant by the *Feudal* Law.

And this ſhall ſuffice as to the Original of Eccleſiaſtical Benefices.

Two General Queſtions relating to an Incumbent.

Now the Law relating thereto, ſerves chiefly to reſolve theſe two General Queſtions: Firſt, by what Means a Perſon may make himſelf complete Incumbent of an Eccleſiaſtical Benefice? Secondly, What are the Effects of a complete Incumbency? In ſpeaking to the Firſt of which, (before I ſpecify the ſeveral Ways, by which a Perſon may take a Title to an Eccleſiaſtical Benefice) I ſhall ſhew, what Things are to be known and done in order thereunto.

Vid. ca. 14, 15.

Things to be known in order to the Firſt.

Firſt then: A Perſon that would be beneficed with an Eccleſiaſtical Preferment, ſhould be inſtructed, by what Means ſuch Preferments do become void; to the End, that he may find out ſome vacant or void Place, worthy his Acceptance. Now Voidances of all Eccleſiaſtical and Spiritual Preferments do happen, either by the Act of God, by the Act of the Party incumbent thereof, or by the Act of the Law.

Voidance by Death.

1. Avoidance by Death.

The moſt uſual and known Means, by which any Spiritual Promotion doth become void, is by the Act of God, *viz.* the Death of the Incumbent thereof; and ſuch Avoidance doth commence from the Day of the Death of ſuch Incumbent; and the Patron is oblig'd to take Notice of it at his Peril, and not to expect an Intimation from the Ordinary. *Mich.* 15 *El.* 3. *Leon.* 46. *Jenk. Cent.* 6. *Caſe* 92. *Mich.* 15 & 16 *El. Dyer* 327. *a.*

Lapſe.

The Law, I find, hath been holden to be, that the ſix Months for Lapſe, upon ſuch an Avoidance, ſhould not be accounted but from the Time the Patron could reaſonably be ſuppoſed to have Notice of the Incumbent's Death; eſpecially if the Patron or Incumbent ſhould happen to be beyond the Seas, or in ſome remote County within the Realm, at the Time of ſuch Avoidance. And there hath been alſo a Canon made to that Purpoſe, *Roll's* 2 *Abr.* 363. But by the Common Law of *England*, the ſix Months ſhall, I ſuppoſe, be accounted from the Time of the Death. *Cateſby's Caſe*, 6 *Co.* 62. *Dr. and Student. cap.* 31. *f.* 116. *Degge's Parſ. Counſellor*, *f.* 10.

From what Time to be accounted.

CHAP.

CHAP. II.

Of Voidance by Ceſſion, both by Canon and by Statute Law; and of the ſeveral Effects of ſuch Avoidances. Of Benefices incompatible.

Voidance by Ceſſion, &c.

THE next Means, by which a Church Preferment doth become void, is by the Act of him that is the Incumbent thereof; which is either by his Ceſſion or Reſignation: A Church-Preferment is ſaid to be void by Ceſſion, when the Incumbent thereof doth take a ſecond Benefice that is incompatible; (what Benefices are incompatible, will afterwards appear in this Chapter.) And Firſt, if an Incumbent of a Benefice, with Cure of Souls, doth take a Benefice with Cure. *Hil.* 41 *El. Digby*'s Caſe, *Co. f.* 79. *a. Paſch.* 9. *Jac. Davis, f.* 68. In which Caſe, his Firſt Benefice was either of leſs or greater Value than 8 *l. per Ann.* if of leſs Value, yet by his Acceptance of a Second with Cure, it is at this Day *in Jure* void by the received Canon Law. *Hil.* 22 *Jac. Evans* and *Aſcough*'s Caſe, *Latch* 243. And there needs not any Sentence Declaratory in the Spiritual Court, to make way for the Patron's Preſentation; for he may immediately thereupon (without either Deprivation or Reſignation) preſent a new Incumbent to the ſaid Church, and require his Admiſſion. 25 *E.* 3. 55. *b. Dr. & Stud.* 126. *b.* 26 *E.* 3. 1. *Trin.* 14 *Car. B. R. King* v. *Baldock*, 2 *Roll's Abr.* 360. 5 *E.* 3. 9. *Hil.* 22 & 23 *Car.* 2. *Shute* v. *Higden*, *Vaughan* 131. *Hil.* 24 *E.* 3. 30 & 33. 9 *E.* 3. 22. 10 *E.* 3. 1. 11 *H.* 4. 37. *b.* & 60. 12 *H.* 8. 6. 14 *H.* 17. *Fitz. N. B.* 34. *Trin.* 39 *El. Armiger* v. *Holland*, *Moor* 542 & *Holland*'s Caſe, 4 *Co.* 75. *Hil.* 22 *Ja. Evans* and *Lun.* v. *Aſcough*, *Palmer* 470. And if the Biſhop doth refuſe the Patron's Clerk, a *Quare Impedit* lies for the Patron, *Trin.* 14 *Car. The King* v. *The Biſhop of London, and Baldock*, *Jones* 405. yet there ought to be a Sentence Declaratory of the Deprivation in the Court Chriſtian, that Notice may be given thereof, as *Popham* ſaid, *Hil.* 43 *El. Robins* v. *Prince*, *Goldſborough* 166. *Hil.* 9 *Car. King* v. *Priſt*, *Jones* 336. And it is ſaid, 10 *Ed.* 3. 1. that in ſuch Caſes, both Churches ſhall be void; that is, if the Clerk continue as Incumbent of the Firſt, after he hath taken a Second without Diſpenſation (as in that Caſe was done) for the Space of two Months; or however, if he contend in Law to retain the Firſt: *See Robin*'s Caſe v. *Glover and Prince*, *Hil.* 38 *El. Moor* 434. And by *Perning*, in 10 *E.* 3. 1. *a.* the Conſtitution of Plurality, is a general Judgment, and ſtronger binds upon Deprivation, than the particular Judgment of any Perſon: For a particular Deprivation may be avoided by Appeal, the other not; and it is ſaid, *per Cur'*, that the Council of *Lateran* was a general Law received in *England*, and is as forcible as an Act of Parliament, which concludes all Parties. *Paſch.* 1657. in *Scaccar. Stavely* v. *Ullithorn*, *Hardres Rep.* 101. But ſome Opinions are, That the Church is not void, but by Deprivation. 5 *E.* 3. 9. 11 *H.* 4. 37. 17 *E.* 3. 59. And that the taking of a Second Benefice with Cure in ſuch Caſe, until Deprivation, is no Ceſſion. *Paſch.* 26 *El. Godbolt* 23. But this is to be underſtood to the Diſadvantage of the Patron; that is, to the making of a Lapſe run from the Ceſſion, no

2. Voidance by Ceſſion or Reſignation.

By Ceſſion in taking a Second Benefice.

Sentence Declaratory.

Plurality Conſtitution.

Council of *Lateran*.

If no Ceſſion till Deprivation.

Lapſe.

Avoidance by Ceſſion, &c.

Notice.

Notice being given to the Patron thereof. *Trin.* 39 *El. Armiger* v. *Holland*, *Moor* 542. *Hil.* 41 *El. Digby*'s Caſe, 4 *Co.* 79. *and Jones* 404. For until after ſuch Clerk is actually deprived of his Firſt Benefice, and Notice thereof given to the Patron, he (though he may) yet need not preſent: But then, after ſuch Deprivation, the Church is void in *Facto & Jure*, ſo that he muſt at his Peril preſent; and ſo all the Books are well reconciled, ſaith *Coke*. *Trin.* 14 *Car. B. R.* in *Baldock*'s Caſe, *by Jones* and *Barkly*, *Roll's Ab.* 2. 364. & 365. *Trin.* 39 *Eliz. Co.* 4. *Holland*'s Caſe, 75 *Hil.* 19 *Car. The King* v. *Priſt*, 1 *Croke* 39 *and* 40 *El. Armiger* v. *Holland*, 3 *Croke* 601. The ſame Caſe in *Moor* 542. *Hill.* 22 & 23 *Car.* 2. *Shute* v. *Heigden*, *Vaugh.* 131.

If Diſpenſation be obtained.

And if an Incumbent of a Church with Cure under 8 *l. per Annum* doth take a Second Benefice with Cure, in which he is alſo inſtituted and inducted, (no Diſpenſation being obtained for the holding of them both) by which the Firſt is void againſt the Patron, ſo that he may preſent, (as is before ſhewed); but before the Patron doth preſent upon ſuch Avoidance, the Archbiſhop, (by Force of the Statute of the 25 *H.* 8.) doth grant to the Clerk a Licence *perinde valere*, to hold the Firſt with the Second Benefice; this is not a good Licence, although confirmed according to the Statute, to take away the Patron's Preſentment, although his Church was only void by Force of a Canon, and not by the Statute of the 21 *H.* 8. for by the Canon the firſt Benefice was ſo void, that the Patron might have preſented before any Deprivation; and after the Patron hath once a Title to preſent, this Title cannot be taken away from him by a ſubſequent Licenſe, unleſs ſuch a Licenſe could make a void Church full. *Trin.* 14 *Car. Baldock*'s Caſe v. *The King*, and upon a Writ of Error affirm'd, *Roll's Ab.* 2. 359. *Intrat.* 13 *Car. Rot.* 1259. & 11 *H.* 4. 38. *b.* & 59. *b.* & 78. *b. Hil.* 19 *Car.* 2. *Henry Edes* v. *Walter Biſhop of Oxon*, *Vaughan* 21.

Licenſe *perinde valere.*

Valuation of Firſt Benefice.

But if any Perſon having one Benefice with Cure of Souls, being of the yearly Value of Eight Pounds or above, (that is, according to the Valuation in the King's Books of Firſt-Fruits and Tenths, as I think the general Opinion at this Day is; ſo is *Humphreys* v. *Knight*, *Croke Car.* 456. *Degge's Parſon's Counſellor* 29. Sir *Thomas Jones*, *Rep.* 19. But *Dyer* 237. and *Bennet* and *Tinket*'s Caſe, 3 *Cro.* 853. and *Noy* 38 *Contra*, that is to be accounted to the real and true Value thereof) accept and take another Benefice with Cure of Souls, and be inſtituted and inducted in Poſſeſſion of the

Of the Second Benefice.

ſame, (altho' that the laſt Benefice be but of Three Pounds Value) immediately after ſuch Poſſeſſion had thereof, the Firſt Benefice is not only void in Law, but *in Facto* alſo. *Stat.* 21 *H.* 8. *c.* 13. 18 *El. Dyer* 347. *a. Mich.* 4 *Car. King* v. *Priſt*, *Hetley* 125. *Hill.* 9 *Car. King* v. *Priſt*, 1 *Croke* 357. and *Jones* 337. So that the Patron thereof muſt preſent to a Living of ſuch Value, ſo void, within ſix Months (without expecting

Notice where neceſſary.

Notice from the Ordinary) to avoid a Lapſe; it being then not only void by Canon Law, but alſo by Act of Parliament, in which all Men are Parties. *Trin.* 39 *El. Holland*'s Caſe, 4 *Co.* 75. *Jones* 404. *Hil.* 41 *El. Digby*'s Caſe, 4 *Co.* 79. *Hill.* 9 *Car. King* v. *Priſt*, *Jones* 337. *Mich.* 9 & 10 *El. Dyer* 255. But he need not (unleſs Notice be duly given) preſent, till ſuch Time as his Clerk is inducted into another Benefice. 7 *El. Dyer* 237. *Jenk. Caſe* 92. *Cent.* 6. For tho' by his Inſtitution he hath *Curam Animarum*, 33 *H.* 6. 13. and the Church is full to ſeveral Purpoſes;

If no Ceſſion until Induction.

yet the Words of the Statute are, — **And be Inſtituted and Inducted, in Poſſeſſion of the ſame,** &c. So that until he be inducted, there is no Ceſſion by that Statute, but only by the Canon Law; by which Law, in ſuch Caſe alſo, he may be deprived. *Hil.* 38 *El. Robins* v. *Gerrard* and *Prince*,

Moor

Moor 447. *Hil.* 41 *El. Digby*'s Caſe, 4 *Co.* 79. *Trin.* 1 & 2 *Phil.* and *Mary*, *Agar* v. *Biſhop of Peterborough and Denn*, *Moor* 12.

Voidance by Ceſſion, &c.

But the Patron, if he pleaſe, may preſent ſo ſoon as his Clerk is inſtituted into another Benefice incompatible, although he hath no Notice from the Ordinary of any Ceſſion or Deprivation made of the Firſt Benefice, by Reaſon of his Acceptance of another by Inſtitution, *Jenkins*, *Caſe* 92. *Cent.* 6. and although he was only inſtituted into the Firſt Benefice, and not inducted, *Digby*'s Caſe, 4 *Co.* 79. or elſe, if he pleaſes, he may ſue ſuch Perſon in the Court Chriſtian, to have him deprived by Sentence, in this, as well as in any other Caſe, where the Living is void by Canon Law only. But then it is beſt, that he either procure the Ordinary to proceed to Deprivation, *Ex mero Officio*; or, that he proceed only as a Promoter of the Office of the Judge, without ſetting forth his Intereſt as Patron: For if he ſhould ſo do, and the Clerk ſhould plead, that the Plaintiff is no Patron, but that ſuch an one is, he may have a Prohibition from the King's Court to ſtop him, if he proceed after ſuch Plea. *Paſch.* 31 *El. Underhill & Savage*'s Caſe, 1 *Leonard* 316. In regard that he may preſent, tho' no Sentence be given, and try his Title at Common Law; yet it is ſaid, *Paſch.* 21 *Jac.* in *Thornton*'s Caſe, *Winch* 63. That whether a Church be void by Ceſſion, doth properly belong to the Trial of the Common Law. But that is not generally true, but only or at the moſt in this Caſe, *viz.* When a Church being ſuppoſed to be void by Ceſſion, the Patron thereof doth preſent his Clerk, who is inſtituted, and alſo inducted; for after the Induction, (becauſe it is a Temporal Act) 'tis ſaid, That nothing ought to be queſtioned in the Eccleſiaſtical Court. *Hil.* 26 & 27 *Car.* 2. *B. R. Monday* v. *Porton*, 2 *Levinz* 125. ſame Caſe, 3 *Keb.* 325, 423. And yet even in this Caſe, when Induction is had, 'tis ſaid, That the Firſt Incumbent may have a *Spoliation* againſt the new Incumbent, when the Firſt retains by Diſpenſation, and that thereby the Plurality ſhall come into Debate in the Spiritual Court; becauſe by the Diſpenſation the old Title remains. *Fitz. N. B.* 36. 31 *H.* 6. 20. See *Robins* v. *Gerrards* and *Prince*, *Moor* 458. And if Voidance by Ceſſion ſhould not be triable by the Eccleſiaſtical Judge, the Ordinary could not give Notice of an Avoidance thereby (as he is bound to do in all Caſes out of the Statute;) and ſo Lapſe would never run by the Patron's Negligence, nor Cures be duly provided for, if the Patron did not pleaſe to preſent without Notice.

Benefice incompatible.

Election of Patron.

How to proceed to Deprivation.

If Trial at Common Law.

Spoliation, and how.

Trial by Eccleſiaſtical Law.

It is not material to the making of a Ceſſion, that the Second Benefice with Cure be in another Church than that in which the Firſt is: For where there are two Incumbents of one Church, and each of them hath the intire Cure of the Pariſh, (whereof there are ſome Inſtances in this Kingdom) if one of them dying, the other doth accept his Benefice, his Firſt is void thereby; and if the Firſt was of the Value of Eight Pounds by the Year, it is void by the Statute. *Mich.* 36 & 37 *El.* 3 *Croke* 351. and by *Walmſley* and *Beaumont*, *Paſch.* 37 *El. C. B. Cooper* v. *Beauchamp*, *Parſon's Counſellor*, but *Anderſon* doubted. But if it was under that Value, though the ſecond was of greater Value than 8 *l.* yet it is only void by Canon. And ſo in other Caſes, by the Words of the Statute 21 *H.* 8. *c.* 13. See *Robins* v. *Gerrard*, *Moor* 440.

Two Incumbents of one Church.

In all Caſes when a former Benefice is ſaid, by the Acceptance of a Second, to be void by Canon Law only, before any Deprivation, this is to be underſtood as to the Patron, and for his Advantage only; ſo that he may, if he pleaſe, preſent, &c. but not as to Strangers: For if the Clerk, before Deprivation, doth ſue for Tithes of the Firſt Benefice, it is not any Bar againſt him to ſay, That he hath taken a Second Benefice; as was ſaid *Trin.* 13 *Car.*

Avoidance by Canon Law only.

Voidance by Ceſſion, &c.

13 *Car. B. R.* by Juſtice *Barkley*, which Juſtice *Yelverton*, in his Argument of the Caſe of *Priſt*, ſaid was ſo adjudged. *Roll's Abr.* 2. 361.

What Benefices and Dignities are incompatible.

As Benefices with Cure, of what Value ſoever, are incompatible, ſo are Dignities, and alſo a Dignity and Benefice with Cure. By Dignity, that Promotion is underſtood, to which Juriſdiction is annexed. 7 *H.* 6. 27. Therefore an Arch-deacon, and a Dean, (becauſe he was wont to take the Confeſſions of the Chapter, and may viſit them) 15 *E.* 3. 7. are ſaid to be Dignitarians. 5 *E.* 3. 9. *Hill.* 22 *Ja.* in *Evans* and *Aſcough*'s Caſe, *Latch* 236. *Quære:* But a Parſon is not a Name of Dignity, 11 *H.* 4. 40. nor a Provoſt, 17 *E.* 3. 31. nor a Chaplain, 27 *H.* 6. 3. nor a Goſpeller, *Paſch.* 41. *El. Broughton* v. *Gouſly*, 3 *Cro.* 663. nor a Prebendary, *Evans* and *Aſcough*'s Caſe, *Latch* 236. See 7 *H.* 6. 27. 27 *H.* 6. 5. 25 *Ed.* 3. 41. 24 *Ed.* 3. *Br. Noſme* 25. Therefore, if any one, having a Benefice with Cure, doth take a Dignity, his Cure is void by Ceſſion. 5 *E.* 3. 2. *Paſch.* 9 *Jac. Davis* 68. *King* v. *Horsfall* and *Wale. Paſch.* 31 *El.* in *Underhill* and *Savage*'s Caſe, 1 *Leon.* 316. But a Benefice with Cure, and a Benefice without Cure, being no Dignity, do not void each other. And therefore, the Taking of a Prebend doth not make a Ceſſion of a Parſonage or Vicarage; for a Prebend is a Benefice without Cure. 39 *E.* 3. 44. *Paſch.* 30 *El. Moor* 261. And yet it is ſaid, That if one that is a Prebendary takes a Deanery, his Prebend is void by Ceſſion. 5 *E.* 2. *Fitz. Brief* 800. *Hill.* 22 *Jac. Evans* and *Aſcough*'s Caſe, *Latch* 263.

Ceſſion by taking a Dignity.

Q. But *Quære*, If both Promotions are not then to be in the ſame Church? For 'tis ſaid, That if a Dean accept of a Prebend in the ſame Church, his Deanary is void; which Caſe need not be ſo put, if the Rule was general. 12 & 13 *El. Walrond* v. *Pollard*, *Dyer* 293, and 10 *El.* 233. And ſo the Taking of a Deanery voids a Provoſtſhip had before in the ſame Church. 5 *E.* 3. 9. 10 *E.* 3. 1. And accordingly, when the Biſhop of *Durham* had preſented a Clerk to a Prebend of the Church of St. *Andrew*, and afterwards had preſented the ſame Perſon to the Deanery of the ſame Church, it was adjudged, that the King ſhould recover his Preſentation to the Prebend aforeſaid, upon this Account; that it is not lawful for any one to poſſeſs two Prebends in one and the ſame Collegiate Church. *Hill.* 11 *E.* 3. *B. R. Rot.* 21. *Roll's Abr.* 2. 361. by which Caſe it appears, that if the Church, void by Ceſſion, upon the Account of the Canon Law, be of the Gift of the Biſhop, and within his Dioceſe, it may go in Lapſe by the Biſhop's Neglect to collate, tho' no Deprivation be made of the Incumbent or Notice given of the Avoidance.

One may not poſſeſs Two Prebends.

Lapſe.

Incompatibility, &c. by Canon Law.

This Incompatibility, as to Dignities and Benefices without Cure, is made only by Canon Law, and not by the Statute, 21 *H.* 8. *c.* 13. againſt Pluralities, which extends only to Benefices with Cures; and therefore declares,

21 *H.* 8. *c.* 13. §. 26.

That no Deanry, Archdeaconry, Chancellorſhip, Treaſurerſhip, Chanterſhip, or Prebend in any Cathedral or Collegiate Church, nor Parſonage that hath a Vicar indued, nor any Benefice perpetually appropriate, ſhall be taken or comprehended under the Name of Benefice having Cure of Soul, in any Article of that Statute, (which they would have been, as it is ſaid, if no ſuch Proviſo had been added.)

Vide Moor 540.

From which it is, I ſuppoſe, that *Coke* ſaith, That it appeareth, Archdeaconries, Prebends, Appropriations, *&c.* are Benefices with Cure of Souls. 3 *Inſt. c.* 71. But *Quære*; For it is held by ſome, notwithſtanding what is ſaid by *Coke*, that a Deanery, Archdeaconry, Prebend, *&c.* are not Benefices with Cure of Souls, nor had they been comprehended under the Name of Benefices with Cure of Souls within the Statute, altho' the Proviſo had been omitted; for there is no ſuch Exception out of the Statute 13 *El. c.* 12.

Q. What Benefices have Cure of Souls.

ken. 1. Hill. Eccles. cap. 24.

concerning reading the Articles; and yet, if a Dean, Archdeacon or Prebend, read not the Articles within the Time limited by 13 *El.* his Promotion is not void by that Statute: The Reaſon is, becauſe 'tis not a Benefice with Cure of Souls; and a Lay-man might have been preſented to a Prebend. *Cawley's Laws concerning Recuſants* 233. And ſo *Hobart* ſaith, That a Benefice appropriated, doth not by the Appropriation ceaſe to be a Benefice with Cure at the Common Law, altho' it be not taken to be ſo within the Statute. *Colt* and *Glover*'s Caſe, *Hobart* 158. And although it be ſaid, if there be a Rectory that is preſentable, and a Vicar endowed out of the ſame that is preſentable, that the Vicar, and not the Parſon, hath the Cure of Souls, 5 *E.* 2. *Fitz. Quare Impedit* 165; yet I conceive, that though the Vicar be *in Subſidium Rectoris*, and to perform the Duties, yet that the Parſon hath alſo the Cure, at leaſt habitually; for by his Inſtitution, the Cure is by the Biſhop committed to him, 2 *Croke* 518. and therefore ſuch a Rectory, by taking a Benefice after, incompatible without Diſpenſation, will be void at the Canon Law, though not by the Statute 21 *H.* 8. *c.* 13. as is there expreſſed. And it hath been lately adjudged, that ſuch Rectories are Benefices with Cure, in the Caſe of *Clarke* and *Heath*, *Mich.* 21 *Car.* 2. *B. R.* where it was ſaid, That there were ſeveral Churches in *England* which have Vicars endowed with Cure, and yet the Parſon had a concurrent Cure with them, and both of them took the Oath of Canonical Obedience to the Ordinary. 1 *Siderfin* 426. It was alſo agreed in that Caſe, by all the Court, That Inſtitution and Induction was an undeniable Evidence of Cure of Souls. 2 *Keble* 556.

Voidance by Ceſſion, &c.

Subſidium Rectoris.

Concurrent Cure.

Evidence of Cure of Souls.

If a Church be void by Ceſſion, and the laſt Incumbent keeps Poſſeſſion, and takes up the Tithes, as if intitled to them, 'till ſuch Time as the Church is lapſed to the King; and then comes a general Pardon, in which are pardoned and remitted all Titles and Actions of *Quare Impedit*, which the King hath, or might have, by reaſon of any Lapſe incurred for or concerning any Benefice, whereof any Incumbent was at the making thereof in actual Poſſeſſion, by the Preſentation of any Patron or Collation of any Ordinary, yet ſuch Poſſeſſor is not thereby re-intitled to a Benefice ſo void by Ceſſion: For if ſo, the Words ſhould (as they are not) be ſufficient to make a Plenarty of a Church abſolutely void, and to make void a ſecond Church really full; or elſe, not only make the Firſt full, but alſo be a ſufficient Diſpenſation for a Plurality to hold them both; but ſuch Words only ſettle him that is poſſeſſed upon a Preſentment made by the Patron, or Collation made by an Ordinary, that had uſurped upon the King's Title, that was come to him by Lapſe. Neither can any ſpecial Pardon, after ſuch abſolute Avoidance of a Church, with Words that he may retain it, or with any other the like Words, make him again Incumbent thereof. *Trin.* 4 *Car. King* v. *Priſt*, 1 *Cro.* 357. and *Jones* 339. But otherwiſe it is, if the Church was not abſolutely void, but only voidable by Deprivation, or otherwiſe. *Hil.* 9 *Car. King* v. *Priſt*, *Jones* 339.

General Pardon after Avoidance by Ceſſion.

Special Pardon after abſolute Avoidance.

The Incumbent of a Parſonage being old, he together with the Grantee of the next Avoidance join in a Leaſe of the Tithes rendring the Rent half-yearly, *viz. Midſummer* and *Chriſtmas*. Incumbent dies before *Midſummer-day*. The Leſſee gathered in the Tithes, except a ſmall Part which he got in afterwards. The Queſtion was, who ſhall have the *Midſummer* Rent? The Court of Opinion, that the Fee is in the Patron during the Vacancy, and recommended it to the Parties to end it by Compromiſe. 2 *Vern.* 204. *Bentham* v. *Alſton*.

Pluralities, &c.

CHAP. III.

Of Pluralities, Qualifications, Diſpenſations and Commendams.

Exceptions to the Rule of accepting a Second Benefice incompatible.

THIS Rule, That the Accepting of a ſecond Benefice that is incompatible, doth make a Ceſſion, or abſolute Avoidance of the former, hath its Exceptions. As Firſt; If a Perſon, having a Benefice incompatible, be admitted, inſtituted, and inducted, into a Second Benefice incompatible alſo, but doth not ſubſcribe the Articles of Religion according to the Statute 13 *El. c.* 12. his Firſt Benefice is not void, 23 & 24 *El. Dyer* 377. becauſe, by reaſon of that Neglect, he was never Incumbent of the Second; (yet in declaring upon a Voidance, by Acceptance of a Second Living, it need not be alledged, that he ſubſcribed the Articles, *&c.* 3 *Keb.* 152. 1 *Anderſ.* 62.) The like Law ſeems to be, if a Man, having obtained a Second Benefice incompatible with his former, by a Simoniacal Contract; for in ſuch Caſe alſo, his Preſentation or Collation, Inſtitution and Induction, are utterly void, and of none Effect in Law. *Stat.* 31 *El. c.* 6. However the Canon Law (without a Pardon prevent) will reach him in this Caſe of Simony; for by that he may be deprived. But if he that had one Benefice doth accept of another incompatible, and at his Admittance to the Second did ſubſcribe the Articles, but did not within two Months after his Induction read them, his Second Benefice is *ipſo facto* immediately void. *Stat.* 13 *El. c.* 11. But when he cannot revert to his former Benefice, becauſe having, at his Admiſſion to the Second, ſubſcribed the Articles, his Admiſſion, Inſtitution and Induction to the Second were good for two Months, and ſo made a Ceſſion as to the Firſt: For the Statute is not, That all Admiſſions, Inſtitutions and Inductions, to Benefices, where any Perſon is deprived by Virtue of this Act, ſhall be void, as if they never were: For then, by not reading the Articles, only his Second Benefice had been void, and his Title to the Firſt had been revived: But the Clauſe is, That all Admiſſions, Inſtitutions and Inductions, made contrary to the Proviſion of the Act, ſhall be void, as if they never were; but where the Articles are ſubſcribed in the Preſence of the Ordinary, the Admiſſion, Inſtitution and Induction, are not contrary to the Proviſion of the Act, *Hil.* 22 & 23 *Car.* 2. *Shute* v. *Higden*, *Vaughan* 131. which ſeems to be warranted alſo by the Opinion of *Hobart*, in the Caſe of *Winchcomb* v. *Biſhop of Wincheſter* and *Pulleſton*, *Hob.* 167. See the Caſe of the *Queen* v. *Biſhop of Lincoln* and *Cok*, 1 *Anderſon*, Caſe 136.

If by Simoniacal Contract.

Of ſubſcribing the Articles, *&c.*

Clauſe of Statute 13 *Eliz.* 13.

But Note, That though a Clerk at his Admiſſion to a Second Benefice did ſubſcribe the Articles, yet if the Subſcription was only made in the Preſence of the Biſhop's Chaplain or Secretary (which I have ſometimes ſeen,) and not in the Preſence of the Ordinary himſelf, the Admiſſion, *&c.* is void, and the former Benefice remains full; for the Statute is expreſs, That the Subſcription ſhall be in the Preſence of the Ordinary.

Subſcription, before whom.

A Second *Exception* from the aforeſaid Rule is, If he that hath one Benefice incompatible, before he takes another, being duly qualified, doth obtain a ſufficient Diſpenſation, to hold at one and the ſame Time more

Diſpenſation to hold more Benefices.

than one of ſuch Benefices as are incompatible: For by Diſpenſation, a Man, at this Day, with us (though he be not qualified by Degree in the Univerſity, Retainer or Birth) may hold as many Benefices without Cure, of what Value ſoever, as he can get; and likewiſe as many with Cure as he can get, all of them, or all but the laſt, being under the Value of 8 *l. per Ann.* (That is, if the Perſon to be diſpenſed withal be not uncapable thereof); for 'tis ſaid, That a Diſpenſation to an Alien to take a Benefice, that knows not our Language, is void. *Jenkins, Caſe* 66. *Cent.* 7. *Hob.* 148. *Stat.* 25 *E.* 3. of Proviſors. For before the making of the Statute againſt Pluralities, Diſpenſations were granted to hold Dignities, yea, Benefices with Cure of any Value, and to any Number, as appears by the ſaid Statute; by which it is enacted for ſuch Pluraliſts, —**That they may retain Four of their Benefices with Cure, that were really entitled to them at the Time of the making thereof, that Statute notwithſtanding; and thoſe that had more than Four with Cure, ſhould reſign the reſt, or the Patron might preſent to them; any Licenſe, Union, or other Diſpenſation, to the contrary before obtained notwithſtanding.** By which 'tis clear, that by Licence, Union, or other Diſpenſation, Men held many Benefices, yea, with Cure, before that Statute; and by that Statute, the Law is only altered as to Benefices with Cure, of or above the yearly Value of 8 *l.* and in theſe Words: —**That if any Perſon or Perſons, having one Benefice with Cure of Soul, being of the yearly Value of eight Pounds, or above, accept and take another with Cure of Soul, and be Inſtituted and Inducted in Poſſeſſion of the ſame, that then, and immediately after ſuch Poſſeſſion had thereof, the Firſt Benefice ſhall be adjudged** in the Law **to be void.** (Which is the ſame that the Canon Law ſpeaks, but not ſo general.) §. 10. **And that it ſhall be lawful to every Patron having the Advowſon thereof, to preſent another, and the Preſentee to have the Benefit of the ſame in the like Manner, as tho' the Incumbent had died or reſigned; any Licence, Union, or other Diſpenſation to the contrary, &c. And every ſuch Licence, Union or Diſpenſation had contrary to the Act to be utterly void, &c.** And after it is enacted, §. 11. **That every Licence, Union or Diſpenſation hereafter to be obtained, contrary to this Act, of what Name or Names, Quality or Qualities, ſoever they be, ſhall be utterly void, and of none effect. And that if any Perſon or Perſons, contrary to this preſent Act, procure and obtain at the Court of** Rome, **or elſewhere, any Licence or Licences, Union, Toleration or Diſpenſation, to receive and take any mo Benefices with Cure than is above limited; that then every ſuch Perſon or Perſons ſuing for himſelf, or receiving or taking ſuch Benefice by Force of ſuch Licence or Licences, Union, Toleration or Diſpenſation, ſhall for every ſuch Default incur the Danger, Pain and Penalty of Twenty Pounds Sterling; and alſo loſe the whole Profits of every ſuch Benefice or Benifices, as he receiveth or taketh by Force of any ſuch Licence or Licences, Union, Toleration, or Diſpenſation: The one half of which Forfeiture to the King our Sovereign Lord, and the other Half thereof to him that will ſue for the ſame by Original Writ, Bill, Plaint of Debt, or Information, in any of the King's Courts; in which Action and Suit no Waget of Law, Eſſoin, or Protection for the Defendant ſhall be admitted, or allowed.**

Pluralities, &c.

Vide 11 *H.* 4. 60.

Stat. 25 *Ed.* 3. of Proviſors.

Nota.

Stat. 21 *H.* 8. *c.* 13. §. 9. Penalty of Pluralities.

Cro. El. 601, 853. 1 *Leon.* 316.

Penalty.

Stat. 21 *H.* 8. *c.* 13. See *Mich.* 15 & 16 *El.* *Dyer* 327. and Note that it hath been reſolved, that this Statute of 21 *H.* 8. is a general Statute. 4 *Co.* 76. *Holland*'s Caſe. 2 *Roll. Abr.* 466.

Note;

Pluralities, &c.

Note; If one take a ſecond Benefice after Inſtitution only, to a former, ſuch former Benefice is void, as if it had been after Induction alſo. And the 8 *l.* yearly Value mentioned in this Section muſt be according to the Valuation in the King's Books, and ſo it was reſolved by the Court of *C. B.* in *Drake* and *Hill*'s Caſe, *Paſch.* 10 *Car.* 1. and *Humfrey* and *Knight*'s Caſe, *Cro. Car.* 455. And the Law is now ſettled in that Point. But as to the Second Benefice, it is not material of what Value it is, or whether it is rated in the King's Books or no, for the Avoidance will take Place in that Caſe, as well when 'tis under, as when above 8 *l.*

4 *Co.* 225.

Vide T. Jones 18, 19.

4 *Leon.* 237. *Cro. El.* 351.

And it was reſolved 36 *Eliz.* in *B. R.* That if there be two Parſons of one Church, and each of them has the intire Cure of the Pariſh, (which may well be) and each of the Benefices be of 8 *l.* Value *per Annum*, if one Dies, and the other Succeeds, this is a Plurality within the Statute.

4 *Co.* 79. *Mo.* 443, 448.

Alſo, Though the Words in this Section are inſtituted and inducted, which being copulative ſeem to imply, That the Voidance thereupon is not to take Place till after Induction, as well as Inſtitution, yet it has been often adjudged, That if one is inſtituted, and then obtains a Diſpenſation, and after that is inducted, the Diſpenſation came too late; not only becauſe by Inſtitution, the Church is full of the Incumbent, and one cannot have a Diſpenſation to take or receive (as the Words of the Act are) what he had before; but alſo, becauſe by the Inſtitution he hinders others from being preſented, and by obtaining Inſtitution to many Churches with Sequeſtration of the Profits of them, the Intent of this Statute might be eluded.

Hard. 101. *Latch* 248.

And it is to be noted, That by a Conſtitution of the Council of *Lateran* under Pope *Innocent* III. (which Council is ſaid to have been received here in *England*, and to be as forcible as an Act of Parliament) and by the Canons of Archbiſhop *Peckham*, That of what Value ſoever the Firſt Benefice was, the Incumbent, by taking of a Second, was (by the Laws of the Church in thoſe Times) *ipſo jure* deprived of the Firſt, and the Benefice void, ſo that the Patron might preſent thereto without any Sentence of Deprivation, and ſo far the Common Law agrees with that of the Church.

2 *Roll. Abr.* 364. *Godbolt* 23. *Moor* 542. *W. Jones* 336.

But tho' by the Conſtitution of *Lateran*, if the Patron did not preſent to ſuch a void Benefice within ſix Months, *Lapſe* was to incur, yet by the Common Law, (tho' thereby the Patron may preſent if he will) yet no Lapſe ſhall incur to him if he do not preſent, unleſs the Biſhop voids the Church by a Declaratory Sentence, and gives Notice of the ſame to the Patron; and then the Patron muſt at his Peril preſent within ſix Months after ſuch Notice; ſuch Benefices therefore as are under 8 *l. per Ann.* in the King's Books (being not within this Statute) do remain upon the old Foot of the Common and Canon Law, and are only voidable, not void by Acceptance of a Second Benefice.

But now by this Statute, if the Firſt Benefice be of 8 *l.* yearly Value or above, the ſame will by Acceptance of a ſecond be abſolutely void to all Intents and Purpoſes, and the Patron in ſuch Caſe muſt at his Peril preſent within the ſix Months, to avoid a *Lapſe*, without expecting Notice from the Ordinary.

Dyer 327. a Trialty quid.

In 15 & 16 *Eliz.* the Caſe was, One being poſſeſſed of two Benefices by Diſpenſation according to this Statute, did afterwards by a Trialty (*i. e.* a Diſpenſation to hold three Benefices) obtain a third, and enjoyed all three. But *Dyer* ſays, divers Juſtices and Serjeants were of Opinion, That the firſt of the three was void, and the Profits of the third were forfeited by force of the latter Part of *Sect.* 10. *ſupra*, and that only the Second Benefice remained to him. *Vide poſt.*

And

Pluralities, &c.

And in the Caſe of *The King* againſt *The Biſhop of Wincheſter*, where one had two Benefices with Cure by Diſpenſation, and then took a third with Cure, (*Quære*, if by Diſpenſation) 'tis ſaid to have been adjudged, That both the former Benefices ſhould be void. And my Lord *Hobart* in the Caſe of *Colt* and *Glover* is expreſs. If a Man take a Trialty which is not allowed him, he cannot by that take two Benefices, becauſe ſuch Diſpenſation is void. And it was adjudged in *Digby*'s Caſe, That a Benefice is taken, received and had by Inſtitution only, and therefore a Qualification or Diſpenſation following, comes too late. *Noy* 149. *Hob.* 158. 4 *Co.* 79.

Tho' formerly the Uſage was to Grant Diſpenſations for any certain Number of Benefices, without ſpecifying what in particular, and ſometimes with Power to exchange, and take others, only keeping Poſſeſſion within the Number diſpenſed with. Yet the later and ſafer way is to ſpecify the Benefices, and to grant the Diſpenſation expreſly to prevent the Avoidance of a Benefice in Poſſeſſion by taking of a ſecond, according to the Tenor of §. 9. *ſupra*, tho' the 13th and following Sections ſeem to admit of a larger Interpretation, *viz.*

21 *H.* 8. *c.* 13.

§. 13. **Provided that all Spiritual Men now being, or which hereafter ſhall be of the King's Council, may purchaſe Licence, or Diſpenſation, and take, receive, and keep three Parſonages or Benefices with Cure of Soul, and that all other being the King's Chaplains, and not Sworn of his Council, the Chaplains of the Queen, Prince or Princeſs, or any of the King's Children, Brethren, Siſters, Uncles, or Aunts, may ſemblably purchaſe Licence or Diſpenſation, and take, receive, and keep two Parſonages and Benefices with Cure of Soul. And by the following Sections, 'tis enacted how many Chaplains with Diſpenſations, an Archbiſhop, Duke, Marquis, Earl, Viſcount, Biſhop, or Baron may retain, of which hereafter.**

Hereupon, in 28 *Eliz.* in the Caſe of *The Queen* and *Saveacre*, 'twas held *per Cur'*, That altho' a Chaplain be removed from the Domeſtical Service of the Family, he ſtill remains a Chaplain at large, and ſo is a Chaplain within this Statute. *Godb.* 42.

13 *El. c.* 20.

By 13 *Eliz. c.* 20. §. 2. 'Tis Provided, that every Parſon by the Laws of this Realm allowed to have two Benefices, may demiſe the one of them, upon which he ſhall not then be moſt ordinarily Reſident, to his Curate only, that ſhall there ſerve the Cure for him; but ſuch Leaſe ſhall endure no longer than ſuch Curate's Reſidence without Abſence above Forty Days in any one Year. *Vide poſt. c.* 43.

Courſe as to Benefices without Cure, &c.

From the foregoing Matters it ſeems plain, That (notwithſtanding what is enacted by Stat. 21 *H.* 8. *c.* 13.) the Courſe of the Canon or Common Law, before this Statute uſed, is to be obſerved for all Benefices without Cure; and with Cure, where the former Benefice is under the yearly Value of 8 *l.* and that this Act doth only forbid him that hath a Benefice of ſuch a Value, from taking and holding a Second therewith, by Vertue of any Diſpenſation made, according as formerly they were, *viz.* to any Perſons, and for any Number of Benefices, without reſpect to the new Qualifications ſet up by this Act, and makes void only ſuch Diſpenſations as are contrary thereunto: Which Qualifications come next to be conſidered.

Qualifications conſidered.

A Spiritual Perſon that hath one Benefice with Cure, of the yearly Value of Eight Pounds, or above, may be qualified to hold by Diſpenſation one other Benefice with Cure, (or more, as the Caſe may be) without making a Ceſſion of the former: But then ſuch Perſon, for that Purpoſe, muſt be qualified either by Birth or Relation, by Univerſity Degree,

Diſpenſations, &c.

By Birth.

by Office or great Employment, or laſtly, by Retainer. If by Birth or Relation, he muſt be the Brother or Son of a Temporal Lord born in Wedlock, or the Brother or Son of ſome Knight born in Wedlock; and then he may purchaſe Licence or Diſpenſation, and receive, take, and keep two Parſonages or Benefices with Cure of Soul. But Note, That the Baſtards of ſuch Perſons are not qualified, nor the lawful Son of any Biſhop, (Biſhops at the making of this Act not being permitted to marry) nor the Son of any Baronet, that Dignity not being then created.

By Univerſity Degree.

If by Univerſity Degree, he muſt be either Doctor or Bachelor of Divinity, Doctor of Law, or Bachelor of Law Canon, and admitted thereto by one of the Univerſities of this Realm, and not by Grace only; and then by Diſpenſation he may hold two Benefices as aforeſaid.

By Office or Imployment.

If by Office, or great Imployment, he muſt be either a Biſhop Suffragan, that doth exerciſe the Office of a Biſhop by Commiſſion of a Biſhop; and then he may have two Benefices with Cure of Soul; any former Act made to the contrary notwithſtanding, *Stat.* 26 *H.* 8. *c.* 14. or elſe be a Perſon ſworn of the King's Council, and then he may by Diſpenſation hold three Benefices with Cure.

By Retainer.

If by Retainer, he muſt be duly retained to be a Chaplain either to the King, Queen, Prince, or Princeſs, or to one of the King's Children, Brethren, Siſters, Uncles or Aunts; all which may retain as many Chaplains as they pleaſe, to hold two Benefices with Cure, of whoſe Gift ſoever they be. And moreover, if he be the King's Chaplain, and it ſhall pleaſe the King's Highneſs to give him any Benefices, or Spiritual Promotions, to what Number ſoever they be, it is lawful for him to accept and take the ſame, without incurring the Danger, Penalty, or Forfeiture, in this Statute comprized; any Thing in the ſaid Act to the contrary notwithſtanding.

Q.

But it is a Queſtion, Whether theſe Benefices of the King's Gift muſt not be alſo taken by Diſpenſation? *Hil.* 8 *Jac. Wallop* v. *Biſhop of Exeter*, &c. *Brownlow*, and *Gouldsborough*, 1 *Part* 162. and 2 *Part* 45. By the following Caſe, it ſeems, they need not. A Chaplain extraordinary of the King has not a Privilege to retain two Benefices, with Cure of Souls, above 8 *l. per Ann.* Value, without a Diſpenſation. 2 L. *Ray.* 791. *Brown* v. *Mugg.* Or elſe he muſt be Chaplain to an Archbiſhop, who may qualify Eight; or of a Duke, or Biſhop, who may qualify Six; or of a Marquiſs or Earl, who may qualify Five; or of a Viſcount, who may qualify Four; or of the Lord Chancellor for the Time Being, or of a Baron or Knight of the Garter, who may qualify Three; or of a Ducheſs, Marchioneſs, Counteſs, Baroneſs, (being Widows, or having taken Huſbands, under the Degree of a Baron) or of the Treaſurer or Comptroller of the King's Houſe, the King's Secretary, the Dean of his Chapel, his Almoner, or Maſter of the Rolls, each of which may qualify Two; or of the Chief Juſtice of the King's Bench, or Warden of the Five Ports, which may qualify One: The Chaplains of all which (being legally retained) may purchaſe Licence or Diſpenſation, and take, receive and keep two Parſonages or Benefices with Cure of Soul. *Stat.* 21 *H.* 8. *c.* 13. Although the former be above the Value of Eight Pounds.

All theſe may purchaſe Licence, &c. for two Benefices.

Qualified by Minors.

Though a Duke, Earl, or the like, be but a Minor, or not above ten Years of Age, in the Cuſtody, and in the Family of another Nobleman, who may and doth retain Chaplains; yet he may qualify Chaplains to be diſpenſed withal to hold two Benefices with Cure, in like ſort as if he was of full Age. *Paſch.* 44 *Eliz. The Queen* v. *Biſhop of Salisbury*, &c. 4 *Coke*, in *Acton*'s Caſe, *fol.* 119.

Teſtimonial to qualify.

If a Spiritual Perſon be retained by Word only to be a Chaplain, by ſuch Perſon as may retain and qualify by the Statute, and doth abide and ſerve as Chaplain in his Family; or if he hath alſo obtained Letters Teſtimonial,

ſigned only, or under the Seal only of his Maſter, witneſſing that he hath retained him; yet if ſuch Letters Teſtimonial be not under both Sign and Seal, he is not a Chaplain within the Statute to hold a Plurality. *Trin.* 28 *El. The Queen* v. *Savacre, Godb.* 41. However, when the Queſtion (to avoid a Leaſe) was, whether the King's Chaplain, retained by Parol only, might have a Plurality by the Statute? It was adjudged, That in regard that the Chaplain, (concerning whom the Queſtion was) died thirty Years before, and whilſt living, was reputed to be the King's Chaplain, and exerciſed the Place of Chaplain in his Cloſet, and elſewhere, and had all the Benefits of his Chaplain, it ſhould be intended he was his Chaplain, and well retained. *Mich.* 37 & 38 *Eliz. Whetſtone* v. *Higford,* 3 *Cro.* 424. See the ſame Caſe in *Savil, p.* 135. So where a Counteſs having retained one Chaplain without Patent, who was thereupon advanced to a Plurality, and did afterwards by Patent retain two others: The firſt Retainer was held good: Becauſe the Patent is not of Neceſſity, but only in caſe where he hath Cauſe to ſhew it, for the Retainer is good without it. *Paſch.* 31 *El. The Queen* v. *Biſhop of Lincoln* and *Skiſling, Moor* 227. But this Reaſon begs the Queſtion, which is, Whether a Retainer by Parol be good to qualify for a Plurality? The Words of the Statute 21 *H.* 8. *c.* 13. are, **Provided, that the ſaid Chaplains ſo purchaſing, taking, receiving, and keeping Benefices with Cure of Soul, as is aforeſaid, ſhall be bound to have and exhibit, where Need ſhall be, Letters under the Sign and Seal of the King, or other their Lord and Maſter, teſtifying whoſe Chaplains they be; and elſe not to enjoy any ſuch Plurality of Benefices by being ſuch Chaplain; any Thing in this Act notwithſtanding.** So that ſuch Letters ſeem abſolutely neceſſary, and likewiſe that they be under Hand and Seal as aforeſaid. And where an Incumbent pleaded, That he was retained Chaplain to the Counteſs of *Derby*, and had a Diſpenſation to take two Livings, being qualified by the Statute; it was replied, That the ſaid Counteſs had retained two Chaplains before ſhe retained the Defendant, and Iſſue taken upon the Retainer of one of thoſe two: And to prove the Retainer, a Copy of the Retainer, entred in the Court of Faculties, was offered to be given in Evidence: But the ſame was not allowed by the Court; who ſaid, That the Oath of any who had ſeen the Retainer under the Hand and Seal of the Counteſs, would have been good Evidence in that Caſe, by reaſon the Plaintiff was a Stranger to it. *Hill.* 2 *Car.* 1. *C. B. The King* v. *Frankwell, Lit. Rep.* 1.

Diſpenſations, &c.

Retainer by Parol.

21 *H.* 8. *c.* 13. §. 22. To exhibit Letters Teſtimonial.

Evidence of a Retainer.

None of the Honourable Perſons aforeſaid may advance above the Number appointed, to receive any more Benefices with Cure of Souls, than one: And if they do, then every Spiritual Perſon ſo advanced above the ſaid Numbers, does incur the Pains and Penalties in the ſaid Statute. *Stat.* 21 *H.* 8. *c.* 13.

Penalties incurred.

This Act againſt Pluralities is to be conſtrued ſtrictly; and therefore, if a Biſhop be made an Archbiſhop, and doth hold both Dignities; or a Baron (that may qualify three) be created an Earl, who may qualify five, and then is made Warden of the Five Ports, who may qualify one; yet they can qualify only in their beſt Capacity, *viz.* eight as Archbiſhop, and five as Earl; and ſo of all the reſt. *Trin.* 43 *Eliz. Drury*'s Caſe, 4 *Coke* 89, 90. *Hill.* 43 *Eliz. Acton*'s Caſe, 4 *Coke* 17.

The Act to be ſtrictly conſtrued.

If a Baron (who can qualify but three Chaplains) retains four at one and the ſame Time, none of them are qualified. *Jenkins, Caſe* 91. *Cent.* 6. But contrary to this it is ſaid, That where there is a Priority in Time, as to the Retainer, thoſe of them ſhall be the qualified Chaplains

Priority in Time.

Diſpenſations, &c.

lains that are firſt advanced. *Dyer* 312. *p.* 88. And this ſeems to be admitted 4 *Coke* 90. *a.*

If any Perſon hath retained more than the Number he may have by the Statute, although they be all Chaplains at the Common Law; yet when he hath retained ſo many as the Statute doth allow him, the Statute is executed, and only thoſe that firſt make up the Statute-number are qualified to hold a Plurality; and though not any of that Number of Chaplains, that are allowed to any Perſon by the Statute, (being retained according to the ſame) be advanced to a Plurality before others, that are after retained by their Maſters, have taken Pluralities, yet their Qualifications remain good, and the firſt Benefices of ſuch Supernumerary Chaplains are void, notwithſtanding ſuch their Retainer. *Trin.* 43 *Eliz. Drury*'s Caſe, 4 *Co.* 90. *Trin.* 27 *Eliz. The Queen* v. *Biſhop of Glouceſter* and *Savaker*, 1 *Anderſon* 200. *Mich.* 41 *Eliz. The Queen* v. *Drury*, in 3 *Cro.* 723. and in *Moor* 561. *Trin.* 43 *Eliz. Drury* v. *The Queen*, 3 *Cro.* 839. 5 *Co.* 89. and 45 *El. The Queen* v. *The Biſhop of Peterborough*, *Moor* 678. *Paſch.* 31 *Eliz. The Queen* v. *Preſident and Scholars of Magdalen College*, *Moor* 277. ſame Caſe, *Savil*, *p.* 101. And yet it was the Opinion of *Catlyn*, *Saunders* and *Dyer*, ——That if a Baron (who is allowed but three Chaplains) retain ſix by his Letters Teſtimonial, and all ſix are preferred to ſix ſeveral Pluralities, the three that are firſt promoted, are only warranted by the Statute. *Trin.* 14 *Eliz. Dyer* 312. And to this Purpoſe, *Walmſley* held in the Caſe of *The Queen* againſt *Drury*, *Mich.* 14 *Eliz.* 3 *Croke* 723. Alſo *Hern* Serjeant, ſaid, That it was ſo reſolved in the *Queen's Bench*, in the Caſe of the Lady *Bridges*. But the former Opinion (as I take it) is the better.

If firſt Pluralities be to the Supernumerary Chaplains.

Firſt promoted only warranted.

Q.

If a Baron (who can have but three Chaplains) doth qualify three accordingly, and they being advanced to Pluralities, he, upon Diſpleaſure, or for other Cauſe, doth diſmiſs them from their Attendance, yet they are his Chaplains at large, and may hold their Pluralities for their Lives: And (though he may entertain as many other as he will) yet he cannot qualify any of them to hold a Plurality, whilſt the firſt three are living. And ſo of others. *Mich.* 37 & 38 *Eliz. Savacre*'s Caſe, *Owen*. *Trin.* 42 *Eliz. Drury*'s Caſe, 4 *Coke* 90. *Paſch.* 28 *Eliz. Savil p.* 79. *Trin.* 28 *El. The Queen* v. *Savacre*, *Hughes*. But as any the three firſt die, he may qualify others, *The Queen* v. *Savacre*, *Owen*, if ſo be he retain them anew after the Death of the firſt; for if, during the Lives of the aforeſaid three firſt Chaplains, he hath retained by Letters Teſtimonial ſigned and ſealed, a fourth, yet by the Death of one of the three firſt, that Retainer will not be good to qualify him for a Plurality. *Trin.* 43 *El. The Queen* v. *Drury*, 3 *Croke* 723. For it is a Rule, That the Perſon retaining muſt be capable to retain at ſuch Time when he Signs and Seals the Qualification, to give his Chaplain Benefit thereby. And therefore if the Son and Heir Apparent of a Duke, Earl or Baron, retains a Chaplain, ſuch Retainer doth not make him a Chaplain to hold a Plurality after the Death of the Father of the Perſon retaining, though he continue in the Service of the Son, when he is the very Baron, that is, without an After-retainer. *Jenkins*, *Caſe* 91. *Cent.* 6.

Three qualified by a Baron, being advanced, are afterwards by him diſmiſſed.

Rule of Retainer.

As the Perſon retaining, to qualify his Chaplain for a Plurality, muſt be capable thereof when he Signs and Seals the Inſtrument of Retainer; ſo to give him the Benefit thereof generally, he muſt continue capable of qualifying till ſuch Time as his Chaplain is advanced: For the Validity of a Qualification not executed, for the moſt part determines with the Power of qualifying in him that made it. And therefore, if a Perſon hath any Office that gives him Capacity to qualify a Chaplain, and he quali-

Validity of a Qualification, how determined.

By Removal from Office.

qualifieth one accordingly, by his being removed from his Office, the Qualification is ſo voided, that the Chaplain cannot afterwards take a ſecond Benefice, by Virtue of that Qualification. *Acton*'s Caſe, *Hill.* 45 *Eliz.* 4 *Coke* 117. So if a Perſon hath duly qualified a Chaplain, and then dieth, by his Death his Chaplain is barred from taking a ſecond Benefice upon ſuch Qualification; yet not from retaining a Plurality taken in the Life-time of the Qualifier. *Trin.* 14 *Eliz.* *Dyer* 312. And though a Nobleman doth continue in Life, yet the like Law is, if he be attainted, which is a Death in Law; for by the Judgment he loſeth his Quality, and becomes Ignoble. *Stamford's Pleas of the Crown*, and 4 *Co.* 118. *b.* 119. *a.* in the ſame Caſe of *Acton*, *Mich.* 44 & 45 *El.* *The Queen* v. *Biſhop of Peterborough*, *Moor* 678. And yet, by the ſame Caſe, if a Baroneſs, *&c.* hath retained two Chaplains, and after taketh to Huſband one of the Nobility, and there loſeth her Capacity of retaining Chaplains during that Coverture; yet the Retainer of her former Chaplains doth remain, ſo that they may after the Marriage take two Benefices with Cure, without a new Retainer: So is *Hill.* 45 *Eliz.* *Acton*'s Caſe, 4 *Co.* 118. *Jenkins*, *Caſe* 91. *Cent.* 6. But otherwiſe it is, if the Lord that married ſuch Baroneſs, doth after Marriage diſcharge her Chaplains before their Advancement. *Mich.* 44 & 45 *El.* *The Queen* v. *Biſhop of Peterborough*, *Moor* 678. But if the Huſband doth not diſcharge them during his Life, and dies before ſuch his Lady, the Chaplains that ſhe had before her Marriage retained and qualified, remained her Chaplains, and are by ſuch her firſt Retainer qualified to take two Benefices with Cure. *Mich.* 44 & 45 *El.* *The Queen* v. *The Biſhop of Peterborough*, *Moor* 678. And ſo I conceive, that if any other Perſon capable of qualifying a Chaplain to hold a Plurality, doth diſcharge his Chaplain before he hath taken the Benefit of his being qualified, he cannot afterwards lawfully hold two Benefices within this Statute.

Diſpenſations, &c.

By Death.

By Attainder.

Diſcharge by Baron, *&c.*

Let the Qualification be never ſo good, yet that alone doth not enable any Perſon to take a ſecond Benefice without making a Ceſſion of the former, but a Diſpenſation for that Purpoſe muſt alſo follow. It hath indeed been a Queſtion, *Hill.* 8 *Jac.* *Brownlow* and *Gouldsborough*, *2d Part* 45. and *Whetſtone* and *Hickford*'s Caſe, *Savil* 135. which I do not find reſolved. If the King's Chaplain, having one Benefice of the Preſentation of a common Perſon, accept another of the Preſentation of the King, without any Diſpenſation, both being of or above the yearly Value of Eight Pounds, whether the firſt be void by the Statute 21 *H.* 8. againſt Pluralities, by Reaſon of the Clauſe therein,— **That it ſhall be lawful to every Spiritual Perſon or Perſons, being Chaplains to the King, to whom it ſhall pleaſe his Highneſs to give any Benefices or Promotions Spiritual, to what Number ſoever it be, to accept and take the ſame, without incurring the Danger, Penalty and Forfeiture in this Statute comprized?** And ſo it hath been ſaid, That if the Chaplain of a Lord takes a ſecond Benefice with Cure, without ſpecial Diſpenſation, his firſt is not void by the ſaid Statute, becauſe the Words are not, that he ought to ſue for a Licence, but that he may ſue for one: But in this laſt Caſe 'tis there ſaid, that the firſt is void by Spiritual Law. *Trin.* 14 *Eliz.* *Dyer* 312. And ſo, I ſuppoſe, it is in the former Caſe: For by that Statute the Canon Law (which makes a firſt Benefice with Cure, of what Value ſoever, void by the Acceptance of a ſecond) is affirmed as to Benefices with Cure, where the firſt is of the yearly Value of Eight Pounds; nor doth the Clauſe aforeſaid look like a Repeal thereof as

Ceſſion without a Diſpenſation follows.

Q.

21 *H.* 8. *c.* 13. §. 29.

A Chaplain may ſue for a Licence.

Diſpenſations, &c.

to this Caſe, but only is an addition to a former Clauſe, that gives the King's Chaplains Power to purchaſe Diſpenſations, and take two Benefices with Cure; which otherwiſe they could not do, by reaſon of what was before enacted, *viz.* §. 9, 10, 11. **That a ſecond Benefice with Cure, ſhould avoid a former of Eight Pounds** per Ann. **as to all Perſons; that all Diſpenſations to the contrary ſhould be void; and that the Perſons obtaining and uſing them ſhould be ſubjected to Puniſhment.** And if that Clauſe be not a Repeal of the Canon Law in this Point, then thereby a former Benefice, when the King's Chaplain accepts a ſecond of the King's Gift, is as much void by Canon Law, as when a Lord's Chaplain accepts a ſecond, no Diſpenſation being had by either; and ſo in both Caſes the Queſtion comes to be one.

Vide Dyer 139, 237, 255, 347, 352, 377. 4 *Co.* 75, 78. 24 *El.* 3. 39.

If a qualified Perſon takes two Benefices without Diſpenſation, &c.

If a qualified Perſon takes two Benefices with Cure, without Diſpenſation, the firſt being of the yearly Value of Eight Pounds, whether the firſt be as well void by the Statute as Canon Law, is to be conſidered. So that the Patron, to prevent a Lapſe, muſt preſent without Notice from the Ordinary: And I rather think, that it is void in ſuch Caſe by the Statute; for though the Words of the Statute are not, that he ought to ſue, or that he ſhall ſue for a Licence, but that he may ſue for one (which makes the Doubt), yet they need not occaſion any: For when 'tis ſaid, that they may purchaſe Licence, and receive and keep two Benefices, it is by way of Exception, as to two Clauſes that went before: (The Firſt) That a former Benefice with Cure, of the yearly Value of Eight Pounds, ſhould be void by taking a ſecond: (The other) That he that obtains a Diſpenſation to hold a former with the ſecond, ſhould be puniſhed. So that the Senſe ſeemeth to be this: That though it be enacted, That if any Perſon, having one Benefice with Cure of the yearly Value of Eight Pounds, accepts another, the firſt ſhall be void; and alſo the Perſon that obtains a Diſpenſation to hold them, ſhall be puniſhed; yet he that is qualified according to this Statute, may purchaſe a Diſpenſation to hold two Benefices with Cure without Puniſhment, although the firſt be of the yearly Value of Eight Pounds; and may take, receive, and keep the ſame, notwithſtanding what is before enacted: From which it followeth, that if he doth not purchaſe Licence, he may not keep them both, by that general Prohibition, from which this is an Exception; and the Words, *may purchaſe*, are moſt proper to expreſs this Senſe. Nor is there any Reaſon why a former Living ſhould not be voided for want of a Diſpenſation by a Statute Law, as well as by a Canon, both being poſitive, when it may in ſome Caſes continue full, notwithſtanding both, by Virtue of ſuch Diſpenſation; neither can it be ſuppoſed, but that the ſaid general Clauſes do extend to Perſons qualified for Pluralities, if they be not diſpenſed with as well as to others, ſeeing no ſuch Pluralities before that Statute could have been without Diſpenſations; the Statute all along makes Diſpenſations the Means, and only Means, by which they may be held, and did not Repeal the Canon Law, by which no Perſon may hold them, tho' he be qualified according to that Statute. And as to this, I have Serjeant *Moor*'s Opinion to juſtify me in what I ſay, in this Argument of the Caſe of *Robins* v. *Gerrard* and *Prince*, *Moor* 440. which Caſe is reported in 4 *Co.* 78. by the Name of *Digby*'s Caſe.

Expoſition of the Words (*may purchaſe.*)

Extent of the former Clauſes.

What Words make a Diſpenſation.

A Diſpenſation however is certainly neceſſary to prevent a Ceſſion by the Canon Law: But to make it valid for that Purpoſe, it is not of Neceſſity, that the Word *Diſpenſamus* be contained therein; for it hath been adjudged, that a Diſpenſation with theſe Words, *Unimus*,

Annexímus & Incorporamus the ſecond Benefice to the firſt, without the Word *Diſpenſamus*, was good, and did enure to a temporary Union, which the Archbiſhop might make without the immediate Ordinary and Patron, the Clerk being qualified according to the Statute. *Mich.* 41 *Eliz.* *The Queen* v. *Page* and *Biſhop of London*, 3 *Cro.* 719. And it was then alſo ſaid, That where a Diſpenſation was to retain a ſecond Benefice *De Donatione, Diſpoſitione, ſeu Præſentatione cujuſcunque*; and a College having an Advowſon, to which they uſed by Election to make a Nomination, preſented him who had his Diſpenſation, who was alſo inſtituted and inducted; the Diſpenſation was not good, for want of the Word *Electione* therein. Diſpenſations, &c.

If a Diſpenſation be for an Incumbent of a Church to hold another Living therewith, *Modo ſit infra* Ten Miles of the former; and he thereupon accepts of one that is more than Ten Miles diſtant from the firſt, yet the Diſpenſation is good to hold both Benefices: For Civilians being called, ſhewed, That by their Law *Modo & Dummodo* are expreſs Proviſo's in ſuch Licences; but do not make a Condition, unleſs it had been added, That if he doth otherwiſe, then it ſhall be void: But is only as an Admonition or Caution, that he ſhall be puniſhed by Eccleſiaſtical Cenſures, if he doth otherwiſe: And affirmed, that this had been always the Expoſition in granting ſuch Licences; and therefore, tho' *Modo, Dummodo, Ita quod*, make a Condition by the Expoſition of the Common Law; all the Court reſolved, That the uſual Expoſition as to theſe Licenſes ſhould take Place, to prevent the Inconvenience of unſettling many Men's Titles, and making their Livings to be in Lapſe. *Trin.* 13 & 14 *Car.* *Dodſon* v. *Lin*, 1 *Croke* 475. ſame Caſe, *Jones* 394. If an Incumbent hath a Diſpenſation to hold a Benefice, altho' he be deprived, this ſhall not prevent an Avoidance, if he be after deprived; becauſe, it ſeems, that this is repugnant, and is as much as to ſay, that the Benefice ſhall be full, when it is void. *Roll's Abr.* 2. *P.* 359. *Contra* 11 *H.* 4. 60. *b.* Of the Words, *Modo & Dummodo*, &c. Avoidance not prevented.

For the preventing of a Ceſſion, by taking a ſecond Benefice, 'tis not enough that the Diſpenſation be truly made, but alſo that it be had in due Time: For if an Incumbent of a Church incompatible be preſented and inſtituted, or collated into another, and then obtaineth Diſpenſation to hold them, and afterwards is inducted, his Diſpenſation comes too late, and his firſt Benefice by his Inſtitution into his ſecond is void, his Diſpenſation notwithſtanding. *Hill.* 41 *Eliz.* *Digby's* Caſe, 4 *Coke* 78. *Hill.* 43 *Eliz.* *Robins* v. *Prince*, *Gouldsborough* 162. *Mich.* 10 *Jac.* *Colt* and *Glover* v. *Biſhop of Litchfield*, *Hobart.* *Hil.* 38 *Eliz.* *Robins* v. *Gerrard*, *Moor* 434. All the Doubt hath been, becauſe the Statute againſt Pluralities doth not avoid the Church before Induction: But at the Canon or Common Law, Inſtitution to a Benefice doth fill the ſame, and makes the inſtituted, *Rector Eccleſiæ* before Induction, againſt himſelf, and all other Perſons but the King; and in the King's Caſe, he is full and complete Incumbent as to Cure of Souls. 22 *H.* 6. 27. *a.* 44 *E.* 3. 3. 11 *H.* 4. 9. *a.* 33 *H.* 6. 13. *a.* 11 *H.* 7. 29. *Hill.* 14 & 15 *Jac.* *Hutchins* v. *Glover*, 2 *Croke* 463. *Mich.* 19 & 20 *Eliz.* *Digby* v. *Fitzherbert*, *Dyer* 360. *Trin.* 14 *Jac.* *Gouldsborough* 163. And therefore it hath been adjudged, That if he that hath a next Turn, doth preſent his Clerk, and he be inſtituted, and not inducted, it ſhall ſerve for his Turn. *Mich.* 16 & 17 *Eliz.* *Rot.* 4. cited in the ſame Caſe in *Goldsborough* 163. And if Inſtitution did not fill the Church, a Man, by being inſtituted into many Churches, Diſpenſation to be had in due Time. Inſtitution filleth the Benefice. *Quære.*

Diſpenſations, &c.

Churches, might bar all others from being preſented to them, and by getting Sequeſtration of the Profits of them, wholly fruſtrate the Act and Canons againſt Pluralities. And if the ſecond be full by Inſtitution, the firſt after ſuch Inſtitution cannot be full alſo; and ſo Diſpenſation after the ſecond Inſtitution muſt come too late, unleſs it was ſufficient to make that full, which was once void. Beſides, by the Act, he can only purchaſe Licence to receive, have, and keep two Benefices; and therefore his ſecond Church being full by his Inſtitution, he cannot afterwards purchaſe Licence to receive, or have that which he had before; and ſo the Firſt being voided by the ſecond Inſtitution, a Diſpenſation will not enable him to retain that which he had loſt before, and which he cannot receive. 4 *Coke* 79. *b.* *Digby*'s Caſe.

Where a Perſon having two Benefices by Diſpenſation, doth afterwards take a Third. *Nota Differentiam.*

If any Perſon having two Benefices with Cure, by a good Diſpenſation, doth afterwards take a Third; *Heron* ſaid, That it had been adjudged, that both of them ſhould be void. *King* v. *Biſhop of Chicheſter*, *Noy* 149. And yet 'tis ſaid to have been adjudged *per Curiam*, that the firſt Benefice is only void. *Mich.* 5 *Jac.* *Hughes* 153. But the Reaſon of the Judgment in the firſt Caſe might be, that the Diſpenſation was to hold together two certain Benefices therein expreſſed: For then, I ſuppoſe, that the taking a Third, without other Diſpenſation, doth avoid both the two firſt: And the Reaſon of the ſecond Judgment might be, becauſe the Diſpenſation was general, to hold any Benefices with Cure, and ſo both Judgments may be well given; but in the laſt Caſe, 'tis good that he who hath two Benefices with Cure, by ſuch general Diſpenſation, or by Diſpenſation *Cum clauſula permutationis*, doth, before he accepts a Third, determine his Choice of the two firſt, by his Reſignation of one of them, eſpecially if he deſign to retain that of the two which he took laſt.

Diſpenſation to hold three Benefices.

When the Diſpenſation is made to hold three Benefices with Cure, whereof the firſt is of the yearly Value of Eight Pounds, (unleſs in the Caſe of the King's Chaplains, when the laſt is of his Donation) the Diſpenſation is void, and he cannot thereby have two Benefices, as *Hobart* held, in the Caſe of *Colt* and *Glover* v. *Biſhop of Litchfield and Coventry*, *Hobart* 158. And 'tis ſaid, that divers Juſtices and Serjeants were of this Opinion, and that the Forfeiture of Twenty Pounds, and the Profits of the third Benefice, did, by taking and uſing ſuch Diſpenſation, fall upon the Incumbent, according to the Statute 21 *H.* 8. 13. *Mich.* 15 & 16 *Eliz.* *Dyer* 327.

As by not ſubſcribing the Articles at the taking of the ſecond Benefice; and by Diſpenſation the firſt Church is not voided by a ſecond, as hath been here ſhewed; the ſame may be ſaid of Union, Appropriation, and *Commendam recipere*: But of theſe in their more proper Place.

Ceſſion by the Incumbent's being made a Biſhop.

Not only a Benefice with Cure or Dignity, may be ſaid to be void by Ceſſion, when the Incumbent thereof accepts of another Benefice, or Dignity, as before is ſhewed (where by Dignities, inferior Dignities only are not to be underſtood,) but alſo, when ſuch Incumbent is made a Biſhop, for thereby all his Eccleſiaſtical Preferments which he had before, whether with or without Cure, are actually void. *Paſch.* 19 *Car.* 2. *Kerry Edes* v. *Walter Biſhop of Oxford*, *Vaughan* 19. 29 *E.* 3. 44. *a.* 11 *H.* 8. 11 *H.* 4. 37, 38, 60, 67. 41 *E.* 3. 5. *b.* *Paſch.* 9 *Jac.* *King* v. *Horsfall* and *Wale*, *Davis* 68. 7 *H.* 4. 25. *b.* 24 *E.* 3. 26. *b.* *Doctor and Student* 126. *b.* *Hill.* 20 *Jac.* *B. R.* *Palmer p.* 344. But it is not the Election of any one to be a Biſhop, and Confirmation thereof, that

that doth void his former Preferment, until Conſecration be alſo had. 20 *E.* 3. *Brief* 250. 5 *E.* 2. *Fitz. Brev.* 800. 41 *E.* 3. 5. *b.* 11 *H.* 4. 37, 38, 59, 60. *Hill.* 17 *Jac. B. R. Palmer p.* 344. And therefore if an Incumbent of a Prebend be elected Biſhop of the Biſhoprick, that is Patron of the Prebend; and after that, and before Conſecration, the King doth grant to him the Temporalities of the Biſhoprick, yet thereby his Prebend is not void; for before Conſecration he is no Biſhop, and may refuſe the Biſhoprick. 41 *E.* 3. 5. *b.* Nor doth Conſecration only void ſuch Eccleſiaſtical Preferments, which the new Biſhop had within the Dioceſe of which he is made Biſhop, but alſo of all others of what Dioceſe or Kingdom ſoever they be: And therefore if a Clerk, who hath one or more Benefices here in *England*, be conſecrated a Biſhop of ſome Dioceſe in *Ireland*, all his Preferments here are, *ipſo facto*, without any Deprivation, void. *Manwaring* and *Woodley*'s Caſe, vouched in *Evans* and *Aſcough*'s Caſe, *Palmer* 78. Becauſe they are not void by the Statute againſt Pluralities, as it is ſaid in *Colt* and *Glover*'s Caſe, *Hobart* 157. but by Canon Law, which is one and the ſame throughout the whole Church. 10 *E.* 3. 1. 19 *E.* 3. *Tryal* 57. 5 *E.* 3. 9. *Hill.* 22 *Jac. Evans* and *Kiffith* v. *Aſcough*, *Palmer p.* 457. *Noy* 98. and *Latch* 31. and 233. The ſame Caſe by *Jones* 158. The ſame Law is, if a Clerk be created Biſhop of *Man*, as was reſolved 15 *Jac.* and *Hill.* 17 *Jac. B. R. Palmer* 334. But if a Man be made a meer titular Biſhop, as of *Chalcedon*, *Utopia*, *Jeruſalem*, (*Banks*) ſaid, no Benefice is voided thereby, in *Evans* and *Aſcough*'s Caſe, *Latch* 135. So if one of our Clergy be created a Biſhop Suffragan of *England*, not any (as I conceive) of the Preferments he had before, do become void; but on the other Hand, if he exerciſe the Office of a Suffragan by Commiſſion, he is thereby qualified to hold at one Time two Benefices with Cure. *Stat.* 26 *H.* 8. *c.* 14. However, his Benefices with Cure, taken after he is a Suffragan, may (unleſs Diſpenſation prevent) void any Dignity he had before.

Diſpenſations, &c. Conſecration.

What Preferments void by Conſecration.

By Canon Law.

Titular Biſhop.

Biſhop Suffragan.

This Rule, That all Benefices become void, when the Incumbent of 'em is made a Biſhop, admits of an Exception: For by Diſpenſation of Retainer, a Biſhop may retain ſome, or all of thoſe Preferments he was intitled to before he was Biſhop. 1 *H.* 4. *f.* 60, 170, 21, 13, 229. Biſhop of *St. David*'s Caſe, 41 *E.* 3. 5. 27 *H.* 8. 15. *b. Hill.* 39 *Eliz. B. R. Armiger* and *Holland*'s Caſe, *Roll's Abr.* 2. *p.* 359. *Mich.* 6 & 7 *Eliz. Dyer* 233. *Paſch.* 9 *Jac. King* v. *Horsfall & Wale*, *Davis* 68. *Mich.* 22 *Jac. Woodly* v. *Biſhop of Exeter*, 2 *Croke* 691. And a Diſpenſation to hold a Benefice in *England* with a Biſhoprick in *Ireland*, under the Great Seal of *England* only, is good; becauſe *Ireland* is ſubordinate to *England*, and governed by the ſame Law; for otherwiſe it ought to be under the Great Seal of both Kingdoms. *Trin.* 3 *Car. B. R. Evans & Kiffin* v. *Askwith*, *Palmer* 457. But without ſuch new Diſpenſation, his former Diſpenſations, though one was to hold Benefices with Cure, another to hold Dignities with them, will not ſerve his turn, as is held, by *Hobart* in *Colt* and *Glover*'s Caſe, *Hobart* 157. Nor will his Diſpenſation avail him any Thing, when of a Clerk he is made Biſhop, unleſs it be obtained before his Conſecration. 11 *H.* 4. 38. *b.* 59. 78. *b.* Biſhop of *St. David*'s Caſe. Neither in the Caſe, of his being tranſlated to another See, can he, by Virtue of ſuch Diſpenſation of Retainer, hold thoſe Benefices he injoyed with his firſt Biſhoprick, but muſt for that Purpoſe ſue out a new Diſpenſation *Retinere*, before he and the King have conſented to the Election. However, before his Election to

Exception to the Rule of Incumbent's being made a Biſhop.

Benefice in *England*, and Biſhoprick in *Ireland*.

Diſpenſation before Conſecration.

Tranſlation and new Diſpenſation.

Diſpenſations, &c.

ſuch other Biſhoprick be ſeconded by the Confirmation thereof, for otherwiſe it will work nothing, as coming too late, in *Evans* and *Kiffin*'s Caſe *v. Aſcough*, in *Noy* 93. and in *Latch p.* 31, & 233. and in *Jones* 158. and in *Palmer* 476. *Jenkins, Caſe* 91. *Cent.* 6. *Paſch.* 19 *Car.* 2. *C. B. Henry Edes* v. *Walter Biſhop of Oxford, Vaugh.* 20.

Diſpenſation *Retinere* for Years, or for Life.

A Diſpenſation *Retinere* former Benefices, may be made either for Years or for the Life of the Biſhop; and therefore a Clerk having a Faculty from the Archbiſhop of *Canterbury*, to retain a Benefice he poſſeſſed for three Years after he ſhould be created Biſhop, and reſigning after his Creation, it was held, That his Church was not void by his Creation, but only by his Reſignation. *Mich.* 6 & 7 *El. Dyer* 233. And *Hobart* ſaid in *Colt* and *Glover*'s Caſe, *Hobart* 156. That when the three Years are paſt, the Benefice voids. And ſo *Vaughan* in *Henry Edes* and *Walter Biſhop of Oxford*'s Caſe, *Vaughan* 24. But it was held by *Hutton* and *Winch*, That though a Diſpenſation of Retainer be made, to retain a Church with a Biſhoprick but for ſix Years, yet the Commendatory hath thereby Power to hold it during his Life. *Mich.* 22 *Jac. Woodly* v. *Manwaring*, 2 *Croke* 629. And their Reaſon might be, becauſe the Diſpenſation for ſix Years prevented his Conſecration from making his Church void, which is that only Act by which, in Law, all former Acts are voided in this Caſe; ſo that he remaining Incumbent of his Benefice at ſuch Time when he was complete Biſhop, the Plenarty of ſuch Benefice would not, without ſome other Act afterwards, as Reſignation, Tranſlation or Death, be determined.

Upon Diſpenſation for Years, held over for Life.

Retinere Dignitatem Decanatus.

If a Diſpenſation be *Retinere Dignitatem Decanatus*, it is good for the Deanery, and he is Dean both in Title and Fact, and may confirm Leaſes, and do all other Acts as Dean: In *Evans* and *Aſcough*'s Caſe, in *Latch* 233. and in *Noy* 14. and in *Jones* 258. And if a Diſpenſation be made by the Words *Retinere in Commendam*, yet the Commendatory is thereby full Incumbent, and may plead as Incumbent. *Woodley*'s Caſe *v. Manwaring*, 2 *Croke* 691. and muſt ſue and be ſued by the Name of Parſon or Vicar, as the Caſe requireth, by *Hobart*, in *Colt* and *Glover*'s Caſe, *Hobart* 163. And where ſuch a Diſpenſation of Retainer is had, if the Patron (after the Biſhop is conſecrated) doth preſent another that is inſtituted and inducted, the Biſhop may have a Spoliation in the Spiritual Court againſt this new Incumbent, becauſe by Diſpenſation his old Title remaineth, for that both claim by the ſame Patron. *Henry Edes* and *Walter* Biſhop of *Oxford*'s Caſe, *Vaughan* 24.

Retinere in Commendam.

Spoliation.

The *Stat.* 21 *H.* 8. *c.* 13. extending, as hath been ſaid, only to Benefices with Cure, and where the Perſon accepting a Second hath a Benefice of 8 *l. per Annum* Value, and that other Caſes of Pluralities are governed by the Canon Law; it will not be amiſs to ſhew what the Canon Law in this Matter is. The Firſt Canon I ſhall mention is that of the Council, which having no Addition, which of the *Lateran* Councils muſt, as we are told, be taken, that under *Alexander* III. *Anno Dom.* 1180, which is in theſe Words: *Quia nonnulli modum avaritiæ non ponentes Dignitates diverſas Eccleſiaſticas, & plures Eccleſias Parochiales contra Sacrorum Canonum inſtituta nituntur accipere, ut cum unum Officium vix implere ſufficient ſibi vindicent ſtipendia plurimorum, ne id de cætero fiat diſtrictius inhibemus. Cum igitur Eccleſia vel Eccleſiaſticum Miniſterium committi debuerit, talis ad hoc perſona quæratur quæ reſidere in loco, & curam ejus per ſeipſum valeat exercere, quod ſi aliter actum fuerit, & qui receperit quod contra ſacros Canones accepit, amittat, & qui dederit largiendi poteſtatem privetur.* Extra Lib. 3. Tit. 4. de clericis non Reſidentibus, Can. 43.

Canon Law.

Which Council of *Lateran* to be taken.

Another Canon there is made in the Council of *Lateran*, under *Innocent* III. *Anno Dom.* 1215. beginning, *De multa*, &c. which are in theſe Words; *Quicunque receperit aliquod Beneficium curam habens animarum adnexam, ſi prius tale Beneficium habebat, eo ſit ipſo jure privatus, & ſi forte illud retinere contenderit, etiam alio Spolietur. Is quoque, ad quem prioris ſpectat donatio, illud poſt receptionem alterius libere conferat cui merito viderit conferendum, & ſi ultra ſex menſes conferre diſtulerit, non ſolum ad alios ſecundum Lateran' Concilii Statutum ejus collatio devolvatur, verum etiam tantum de ſuis cogatur proventibus in utilitatem Eccleſiæ cujus eſt illud Beneficium adſignare, quantum a tempore vacationis ipſius conſtiterit eſſe perceptum. Hoc idem & in perſonalibus eſſe decernimus obſervandum, addentes ut in eadem Eccleſia nullus plures Dignitates aut Perſonatus habere preſumat, etiam ſi curam non habeant animarum. Circa ſublimes tamen & literatas Perſonas quæ majoribus Beneficiis ſunt honorandæ, cum ratio poſtulaverit, per ſedem Apoſtol' poterit diſpenſari.* Extra Lib. 3. Tit. 5. de Prebendis, Can. 28.

Pluralities, &c. Another Canon.

The Firſt Canon not inflicting the Puniſhment of Deprivation *ipſo facto*, did not produce any great Effect, (as *Abbot* obſerves upon it,) therefore comes this Second Canon with the Penalty of Deprivation *ipſo facto*; yet the diſpenſing Power reſerved to the Pope in the Clauſe, makes this Second as fruitleſs as the former. Therefore, chiefly to redreſs the Exceſs and Grievance of holding Church Preferments by Diſpenſations, Pope *John* XXII. in his Decretal, beginning *Execrabilis*, after a long Recital of the miſchievous Conſequences of Pluralities, decrees, That every one who holds a Benefice by Virtue of any Diſpenſation, ſhould, within a Month after Notice of this Decree, chuſe which of the Preferments they liked beſt to keep, and reſign the others; elſe all their Benefices to be void. *Extravag. Tit.* 3. *de Prebendis & Dignitatibus.*

Both Canons fruitleſs.

Pope *John*'s Decretal.

Many more Canons and Decretals might be mentioned concerning this Matter; but theſe being the chief made by foreign Authority, and received here to be Law, and to direct the Practice and Proceeding in this Matter, I will mention no more, but only ſhew how they were allowed and received here with us. And to that Purpoſe, I find a Canon made here by *Othobon* the Pope's Legate, beginning *Chriſtianæ*, &c. inforcing the Performance of that made in the Council of *Lateran*, under Pope *Alexander*; and this was again explained and altered by Archbiſhop *Peckham*, *Anno Dom.* 1279. Lib. 3. Tit. de Prebendis & Audiſtis. Linw. Old Impreſſion, 75.

How theſe Canons were allowed and received with us.

Othobon's Canon.

Alter'd, &c.

By theſe Canons it may appear, how the Law ſtood concerning Pluralities before the Statute 21 *H.* 8. and how it ſtands at this Day in Caſes not within that Statute: Firſt, The Second Living accepted was made void by Deprivation, by the Canon in the *Lateran* Council under Pope *Alexander*. Secondly, That the Firſt Living was to be *ipſo facto* void by accepting of a Second; and in caſe of Endeavour to keep both, then both to be void. Thirdly, Although there were a Diſpenſation, yet if the Firſt was not actually reſigned within a Month of receiving a Second, both to be void. But the Canon for making the Firſt Benefice void, was the Law generally owned and practiſed here, as may appear not only from *Linwood*, but more fully from the Books of the Common Law; as, 5 *E.* 3. 9. 25 *E.* 3. 49. 11 *H.* 4. 60. 4 *Coke* 75, 79. 6 *Coke* 29. and ſeveral other Books; yet in the 10 *E.* 3. 1. there we find a Title made under the Decretal of Pope *John*, before-mentioned, as I underſtand that Caſe; becauſe 'tis there ſaid, That by the Conſtitution of Plurality they ſhould be deprived, who kept their Benefices beyond a Month after that Conſtitution, which

How Pluralities ſtood before 21 *H.* 8.

The Canon generally owned.

Pluralities, &c.

which is according to the Words of that Decretal: *Linwood* alſo, in the Place before cited, v. *Nec ultimo*, ſeems to allow that Decretal to be in Force here.

25 *H.* 8. *c.* 19. §. 7.

If theſe Canons were continued in Force.

All theſe Canons, as they were allowed here, ſo conſequently were they continued in Force by the Stat. 25 *H.* 8. *c.* 19. whereby 'tis provided, **That all ſuch Canons, Conſtitutions, Ordinances, and Synodals Provincial being already made, which be not contrariant nor repugnant to the Laws, Statutes and Cuſtoms of this Realm, nor to the Damage or Hurt of the King's Prerogative, ſhall now ſtill be uſed and executed as they were before the making of this Act, until ſuch Time as they be viewed, ſearched, or otherwiſe ordered and determined by Thirty two Perſons, or the more Part of them, according to the Tenor and Form of this Act.** The King, by a former Clauſe in this Statute, had Power to appoint Thirty-two Perſons to examine and correct all Canons then extant, and to frame a Body of Eccleſiaſtical Laws out of them at their Diſcretion: And that ſuch Eccleſiaſtical Laws ſhould be obſerved and obeyed, ſo as the King's Aſſent under the great Seal were firſt had to the ſame. And the like Authority was given to that King by two other Statutes made the 27th, and in the 35th of his Reign. Purſant to which ſaid Acts of Parliament, and the Powers thereby given K. *H.* 8. 32 Perſons, half Clergy and half Laity, were nominated and appointed for Reformation of the Canon Law, who accordingly drew up and reduced into Order ſuch a Body of Laws under the Title of *Reformatio Legum Eccleſiaſticarum.* But that King dying before his Royal Aſſent thereto, under the Great Seal, as was provided by the ſaid Statutes, rendered that Body of Laws uſeleſs and ineffectual.

Ibid. §. 2. Power for 32 Perſons to correct the Canons.

27 *H.* 8. *c.* 15. 35 *H.* 8. *c.* 16.

Reformatio Legum Eccleſiaſticarum.

3, 4 *E.* 6. *c.* 11.

After which in the Third of King *Edward* VI. the Buſineſs was again revived, and an Act of Parliament paſſed, giving the like Power to that King, as had been given to *H.* 8. And *E.* 6. by Letters Patent teſted at *Weſtminſter*, *Nov.* 11. *Anno Reg.* 5. impowered eight Perſons, *i. e.* the Archbiſhop of *Canterbury*, the Biſhop of *Ely*, and two other Clergy-men, with four Laymen to begin the Work. And the Reaſon of appointing at that Time only eight is there expreſſed, *viz. Quia Conſiliariis noſtris à ſecretis conſentaneum magis videtur hujus rei initium, introitum, primam formam & lineaturam numero Octavo, qui triginta erit portio, committere; nempe quaſi Præparationem quandam grandiori numero futuram.*

See theſe Letters Patent prefixed to the ſaid Book, printed at Lond. Anno 1571, & 1640.

But this Deſign of King *Edward* VI. was alſo defeated by his Death, and thereupon the Matter reſted till the Year 1559, *i. e.* 1 *Eliz.* When a Bill was brought into the Houſe of Commons for impowering 32 Perſons to Reviſe the Eccleſiaſtical Laws. But ſays Biſhop *Burnet*, as that Bill was then let fall, ſo to the great Prejudice of the Church it has ſlept ever ſince.

Hiſt. of Reformation, 1 *Eliz.*

Codex 991.

Yet by another Right Reverend Prelate we are informed, That in 1562, *i. e.* 4 *Eliz.* it was propoſed in Convocation to move her Majeſty, *That certain learned Men, Biſhops and others, might be appointed to ſet down Eccleſiaſtical Rules and Orders in all Eccleſiaſtical Matters for the good Government of the Church of* England, *as ſhould by them be thought moſt Meet, and the ſame in this preſent Seſſion, whatſoever they ſhall order or ſet down within one Year next, to be effectual, and for Law confirmed by Act of Parliament, at or in this Seſſion.*

Quære the Meaning.

Dew's Journal 167.

And that afterwards, by the Endeavours of Archbiſhop *Parker*, it was again ſet on Foot in the Parliament of 13 *Eliz.* and by a leading Member recommended to the Houſe of Commons; but after that we hear no more of

of it. But preparatory to the Gaining a Parliamentary Eſtabliſhment, Care was taken to have the whole Work publiſhed by *John Fox*, who has ſhewn this to be the main Deſign in the Concluſion of his Preface thereto, viz. *Optandum, quod per præmaturam Mortem Regis illius* (i. e. Ed. 6.) *negatum eſt Eccleſiæ felicitati, per feliciora Tempora Sereniſſimæ Reginæ noſtræ Elizabethæ ſuppleatur, accedente publicâ hujus nunc authoritate, Parliamenti Authoritate.*

Pluralities, &c. Lond. 1571.

From what is before ſaid it appears, That the Collections in that Book cannot be eſteemed any Part of the Canon Law, and conſequently the former Canons remained in Force no Ways altered thereby; and that thoſe former Canons were not contrary to the Laws and Cuſtoms of the Realm, according to the Proviſo in the 25 *H.* 8. *c.* 19. and that they were then the only Law in the Caſe, except only as altered by Stat. 28 *H.* 8. *c.* 16. concerning Diſpenſations.

Determined by the Death of the Kings.

Stat. of Diſpenſations.

There is alſo a Canon made in the Convocation for the Province of *Canterbury*, *Anno Dom.* 1603, in the Words following: *No Licence or Diſpenſation, for the keeping of more Benefices with Cure than one, ſhall be granted to any, but ſuch only as ſhall be thought very well worthy for his Learning, and very well able and ſufficient to diſcharge his Duty; that is, who ſhall have taken the Degree of Maſter of Arts, at the leaſt, in one of the Univerſities of this Realm, and be a publick and ſufficient Preacher licenſed; provided always, that he be, by good and ſufficient Caution, bound to make his perſonal Reſidence in each of his ſaid Benefices for ſome reaſonable Time in every Year; and that the ſaid Benefices be no more than Thirty Miles diſtant aſunder: And laſtly, That he have under him, in the Benefice where he doth not reſide, a Preacher lawfully allowed, that is able ſufficiently to teach and inſtruct the People.* Can. 41.

Canon *Cant.* 1603. for Diſpenſations.

Reſidence.

Preacher allowed.

In an Act made 13 *Car.* 2. intitled, *An Act for explaining a Clauſe contained in an Act* 17 Car. 1. *concerning Commiſſioners for Cauſes Eccleſiaſtical*, is inſerted the following Clauſe, *viz.*

13 Car. 2. c. 12. ſect. 5.

Provided always, That the Act or any Thing therein contained, ſhall not extend or be conſtrued to extend to give unto any Archbiſhop, Biſhop, or any other Eccleſiaſtical Judge, Officer, or other Perſon or Perſons aforeſaid, any Power or Authority to Exerciſe, Execute, Inflict, or Determine any Eccleſiaſtical Juriſdiction, Cenſure or Coertion, which they might not by Law have done before the Year of our Lord 1639. **Nor to abridge or diminiſh the King's Majeſty's Supremacy in Eccleſiaſtical Matters and Affairs, nor to confirm the Canons made in the Year** 1640. **nor any of them, nor any other Eccleſiaſtical Laws or Canons not formerly confirmed, allowed, or enacted by Parliament, or by the eſtabliſhed Laws of the Lands, as they ſtood in the Year of our Lord** 1639.

It may be obſerved upon this Clauſe, that the Legiſlature has rejected the Canons of 1640. and accordingly, tho' they be ſometimes cited by Counſel in the Books of Reports, the Judges have conſtantly diſallowed them. And by *Holt* C. J. The Clergy are ſubject to obey the Canons; and if they do not conform themſelves, it will be Cauſe of Deprivation. 2 *Cro.* 37. Reſolved by all the Judges of *England*. The Canons of 1603. have been received, though ſome Queſtion has been made of the Canons in 1640. And many of the antient Canons are as old as any Law that we have at this Time. 1 *Ld. Raym.* 449. in the Caſe of the Biſhop of *St. Davids* v. *Lucy*.

By Lord Keeper *Wright*, *Anno* 1700. The Canons of a Convocation do not bind the Laity without an Act of Parliament. 1 *Wms.* 32.

Canons.

Pluralities, &c.

How Stat. 21 *H.* 8. *c.* 13. ſtands in Force.

Having given this Account of Canons in general, and alſo of the Canon as to Caſes not within the Statute 21 *H.* 8. yet before I come to conſider the Qualifications mentioned in the ſaid Statute, I will obſerve how this Statute ſtands in Force; and it once was a Queſtion between the Common Lawyers and Civilians, Whether it ſtood in Force or not? As appears 18 *Eliz. C. B. Dyer* 352. As to this,

Pluralities repealed by 1 & 2 *P.* & *M. c.* 8.

1 & 2 *P.* & *M.* repealed by 1 *Eliz. c.* 1. §. 2. & §. 13.

Note, That by the firſt and ſecond of *P.* & *M. c.* 8. ſo much of this Statute of 21 *H.* 8. as concerns Pluralities is repealed; but then by Statute 1 *Eliz. c.* 1. §. 2. this Statute of 1 & 2 *P.* & *M.* of Repeal is repealed. But in this Statute 1 *Eliz.* Sect. 13. there is a Clauſe, **That all Statutes and Laws made void by the** 1 & 2 P. & M. **and not ſpecially and particularly revived by this Act, ſhall ſtand and remain void and repealed, as they were before the making of this Act,** &c.

If 21 *H.* 8. be revived by 1 *Eliz.*

Now this Statute of 21 *H.* 8. is not thereby revived, or mentioned to be revived; ſo that ſome Perſons will hold, that this Statute ought not to have been held revived, and would maintain their Opinions by this Way of arguing: That this cannot be within the Rule laid down by the Lord *Coke's Inſt.* that a Statute of Repeal being repealed, the Firſt Statutes are revived; for here by expreſs Declaration, no Statutes are to be revived which are not particularly mentioned by the Statute to be revived, which very many Statutes are. But this of 21 *H.* 8. is not; and this, ſay they, is one Reaſon the Judges went upon, in holding that the Statute 1 *E.* 6. *c.* 2. concerning the Conſecration of Biſhops, and the Proceedings in the Eccleſiaſtical Courts in the Name of the Biſhops, which was repealed by this ſame Statute of 1 & 2 *P.* & *M.* but held not to be revived by 1 *Eliz.* by Reaſon of the Clauſe here-in before-mentioned, not being mentioned in that Statute; and if there had been nothing more in the Caſe, doubtleſs it muſt have been agreed, that the Stat. 21 *H.* 8. had ſtood repealed: But in Fact, in the Statute of 25 *H.* 8. *c.* 21. which is expreſly revived by that of 1 *Eliz.* there is this Clauſe; **Provided always, that this Act, or any Thing therein contained, or any Licence or Diſpenſation to be granted by Virtue thereof, ſhall not extend to the Repeal or Derogation of the Statute** 21 H. 8. **nor to any Thing contained or mentioned therein; nor that this Act, nor any thing to be done by Authority thereof, ſhall be taken or expounded to give Licence to any Perſon or Perſons, to have any more Number of Benefices than limited in the ſaid Act; and that the ſaid Act of Pluralities, and Non-reſidence of Benefices, and every thing contained, ſhall ſtand good and effectual in all Intents and Purpoſes, according to the true Meaning thereof; any Thing in this preſent Act, or any Licence or Diſpenſation, to be had by Authority thereof, in any wiſe notwithſtanding.**

If a Clauſe in 25 *H.* 8. *c.* 21. §. 21. is revived by 1 *Eliz.*

If 21 *H.* 8. revived by 25 *H.* 8.

So that by Force of this Clauſe in the Statute 25 *H.* 8. the Statute of 21 *H.* 8. is held to be revived. But this is objected to be a very much ſtrained Expoſition, to have a Statute to be revived by Implication contrary to the expreſs Words of 1 *Eliz.* which ſay, That no Statute ſhall be thereby revived, which is not therein particularly mentioned to be revived, which the 21 *H.* 8. is not. That this Statute of 21 *H.* 8. is revived, they own to have been the conſtant Opinion; and the ſame is evident by conſtant Practice, very many Actions and Judgments having been brought and given upon it; but that, they ſay, it was never directly in Queſtion, whether in Force or not, except in that Caſe mentioned *Dyer* 352. *a.* where it was objected by ſome Civil Lawyers, That it was repealed, but over-ruled by the Judges. As to this Caſe in *Dyer*,

Over-ruled, that it was repealed.

'tis

'tis anſwered, That the Reaſons which ſeem to be given in that Caſe, are not ſufficient to hold the Statute 21 *H.* 8. to be revived: The Reaſon given is, That it had been meerly contrary to the Deſign and Intent of the Statute 1 *Eliz.* to have revived it; but that the Act of 25 is revived, in which is the Proviſo before-mentioned, which affirms the 21 to be in Force: But the Judges ſay not how it had been contrary to the Statute of 1 *Eliz.* to have revived that of 21 *H.* 8. but if it had been contrary to the Intent of that Statute to have revived it expreſly, it muſt be as contrary to have it revived by Conſtruction or Implication; for by what Way ſoever 'tis revived, the Effect and Conſequences muſt be the ſame. The Statute 21 *H.* 8. cannot be ſuppoſed contrary to 1 *Eliz.* unleſs one muſt ſuppoſe the Pope's Power of Diſpenſing is ſome Way owned by it: But this can be no Reaſon; for the Pope's Power would have been no Way owned by reviving that Statute, for 'tis not therein any way aſſerted. Beſides, the Statute 25 *H.* 8. expreſly provides, that it ſhall be in Force; and yet that was to take away, diſown and abrogate the Pope's uſurped Power of Diſpenſing. But the Pope's uſurped Power of Diſpenſing is no other Way owned by the 21, than in Part reſtrained thereby: But 'tis true, according to the Opinion and Practice of thoſe Times, the Pope was owned to have a Power of Diſpenſing here in Eccleſiaſtical Matters, and Diſpenſations did uſually flow from *Rome* after the 21ſt, till the 25th of *H.* 8. but that was a Wrong, and Uſurpation, contrary to the Law and Inſtitution of the Government, and is ſo declared by Parliament in ſeveral Statutes. So that Setting up and Reviving the Statute 21 *H.* 8. had ſet up and allowed all Legal Acts relating to it, but could not have owned any incroached or uſurped Power, unleſs that uſurped Power had therein been taken Notice of as legal, or referred to Diſpenſations to be had from *Rome*, or the like. But the Statute 21 only reſtrains Diſpenſations, and leaves the Granting of them to Conſtruction of Law, which is afterwards, and before the 1 *Eliz.* declared to be in the King and Parliament, and ſettled by them. But this is but mentioning the Opinions of ſome, who I have heard argue, that this Statute ought to ſtand repealed, which I take to be contrary to Law; For I take the Statute of 21 *H.* 8. to be in Force, the Law and Practice ever ſince having been taken to be ſo, and Multitudes of Judgments have been given upon it.

Diſpenſations, &c.

When the Pope had a Power of Diſpenſing here.

How the 21 *H.* 8. reſtrains Diſpenſations, &c.

That Stat. 21 *H.* 8. is in Force.

CHAP. IV.

Of Reſignations, and Exchange of Benefices.

AS by Ceſſion, ſo by Reſignation, a Church is ſaid to become void by the Act of the Party Incumbent. That a Church may be voided by Reſignation, the Inſtrument of Reſignation muſt be duly made; the Word *Reſignare* is not good; for *Reſignare* is not in Law a Term of Reſignation, but *renunciare*, *cedere*, *dimittere*, are the uſual Terms. 12 & 13 *Eliz.* *Dyer* 29. *a.* But if a Prebendary doth give, grant, render, and confirm to the Ordinary, *Totam Præbendam ſuam de* C. *ac omnia maneria, terras, tenementa, proficua, poſſeſſiones, jura, & hæreditamenta*

Voidance by Reſignation.

By what Words.

Reſignations, &c.

menta quæcunque tam Spiritualia quam Temporalia, ac omnem & omnimodam plenam & liberam facultatem, diſpoſitionem, authoritatem & poteſtatem dictæ Præbendæ pertinentem, ſpectantem, appendentem ſive Incumbentem, aut ut parcell', &c. habend' & tenend' to him the ſaid Ordinary and his Succeſſors, in Fee; and after the *Habendum* doth ſay, *Cui in hac parte ad omnem Juris effectum qui exinde ſequi poterit aut poteſt dictæ Præbendæ, ac omnia jura mihi ratione ejuſdem qualitercunque acquiſita ut decet ſubjicio & ſubmitto, &c.* Theſe Words be ſufficient, and amount to a Reſignation, although the more proper Words are not uſed. *Mich.* 12 & 13 *Eliz. Dyer* 293.

Reſignation muſt be abſolute.

If a Reſignation be made to the Uſe of another Perſon; that is, with Condition, That if one of two Perſons named, be not admitted to the Benefice reſigned within ſix Months, the Reſignation ſhall be void, and of none Effect, ſuch Reſignation is abſolutely void; for every Reſignation ought to be abſolute, *Sponte, Pure & Simpliciter. Mich.* 33 & 34 *Eliz. Gayton's* Caſe, *Owen* 12.

Upon Exchange of Benefices,

Two Perſons, by one Inſtrument in Writing, do agree to exchange their Benefices, which are both Spiritual, (for, a Lay-Preferment, as an Hoſpital, cannot be exchanged, or go for a Prebendary, or other Spiritual Benefice. *Roll's Abr.* 1, 811.) and in order thereunto, reſign them into the Hands of the Ordinary: Such Exchange being executed, the Reſignations are good; but though the one is inſtituted and inducted into the other's Benefice, yet if the Exchange be not executed on both Parts, the Clerk, on whoſe Part the Exchange was not executed, may have his Benefice again, 45 *E.* 3. *Fitz. Exchange* 20. for in this Caſe of Exchange, the Law doth annex this Condition to a Reſignation, if it be fully executed: But a Collateral Condition may not be annexed thereunto, no more than an Ordinary may admit upon Condition, or a Judgment be confeſſed upon Condition, which are Judicial Acts. *Gayton's* Caſe, *Owen* 12. And ſo if two, upon ſuch Agreement, reſign, as aforeſaid, and the Patrons according to their Agreement preſent croſs *de Novo*, (as they muſt do, if the Exchange be executed, *Mich.* 18 & 19 *Eliz. Grendon* v. *Biſhop of Lincoln, Plouden* 3 *E.* 3. *c.* 18.) and the one is admitted, inſtituted and inducted into the other's Benefice; and the other is likewiſe inſtituted into his, but the firſt dieth before he is inducted into his Benefice, although after a Mandate made by the Biſhop to the Archdeacon for his Induction (although the Induction of the firſt was abſolute) yet becauſe it was directed by the precedent Agreement, which ought to be executed on both Parts in the Life-time of the Parties (which in this Caſe it was not, for want of Induction) the Exchange is void. 45 *E.* 3. *Fitzherb. Exchange* 10. *Hill.* 43 *Eliz.* Lord *Cromwell's* Caſe, 2 *Co.* 74. *b.* The like Law, if before the compleating of the Exchange by mutual Preſentment, Inſtitution and Induction, the Reaſon of the Exchange fail; for Reſpect muſt be had to the Reſignation and Proteſtation of both Incumbents: And therefore either Incumbent may return to his old Benefice, *in Priſtino Statu*, upon his former Preſentments. 45 *E.* 3. *Fitz. Exchange* 10. *Regiſter* 306. *B. Mich.* 10 *Jac. Colt* and *Glover* v. *Biſhop of Coventry* and *Litchfield, Hobart* 152. *Owen* 12.

muſt be executed on both Parts.

Preſentation croſs *de Novo.*

Void for want of Induction, &c.

Reſignation muſt be to a proper Perſon.

That a Reſignation may take its Effect, it muſt not only be abſolute, but alſo made to a proper Perſon; for though it may be made before a Publick Notary, yet the Inſtrument muſt be directed to him who hath Power to accept of the Reſignation, and the Notary is to certify the ſame to him; and when he hath accepted thereof, then, and not till then,

is the Church void by Reſignation; and before ſuch Acceptance all Preſentations made of Benefices, as reſigned, are void. *Paſch.* 3 *Jac. Fairchild* v. *Gayre*, 2 *Cro.* 63. *Smith* v. *Founes*, *Noy* 147. *Mich.* 5 *Jac. Fane*'s Caſe, 2 *Cro.* 198. Reſignations, &c.

That Ordinary who hath the Power of Inſtitution, hath Power alſo to accept of a Reſignation made of the ſame Church, to which he may Inſtitute; and therefore the reſpective Biſhop, or other Perſon, who either by Patent under him, or by Privilege or Preſcription, hath the Power of Inſtitution, are the proper Perſons to whom a Reſignation ought to be made. And yet a Reſignation of a Deanery, in the King's Gift, may be made to the King; as of the Deanery of *Wells*, *Mic.* 18 & 19 *El. Grendon* v. *Biſhop of Lincoln*, &c. *Plouden* 498. And ſome hold, that a Reſignation may be well made to the King, of a Prebend that is no Donative. 12 & 13 *El. Dyer* 294. *Pollard* and *Walron*'s Caſe, *Roll's Abr.* 2. *p.* 358. But *Harper* and *Weſton*, in the ſame Caſe held, That a Reſignation of a Prebend ought to be made only to the Ordinary of the Dioceſe, and not to the King as Supreme Ordinary; becauſe the King is not bound to give Notice to the Patron (as the Ordinary is) of the Reſignation; nor can the King make a Collation by himſelf, without preſenting to the Biſhop, notwithſtanding his Supremacy. Who hath Power to accept of a Reſignation. Deanery. Prebend. Notice. Collation.

But if a Donative be to be reſigned, the Incumbent thereof is to make his Reſignation to his Patron, and by his Acceptance thereof, the Donative is voided: And if there be two Founders or Patrons, it is ſufficient that it be made to one of them; if to one of them, and a Stranger alſo, 'tis good, being void as to the Stranger only; eſpecially if both conſent thereto, and grant it *de Novo*; and ſuch Reſignation of the Church only, doth extend to all the Poſſeſſions of the Donative. *Paſch.* 3 *Jac. Fairchild* and *Gayre*, *Brownlow* and *Gouldsborough* 201. and in 2 *Cro.* 63. and in *Yelverton* 60. And generally every Perſon that reſigns, muſt reſign to his Superior; and therefore it is ſaid by *Coke*, That a Biſhop cannot reſign to the Dean and Chapter. *Hill.* 12 *Jac. B. R. Roll's* 1 *Rep.* 137. Reſignation of a Donative muſt be to a Superior.

So ſoon as the Acceptance is made, the Patron may preſent, if he pleaſe, to the Benefice reſigned: But in the Caſe of a Donative, if the Patron doth not preſent within ſix Months, yet the Donative will not be lapſed, but the Ordinary may compel the Patron to fill the Church. In other Caſes, where a Reſignation is made to the Biſhop, or other inferior Ordinary that may accept it, the Lapſe doth not run as from the Acceptance, but from the Time of Notice given by the Ordinary to the Patron. *Mic.* 15 *El. c.* 3. *Leonard* 45. *Mich.* 15 & 16 *El. Dyer* 327. *Jenkins*, *Caſe* 28. *Cent.* 6. 18 *H.* 7. *Keil.* 49. *B.* 18 *Eliz. Dyer* 347. 12. 1 *H.* 7. 9. *b. Doctor and Student* 116. 5 *E.* 4. 3. *b. Noy* 65. And if the Biſhop doth die that took the Reſignation before he gives Notice, yet the Guardian of the Spiritualties, or if he neglect, the Succeſſor Biſhop is bound to give Notice, before the Patron ſuffer by Lapſe, if he neglect to preſent. 18 *H.* 7. *Kelw.* 49. *b.* So if the Temporalties of the Biſhoprick in which a void Church is, be in the Hands of the King, Notice of the Avoidance ought, *de jure*, to be given to the Patron, and the Guardians of the Spiritualties ought to give ſuch Notice, and Lapſe cannot run without it, upon what Account ſoever the Avoidance, of which Notice is to be given, did happen. 22 *El. Dyer* 369. 54. will prove this, ſaith *Roll's Abr.* 2. *p.* 365. Acceptance and Preſentation. Notice to be given.

After a Clerk hath taken Inſtitution, the Church is full againſt all Men in the Caſe of a common Perſon, and ſuch Incumbent may void the Church again by Reſignation, before Induction: But where the Inſtitution Plenarty by Inſtitution avoided by Reſignation.

Reſignations, &c.

ſtitution was upon the Preſentation of the King, or where the Right of Patronage after the Inſtitution doth come to the King, the Church, before Induction had, remaineth open to the King's Preſentment: And therefore, if the King will preſent another, the Reſignation of the Party inſtituted is not neceſſary. But if the Caſe be, that a Clerk is inſtituted to a Church of the King's Gift, and doth not take Induction, if the King will not preſent another, ſuch Clerk may and muſt reſign, if he reſolve to Diſcharge himſelf of the Cure, and the Duties relating thereto: For by his Inſtitution the Church is full, as to the Cure of Souls, againſt himſelf and all other Perſons, unleſs and until ſuch Time as the King ſhall uſe his Prerogative of making the Inſtitution void, (as he may do before Induction) by preſenting another: But until he doth ſo preſent, the Inſtitution hath the ſame Effects (as I conceive) in his Caſe, which it hath in the Caſe of a common Perſon; and therefore the King's Clerk that is only Inſtituted, if he be Non-reſident, or neglecteth the Cure, is ſubject to the Puniſhment thereof.

To diſcharge himſelf of the Cure.

Evidence of a Reſignation.

If an Inſtrument under the Seal of the Biſhop be found by a Jury in their Verdict, upon which is indorſed, that the Reſignation was acknowledged and accepted by the Biſhop, yet that is no abſolute finding that it was a Reſignation in Fact, as the Juries finding of an Acquittance of the Debtee, is no good finding upon an Iſſue of *Plene Adminiſtravit*, but a Circumſtance and an Inducement to the Jury. *Smith* v. *Founes*, *Noy* 147.

Stat. 31 *El.* *c.* 6. §. 8. Penalty of a corrupt Reſignation or Exchange.

And Note, **That if an Incumbent of any Benefice with Cure of Souls, do or ſhall corruptly reſign, or exchange the ſame, or corruptly take for or in reſpect of the reſigning or exchanging of the ſame, directly or indirectly, any Penſion, Sum of Money, or other Benefit corruptly, as well the Giver as the Taker ſhall loſe double the Value of the Sum ſo given, taken or had; the one Moiety thereof to be to the Queen's Majeſty, her Heirs and Succeſſors; and the other Moiety to him or them that will ſue for the ſame by Action of Debt, Bill or Information, in any of her Majeſty's Courts of Record, in which no Eſſoin, Protection or Wager of Law, or Privilege ſhall be admitted or allowed.** But of this in its proper Place. See the following Chapter.

CHAP. V.

Church void by Act of Law. Of Simony, &c.

Voidance by Act of the Law.

THE laſt Mean by which a Church may be void, is by the Act of the Law; for by that, in ſome Caſes, a void Church, notwithſtanding Preſentation, Admiſſion, Inſtitution and Induction, remaineth void; in others a full Church doth become void. A Church, notwithſtanding the aforeſaid After-Acts, may remain void, Firſt, from the Incapacity of the Perſon preſented, *&c.* And therefore, though in former Time, if a meer Lay-man was Preſented, Inſtituted and Inducted

From Incapacity.

into a Benefice with Cure, this was not a meer Nullity, but he was Parſon in Fact, until Deprivation came, tho' not *de Jure*. *Mich.* 12 & 13 *El. Dyer* 293. *Beningfield* and *Pickering*'s Caſe. 1 *Anderſon* 16. *Windſor*'s Caſe. 5 *Co.* 102. *Coſtard* and *Wingate*. *Moor* 606. Yet at this Day, **If a Lay-man, or a Deacon, of the Age of Twenty-three Years, be preſented and admitted into a Benefice with Cure of Souls; or if any Perſon be admitted to any Benefice with Cure, of or above the Value of Thirty Pounds yearly in the King's Books, unleſs he be then a Batchelor in Divinity, or a Preacher lawfully allowed by ſome Biſhop within this Realm, or by one of the Univerſities of** Cambridge or Oxford, **their Admiſſion, Inſtitution and Induction, and all Toleerations, Diſpenſations, Qualifications and Licences, to the contrary, are meerly void in Law, and of none Effect.**

Simony, &c. *Stat.* 13 *El.* c. 12. §. 3, 4, 5, 6. Lay-man preſented, *&c.* See 1 *Anderſon* 62. 1 *Leon.* 230. 3 *Bulſ.* 90.

Tho' the Patron may preſent again when he pleaſeth, without Notice of an Avoidance in the aforeſaid Caſes, yet becauſe the ſaid Statute of 13 *Eliz.* makes only the Admiſſion, *&c.* void, and not the Preſentation, leaving that in Force, it was adjudged in the Caſe of a Deacon, that no Lapſe ſhall incur upon any Deprivation, by reaſon of the ſaid Incapacities, without Notice thereof given to the Patron. *Trin.* 18 *Car.* 1. *Biſhop of Hereford* and *Okeley*'s Caſe, *Parſon's Law c.* 18. *fol.* 131. *Marſh* 119. And the like Law is, I ſuppoſe, in the other Caſes, for the Reaſon is the ſame in them all: And before the ſaid Statute, when a Lay-man was admitted and deprived at the Canon Law, Lapſe did not run to the Ordinary, before Notice given thereof to the Patron. *Dyer* 293. *Parſon's Law, c.* 17. *fol.* 121.

Notice to be given.

Alſo a Church, notwithſtanding Inſtitution and Induction had, may be ſaid to remain void by the Act of the Law, in reſpect of the Incapacity of the Preſentee, by reaſon of ſome Simoniacal Contract preceding the Preſentation to it, and upon which the Preſentment is made: For it hath been enacted —— **That if any Perſon or Perſons, Bodies Politick or Corporate, ſhall or do at any Time, for any Sum of Money, Reward, Gift, Profit or Benefit, directly or indirectly; or for or by reaſon of any Promiſe, Agreement, Grant, Bond, Covenant, or other Aſſurance of or for any Sum of Money, Reward, Gift, Profit or Benefit whatſoever, directly or indirectly, preſent or collate any Perſon to any Benefice with Cure of Souls, Dignity, Prebend, or Living Eccleſiaſtical; or give or beſtow the ſame for or in reſpect of any ſuch corrupt Cauſe or Conſideration; that then every ſuch Preſentation, Collation, Gift and Beſtowing, and every Admiſſion, Inſtitution, Inveſtiture and Induction thereupon, ſhall be utterly void, fruſtrate, and of none Effect in Law: And that it ſhall and may be lawful to and for the Queen's Majeſty, her Heirs and Succeſſors, to preſent, collate unto, or give or beſtow every ſuch Benefice, Dignity, Prebend, and Living Eccleſiaſtical, for that one Time, or Turn only; and that all and every Perſon or Perſons, Bodies Politick and Corporate, that from thenceforth ſhall give or take any ſuch Sum of Money, Reward, Gift or Benefit, directly or indirectly, or that ſhall take or make any ſuch Promiſe, Grant, Bond, Covenant, or other Aſſurance, ſhall forfeit and loſe the double Value of one Year's Profit of every ſuch Benefice, Dignity, Prebend and Living Eccleſiaſtical; and the Perſon ſo corruptly taking, procuring, ſeeking or accepting any ſuch Benefice, Dignity, Prebend or Living, ſhall thereupon, and from thenceforth be adjudged a diſabled Perſon in**

Simoniacal Contract. See 12 *Co.* 101. 1 *Inſt.* 120. *Stat.* 31 *Eliz.* c. 6. §. 5.

Simony, &c.

in the Law to have or enjoy the ſame Benefice, Dignity, Prebend, or Living Eccleſiaſtical. Vide poſt. Chap. 6.

Simony is an Offence by the Canon Law, of which the Common Law does not take Notice to puniſh it: For there is not a Word of *Simony* in the above Statute of *Elizabeth*; but of Buying and Selling. 1 *Ld. Ray.* 449. By *Holt* C. J. in the Caſe of the Biſhop of *St. David's* v. *Lucy*.

How made.

This Act hath given Being to many Book-caſes; ſome of which relate to the Contract itſelf, ſome to the Puniſhment of the Patron, and others to the Puniſhment of the Clerk. As for the Contract, it may be made Simoniacally as well before as after the Church is void: For tho' it be lawful for any Perſon to buy the next Turn of a Church, when it is full of an Incumbent, generally ſpeaking, *Mich.* 33 & 34 *Eliz. Rot.* 2122. yet ſuch Contracts, in ſeveral Caſes, have been held not lawful: For if *A.* being ſeiſed of an Advowſon, doth grant the next Preſentation to *B.* and *B.* doth make a Bond to pay him a Sum of Money for it, when the Church ſhall fall void, this is Simony. And ſo Juſtice *Reede* ſaid it had been adjudged in *Pool's* Caſe; for otherwiſe, by this Means the Statute might be utterly defeated. *Hill.* 17 *Car. March's* Caſe 228. *Parſon's Law, c.* 18. *fol.* 136.

By a Leaſe of the Tithes, &c.

So if an Incumbent of a Church being upon the Deſign of exchanging his Benefice, to get his Patron's Conſent to promote another thereto, doth promiſe, that the Clerk ſhall make a Leaſe of the Glebe or Tithes to the Patron at a certain Rent; and the Clerk is preſented, and doth make the Leaſe accordingly, altho' that he knew not of the Contract, yet this is Simony. *Hill.* 16 *Jac. C. B. Rot.* 667. *Grant* and *Bowder's* Caſe. If (a Church being full of a ſickly Incumbent) a Clerk doth contract with a Stranger to procure the Grantees of the next Avoidance to ſurrender to the Grantor, and to influence the Grantor to preſent ſuch Clerk, when the Living ſhall become void, and this be done accordingly, this is Simony. *Mich.* 8 *Jac. Penn's* Caſe, 2 *Brownlow* and *Glouldſ.* 7. So it is, if (a Church being full of an old and ſickly Incumbent) a Clerk doth contract with the Patron, (for a certain Sum of Money, payable when the Church ſhall become void) to make a Grant of the next Avoidance to a Friend of his; and the Friend having ſuch Grant, doth preſent the ſaid Clerk accordingly. *Paſch.* 14 *Jac. Winchcomb's* Caſe, in *Hobart* 165, and in *Noy* 25. and in *Brownlow* and *Gouldsborough* 164. *Trin.* 41 *El. Smith* v. *Shelbourn*, 3 *Cro.* 685. And though the Perſon, to whom the Grant of the next Turn is made in Truſt, ſhould not know of any precedent Agreement between the Patron and the Clerk, yet if the Clerk be preſented, it ſhall be intended that it was with reſpect to the Agreement, and that he came to his Benefice by Simony. *Cloſs* and *Rumcoy's* Caſe, in the Caſe of *Calvert* v. *Kitchin* and *Parkinſon*, 7 *Jac. Lane* 37. And *Hutton* ſaid, That we in Chancery have adjudged, that the Grant of the next Avoidance for Money, when the Parſon was ſick in his Bed ready to die, is Simony: For the Statute is, If the Contract be made directly or indirectly, by any Way or Means. *Paſch.* 21 *Jac. Sheldon* v. *Bret*, *Winch* 63.

Surrender by Grantees.

Sickly Incumbent.

A Sale was of an Advowſon with a Covenant to preſent ſuch a Perſon as the Bargainee ſhall nominate, the Church at that Time being full of an Incumbent by Uſurpation, and a *Quare Impedit* then pending to remove him, by which he was afterwards removed; this is Simony. *Skin.* 90. *Walker* v. *Hammerſly*.

But

But if a Father (the Incumbent of a Church being ſick) doth purchaſe the next Avoidance thereof in the Preſence of his Son, and with an Intent to preſent him, and doth preſent him, after the Death of the Incumbent, it is not Simony; as was adjudged by three Juſtices, upon this Reaſon, That the Father is bound by Nature to provide for his Son: And therefore, though the Son may not contract for a Benefice, to the Intent that another ſhould preſent him; yet the Father may contract, with an Intent to preſent his Son, and with his Privity; for that it being no Offence in the Father, who was the Principal, it cannot be any Offence in the Son, who was the Acceſſary: For there cannot be a *Particeps Criminis*, where there was not any Crime committed. But *Anderſon* againſt the other three, That this Contract with the Father, with an Intent to preſent his Son, being in Preſence, and with the Son's Privity, made it Simony in him: But he granted, That if the Father had bought the Benefice, with an Intent to preſent the Son, if it was without the Privity and Conſent of the Son, it had not been Simony. 41 *Eliz. Smith* and *Shellbourn*'s Caſe, 3 *Cro.* 685. See *Bowderock* and *Mackaller*'s Caſe, *Cro. Car.* 331. But this Caſe is otherwiſe reported by *Moor*, *p.* 916. who ſaith, That the Caſe was agreed clearly to be Simony; and that if the Son had not been privy to the Bargain, all the Juſtices, but *Anderſon*, held, that it had not been Simony. But they agreed, That if a Stranger buy the next Avoidance, and preſents one that is not privy until after the Contract or Purchaſe made, and when he is made privy, is preſented, this is Simony. Not ſo where the Father doth buy, becauſe he is bound in Nature to provide for his Son. But by *Hobart*, if in the Grant of the next Avoidance it appears, that it was to the Intent to preſent his Son, or his Kinſman, and it was done accordingly, it is Simony, in *Winchcomb* and *Pulleſton*'s Caſe, *Mich.* 15 *Jac. Noy* 25. And *Parſon's Law*, *c.* 18. *fol.* 134. ſays, that it was adjudged in this Caſe, that if a Man purchaſe the next Preſentation or Avoidance, or the next Avoidance or Preſentation be granted unto him to preſent *A.* by Name, be it the Son, Kinſman of the Patron, or of a Stranger, that the ſame is Simony, and the Clerk preſented comes in by Simony. And it was cited to be adjudged, that if a Man purchaſe the next Avoidance of a Church, with an Intent to preſent his Son, and afterwards doth preſent him, it is Simony within the Statute. *Paſch.* 3 *Car. Hughes* 390. And Baron *Snigg* ſaid generally, That if *A.* doth buy the next Avoidance, with an Intent to preſent *B.* and the Church becoming void, *A.* doth preſent *B.* accordingly, this is Simony. By Averment, and by good Pleading, the Preſentment of *B.* ſhall be void, in *Kitchin* and *Calvert*'s Caſe, *Hill.* 8 *Jac.* in the Exchequer, *Lane* 102. By Reaſon of this Diverſity of Opinion, *Quære:* But my Thoughts are, That ſeeing (whatever the Law is in other Countries, where the Canoniſts have Cognizance of Advowſon) it was before the Statute againſt Simony, and now is lawful with us, to buy and ſell, *bona fide*, the next Avoidance of a full Church; I ſuppoſe it was, and is lawful, as well for all Subjects as for ſome: And ſuppoſing, that to buy the next Avoidance of a Church, when the Incumbent is ſick in his Bed, ready to die, is Simony in one Man, I cannot but think that it is Simony in another, though it be the Father of a Son capable thereof. And ſuppoſing that for a Stranger to purchaſe the next Avoidance in the preſence of his Friend, or only with Intent to preſent his Friend, preſenting him accordingly, is unlawful; I conceive, this is equally unlawful in a Father, with reſpect to his Son: For if it be

Simony, &c. *Aliter* if by a Father for his Son.

Econtra.

Son Privy to the Bargain, *&c.*

The Intent. Purchaſe to preſent *A.* by Name.

Averment of the Intent, *&c.*

Whether it be not Simony in the Caſe of a Father which is Simony in another Perſon?

Simony, &c. Simony to buy and ſell in theſe Caſes, it is Simony (at leaſt in the Temporal Court) by reaſon of the Statute, and the Word **indirectly** therein; and it is moſt plain, that the Statute doth not give any colour to ſuch Diſtinction: For the Words are, — **If any Perſon or Perſons, Bodies Politick or Corporate,** &c. And ſo are moſt general; and where the Law doth not diſtinguiſh, we ought not to diſtinguiſh. Neither is the Reaſon, That a Father is bound by Nature to provide for his Son, good to the aforeſaid Purpoſe: For a Man is bound by Nature alſo to provide for himſelf, and ſo might as well purchaſe for himſelf: And if this Reaſon ſhould make that not to be Simony in the Caſe of a Father, which is Simony in another Perſon, before the Church is void, it might as well do the ſame after the Church is void; for the Father's Obligation continueth, he is ſtill bound in Nature to provide for his Son; and it is no more Simony in a Friend to buy, with reſpect to his Friend, when the Church is void, than it is in the aforeſaid Caſes, before it is void (as it hath been held); and then, Why ſhould it be more Simony in the Father to buy, with a reſpect to his Son, when the Church is void, than before it is void? Unleſs the Reaſon, why he of all Men might buy before the Church is actually void, was changed and gone, as it is not; and by the Statute there is nothing more of Simony in buying directly, than indirectly; and therefore, if the ſaid Reaſon excuſe the Father before the Church is void, it may as well excuſe him after it is void, and by conſequence it doth excuſe him in neither Caſe; unleſs in the Judgment of thoſe, that can be ſo abſurd as to hold, That no Humane Law ought to be made, or if made, ought to be expounded, to reſtrain this Natural Liberty, or (as they may call it) Duty in the Father. However, to avoid Queſtions of Law, 'tis beſt, that a Purchaſer of a next Turn (whether he deſign it for Son, Kinſman or Stranger) doth make the Contract, when the Incumbent of the Church is not in Danger of Death; that he doth not declare his Intentions to the Perſon to whom he intends a Kindneſs, or whom he intendeth to preſent; that the intended Clerk be not preſent at the Contract; however, that he be not named in the Deed, by which the Power of Preſentation or Nomination is granted.

Words of the Statute 31 *Eliz. c.* 6.

As to the Allegation that a Father is bound by Nature, *&c.*

Caution to a Purchaſer.

Covenant upon Conſideration of Marriage. So if a Father, in Conſideration of a Clerk marrying his Daughter, doth covenant with the Clerk's Father, that he will procure the Clerk to be Preſented, Admitted, Inſtituted and Inducted into ſuch a Church, upon the next Avoidance thereof: That is a Simoniacal Contract. But if the Father of the Clerk doth covenant, That his Son ſhall marry the other's Daughter; and the other, in Conſideration thereof, covenants to pay Money; upon which the Father of the Clerk covenants, to aſſure Land for a Jointure; and afterwards, the Father of the Woman doth covenant, to procure the Clerk to be Preſented, Inſtituted and Inducted into ſuch a Church: If this laſt Covenant be not in Conſideration of the former, nor depending thereupon, without ſpecial Averment, or ſhewing that it was a Simoniacal Contract, it ſhall not be ſo intended, and a Bond for Performance thereof, upon a general Demurrer to the Condition, was adjudged good. 11 *Car. Birt* v. *Manning*, *Cro. Car.* 425. So by the Reaſon of this Caſe, if one Promiſe to a Clerk, that in Conſideration he will marry his Daughter, Kinſwoman, *&c.* that he will preſent him to ſuch a Living when void, or to the next Living, or next good Living that ſhall fall void within his Gift and Diſpoſal, this is a Simoniacal Contract, for there can be no Difference in Reaſon, as to making of a Contract Simoniacal, whether it be by Covenant,

Averment.

Promiſe in Conſideration of Marriage.

Simony, &c.

nant, or by bare Promiſe; or whether it be to be preſented to one Church in certain, or to ſuch as ſhall next fall void; for when the Church is become void, and the Clerk preſented to it purſuant to ſuch an Agreement, 'tis then become as certain as if the Agreement had been to preſent to that very Church; and by *Yelverton*, one preſented to a Living, to the Intent that he ſhall marry the Patron's Daughter, is Simony; which *Richardſon* denied, but upon what Reaſon the Book tells us not. *Mich.* 4 *Car. Steven*'s Caſe, *Littleton Rep.* 177.

Simony, where neither Patron or Incumbent privy.

Simony may be committed, and yet neither the Patron or Incumbent privy to it, or knowing of it. *Mich.* 9 *Car. Bawderock* v. *Mackaller*, 1 *Croke* 331. So in a Writ of Error to reverſe a Judgment, whereby the King had recovered in a *Quare Impedit*, upon a Title of Simony (which was) That a Friend of the Parſon agreed to give ſo much Money to *J. S.* (who was not the Patron) to procure the ſaid Parſon to be preſented; who was preſented according to that Agreement: It was aſſigned for Error, that it did not appear that either Patron or Parſon were knowing of this Agreement. But *per Cur.* the Parſon is *Simoniace Promotus*. And it was then ſaid, That Dr. *Duxon* had enjoyed the Church of St. *Clements* above twenty Years by ſuch a Title of the King's, the Preſentee of the Patron being outed, by reaſon a Friend had given Money unto a Page belonging to the Earl of *Exeter*, to endeavour to procure the Preſentation; and neither the Earl nor the Parſon knew any Thing of it. *Paſch.* 19 *Car.* 2. *B. R. The King* and *Truſſel*, 1 *Siderfin* 329. the ſame Caſe, 2 *Keble* 204.

Money to a Page.

Simony when the Church is void.

As Simony may be committed when the Church is full, ſo more eſpecially when the Church is become void, whether the Contract was made with the Patron, his Wife, or a meer Stranger. 1 *Roll's Rep.* 235. If a Stranger (the Church being void) doth contract with the Patron for the void Turn, and the Patron for Money granting the ſame, the Stranger doth preſent, and after the Induction of the Incumbent, doth acquaint him what he had done, and require a Conſideration for it; although the Grant of a void Turn, as being a Thing in Action, is void, and the Preſentee comes in *Quaſi per Uſurpationem*; yet becauſe it is by Means of a Simoniacal Contract, as the Cauſe thereof, (for otherwiſe it is to be intended, that the true Patron would not have permitted that Preſentment) it was held, that it was as well Simony, as if the Grant had not been void. *Mich.* 42 & 43 *Eliz. Baker* v. *Rogers*, 3 *Croke* 788. ſame Caſe, *Moor* 914.

By a Stranger.

By a Brother;

So if the Brother giveth Money to the Patron to preſent his younger Brother being then a Student in the Univerſity, the Church being then void, and the Patron preſents accordingly; this is Simony. *Paſch.* 39 *Eliz. Buſhe*'s Caſe.

By a Teſtator.

And ſo it is in caſe that a Teſtator contract by Simoniacal Contract, That his Executors ſhall preſent ſuch a Man by Name, the Church being then void, and the Teſtator dieth, and his Executors do preſent the ſame Perſon accordingly, this alſo was adjudged to be Simony. *Mich.* 3 *Jac. Freeman* and *Engliſh*'s Caſe. Both theſe laſt Caſes are cited, *Parſon's Law*, *c.* 18. *fol.* 134, 135.

By a Father with the Grantee.

So if the Father (the Church being void) contract for Money with the Grantee of the void Turn, to permit the Grantor to preſent his Son, and the Grantor at the Requeſt of the Father doth preſent accordingly, this is Simony. *Paſch.* 17 *Jac. Booth* v. *Potter*, *Cro. Car.* 533.

Upon an Uſurpation,

So it was found by Special Verdict, that an Uſurpation had been made to a Church, and a *Quare Impedit* brought to remove the Incumbent, and pending the *Quare Impedit*, the perpetual Advowſon was ſold by the Plaintiff, (*ea intentione*) that *J. S.* Clerk, ſhould be preſented after the

Uſurper's

Simony, &c. Uſurper's Clerk removed; and accordingly, after ſuch Removal, *J. S.* was preſented, admitted, inſtituted and inducted. This was held by the Court to be Simony. *Paſch.* 35 *Car.* 2. *C. B. Anonymus*, 2 *Ventris* 39. The like Caſe, if not the ſame, is reported by Serjeant *Levinz*, that is, That *S.* being Incumbent of a Church, and alſo Patron of the Advowſon, mortgages the Advowſon to *H.* and dies, whereby the Church became void, and one *D.* by Uſurpation preſents to the ſame Church, upon which the Mortgagee brings a *Quare Impedit* to remove the Uſurper's Clerk; and pending that *Quare Impedit*, the Heir of the Mortgagor brought a Bill in Chancery to redeem the Mortgage, and it was decreed that he ſhould redeem, and that the Mortgagee ſhould permit him to proſecute the *Quare Impedit*, brought in his Name to recover the Preſentation. Matters thus ſtanding, the Heir enters into Articles of Agreement with *H.* for the purchaſing of the Advowſon, whereby the Heir covenanted to convey the Advowſon in Fee, and that he would preſent ſuch a Perſon to the preſent Avoidance when recovered, as the Purchaſor ſhould nominate; and the Purchaſor covenanted to pay the Purchaſe Money at ſeveral Times, one whereof was, when Judgment ſhall be given to the Plaintiff in the *Quare Impedit*; and all this was found by Verdict, and to be to the Intent to preſent one *H.* when the Avoidance was recovered by the *Quare Impedit*; the Avoidance was recovered, and *H.* preſented accordingly, and adjudged the Preſentation of *H.* in this Caſe was Simoniacal. *Paſch.* 35 *Car.* 2. *C. B. Walker* v. *Hammerſly*, 3 *Levinz* 115.

Uſurpation after a Mortgage.

Redeemed by the Heir.

Who commits Simony.

Bond taken by the Patron for the Benefit of Incumbent's Wife, &c.

But if a Patron (the Church being void) doth take a Bond of a Clerk before he preſents him, to pay ten Pounds yearly to the Son of the laſt Incumbent, ſo long as he ſhall be a Student in *Cambridge* unpreferred, no Simony is committed. So in the Earl of *Suſſex*'s Caſe, vouched by *Foſter*, Juſtice: A Patron took Bond of his Preſentee to pay five Pounds yearly to the Wife and Children of the laſt Incumbent; and yet, notwithſtanding great Oppoſition, the Clerk kept his Living. *Paſch.* 2 *Jac. Abigail Baker* v. *Mounford*, *Noy* 142. (Charitable Reſolutions, if any ſuch were given; but I much doubt whether they are to be taken for Law.) Or if the Condition of an Obligation be, That a Clerk, after his Admiſſion, Inſtitution and Induction, to ſuch a Church, ſhall at all Times after be ordinarily reſident, and ſerving the Cure of the ſaid Benefice, without Abſence by eighty Days in one Year, during the Time that he ſhall be Parſon of the ſaid Church; this is a good and lawful Condition, without any Averment taken, that it was for ſome Simoniacal Purpoſe. *Mich.* 14 *Jac. B. R. Carey* v. *Yeo*, *Roll's* 1. 417. See *Brockham*'s Caſe, 4 *Car. Richardſon*'s Opinion, *Litt. Rep. f.* 138.

Averment.

By Patron of the Preſentee to reſign, &c.

So if a Patron takes Bond of his Preſentee to reſign within three Months after Requeſt abſolutely (he being firſt inſtituted and inducted;) or if the Condition be, That whereas *A.* is within a ſhort Time to be preſented, inſtituted and inducted to the Church of *D.* if *A.* after his Admiſſion, Inſtitution and Induction thereto, at all Times, upon the Requeſt of *B.* his Heirs, Executors or Adminiſtrators, ſhall reſign the ſaid Rectory and Church to the Ordinary, or Guardian of the Spiritualties for the Time being, by which *B.* his Heirs or Aſſigns, Patrons of the ſaid Church, may preſent of new to the ſaid Church, diſcharged of all Charges and Incumbrances done or ſuffered by the ſaid *A.* Theſe Conditions are not void as Simoniacal, without Averment that they were for a Simoniacal Purpoſe, becauſe they may be upon good

Averment of Simoniacal Purpoſes.

good and valuable Reaſons, without any Colour of Simony; as if he take a ſecond Benefice, or be many Months Non-reſident, or that the Patron may preſent his Son, when capable of a Benefice. *Trin.* 8 *Jac. Jones* v. *Lawrence*, and *Paſch.* 9 *Jac. Lawrence* v. *Jones*, 2 *Cro.* 274, 248. *Hill.* 5 *Car. Babbington* v. *Wood*, in 1 *Cro.* 180. and in *Hutton* 110. and in *Jones* 220. *Mich.* 14 *Car. B. R. Carey* v. *Yeo*, *Roll.* 1. 417. *Mich.* 43 & 44 *Eliz. Webb* and *Hargrave*, *Moor* 644. And if the Clerk having given Bond to reſign, doth after take away his Bond, it ſeems that he refuſing to reſign according to the Condition, may notwithſtanding be compelled in Chancery to reſign: For in the Caſe of a Fellow of a College, the Court did diſplace him, and decreed him to leave it. *Paſch.* 15 *Car. Holme* v. *Wild*, *Tothill*, *p.* 129. But by *Holt*, Chief Juſtice, *Mich.* 8 *W.* 3. *B. R.* in the Caſe of *Swaine* v. *Carter*, a Reſignation Bond comes as near Simony as can be, for 'tis eaſy to ſecure a Round Sum by ſuch a Bond, *&c.* See *Cumb. Rep.* 394. Notwithſtanding which Opinion it has been generally held, That ſuch Bonds are good and binding in Law. See 1 *Sid.* 387. *Raym.* 175. 3 *Mod.* 297. 3 *Salk.* 325, *&c.* Yet the Chancery will reſtrain the Patron, that he ſhall not make any ill Uſe of theſe Bonds of Reſignation. *Chancery Rep.* 2 *Part* 399.

Simony, &c.

Decrees in Chancery.

On a Motion to diſſolve an Injunction granted to ſtay Proceedings in an Action on a Bond given by an Incumbent to his Patron, that he (the Incumbent) ſhould reſign on Requeſt, *Lord Keeper* ſaid, he was not ſatisfied, that ſuch a Bond was good in Law: The Precedents that were in the Caſe were not directly to the Point, whether ſuch Bonds are Simoniacal or not; he therefore directed that the Plaintiff ſhould declare on this Bond, and the Defendant plead Simony, and after that and Judgment at Law come back to the Court. 1 *Vern.* 131. *Grahme* v. *Grahme.*

The Defendant, upon his preſenting the Plaintiff to a Parſonage, took a Bond of him to reſign, which tho' in itſelf lawful, yet the Patron making an ill Uſe of it, *viz.* to prevent the Incumbent from demanding Tithes in Kind, the Court awarded a perpetual Injunction againſt the Bond. 1 *Vern.* 411, 412. *Durſton* v. *Sandys.*

When a Condition was to reſign upon Requeſt, and the Plaintiff did aſſign for Breach, that the Defendant could not be found to make a Requeſt to him, and therefore that he made a Proclamation at the Church where he was born; and another Proclamation at ſeveral Markets within the ſame County, by them giving him Notice of his Requeſt; yet that this was not ſufficient, as adjudged upon a Demurrer; for that the Requeſt ought to have been made to the Perſon himſelf. *Mich.* 8 *Car. B. R. Gruit* v. *Pinnel*, *Roll's Abr.* 1. *p.* 443. The Judgments, that to take and give a Bond to reſign, is not Simony, have occaſioned many corrupt Patrons to exact ſuch Bonds of their Clerks, only that they might thereby make ſure (as they think) to themſelves a Recompence for their Preſentments. And ſome inconſiderate Clerks (that have given ſuch Bonds) have been emboldened thereby to take the Oath againſt Simony, though they well underſtood the baſe Deſign of their Patrons and themſelves in taking and giving ſuch Bonds, and intended to accompliſh them afterwards, by ſubmitting to their Demands, to the utter fruſtrating that moſt Religious Law againſt ſuch Corruptions; tho' the Judgments in this Caſe were given for the Validity of ſuch Bonds, only becauſe the Defendants demurred generally to them, and did not aver, that the Bonds were made to reſign, only to over-awe the Clerks, by Fear of After-pay-

Reſignation upon Requeſt.

Corruption in Patrons and Clerks.

Want of Averment.

Simony, &c.

ments, or to let a Leaſe of the Glebe, Tithes, *&c.* For then (as was declared in the Caſes aforeſaid) it had been Simony; but otherwiſe it could not appear to the Court to be ſo. It is alſo reported to have been ſaid by the Court upon Evidence in Sir *John Paſcall* and *Clark*'s Caſe, 15 *Jac. Com. B. Rot.* 2051. *Noy*. 22. That if a Patron doth preſent one to a Church, having taken an Obligation of the Preſentee, that he ſhall reſign at three Months Warning, that it is Simony within the 31 *Eliz.* And ſuch Conſtruction, upon a Preſumption, that theſe Bonds are taken and given upon a Simoniacal Deſign, when they are general, and do not contain ſome good Reaſon, or ſuch Reaſon of them is not otherwiſe manifeſt, or though they do, if it appear that they were taken upon a corrupt Deſign, by any After-practice, is but ſuitable to the Judges wonted Care of preſerving ſuch like Religious Laws in their full and effectual Force: But this Caſe of *Paſcall* being againſt the Reſolution of *Jones* and *Lawrence*'s Caſe, ſolemnly ſettled not many Years before, doth not, as I have been told, paſs for any great Authority; and there have been very many Reſolutions agreeing with *Jones* and *Lawrence*'s Caſe, ſince that Time. Beſides, it appears not by the Roll cited, that there ever was any Trial had, or Verdict or Judgment given in the Caſe; or if there were any ſuch Trial and Saying, as is reported, yet it appears not by the Record, that ſuch Matter could any Ways tend to determine the Iſſue there taken. However our Ordinaries may diſcourage, if not quite ſpoil, (and no doubt but their Juſtice and Prudence will oblige them to it) this Way of Trading, by not accepting of any Reſignation made by the Conſtraint of ſuch Bonds. In regard (as hath been ſhewed, *Chap.* 4.) a Reſignation (eſpecially of a Benefice with Cure) cannot be made to void the ſame by the ſole Act of the Incumbent, but the Ordinary muſt for that End alſo accept it, and declare the Church void; and till then the Patron's new Preſentation will be null: And the Reaſon of the Law in this Caſe, is partly becauſe the Ordinary is to give Notice of a Reſignation to the Patron, that he may preſent again; and if he do not within ſix Months after Notice, that the Ordinary may provide for the Church; but more eſpecially, I ſuppoſe, becauſe the Biſhop having Cure of all Souls within his Dioceſe, is to ſee that the Paſtors, to whom he hath committed, and who have undertaken the Cure, and in whom thereby the People have an Intereſt, do not without a reaſonable Cauſe leave their Charge; that it be not for Money, *&c.* or to live a Lay-converſation, which he is not to ſuffer.

How the Ordinaries may ſpoil this way of Trading.

The Reaſon.

Bond collateral to the Simony.

If the Patron (or other Perſon) take Bond of his Preſentee or his Friend, to pay Money upon the Account of a Preſentation made, it hath been held, that the Bond is not void, as being but collateral to the Simony, which *eo Nomine* is puniſhable only in the Eccleſiaſtical Court in Sir *William Bowyer*'s Caſe, *Hill.* 21 *Jac.* 2. *Bulſtrode* 182. and in *Winchcomb*'s Caſe v. *Pulleſton*, 15 *Jac. Noy* 25. *Hill.* 17 *Eliz. March*, *p.* 156. 3 *Inſt.* 153. For a Bond being ſued, the Defendant pleaded, That the Sum was agreed to be paid for the Reſignation of a Church, to the Intent that another might be preſented; and ſhews that Clerks, Patron, Obligor and Obligee, were Parties to the Agreement, and the Bond was allowed good; becauſe Simony is not an Offence againſt the Common Law, nor any Contract or Bond made void by the Statute, and that it is not averrable, that the Money was for other Cauſe than the Obligation expreſſeth. *Paſch.* 40 *Eliz. Oldbury*

v. *Gregory*, *Moor* 564. *Gregory* v. *Older*, *Noy* 72. But *Hobart* holds, in *Winchcomb*'s Caſe, *Hobart* 167. That ſuch Contracts are void between the Parties, and againſt Law, as being *Contractus ex turpi Cauſa*, and *Contra bonos mores*; like as if a Man be bound in an Obligation uſurious, the Bond is void between the Parties; and if paid by an Executor, it is a *Devaſtavit*. And according to this, an Action being brought upon an *Aſſumpſit* to pay Twenty Pounds upon Conſideration of procuring a Clerk to be Preſented and Inſtituted to one of the King's Donatives, (for to Donatives, and to all other Benefices even of the King's Preſentment, the Statute againſt Simony doth extend) *Mich.* 9 *Car. Bowderock* v. *Mackaller*, 1 *Cro.* 337, 353, 361. and Judgment being given againſt the Defendant, a Writ of Error was brought in *B. R.* where it was urged, that the Contract was good, and that it had been ſo adjudged, *Mich.* 40 & 41 *Eliz. C. B.* where it was pleaded, That an Obligation was made upon a Simoniacal Contract, and ſhewed how that Bond was not void, becauſe Simony is but a Spiritual Offence, and that in 8 *Jac.* between *Taverner* and *Smith* it was adjudged to the ſame Effect. But notwithſtanding theſe Precedents, the Court, after two Adjournments, was of Opinion, That the Conſideration was illegal, being to perform a Simoniacal Contract. And it being objected, that Simony was an Offence, whereof the Common Law takes not any Notice, or at leaſt did not before the Statute; that was denied. *Mich.* 9 *Car. Hill.* 9 *Car.* and *Paſch.* 10 *Car. Mackallar* v. *Todderick*, *Roll*'s *Abr.* 1. 18. See the Opinion of *Noy* in *Sanderſon* and *Warren*'s Caſe, 20 *Jac. B. R. Palmer* 293. *Byrte* and *Manning*, *Mich.* 11 *Car. B. R.* 1 *Cro.* 425. And this I take to be the better, as well as the later Opinion.

Simony, &c.

Contractus ex turpi Cauſa.

Conſiderations illegal.

As to the Puniſhment of the Patron, be he an Uſurper, or other corrupt Contractor, he doth forfeit the double Value of the Benefice about which the Contract is made; and if he that preſents be the true Patron, and not an Uſurper, in all Caſes where the Clerk loſeth the Benefice, the King gaineth the Preſentment, *viz.* for the next Turn, that is, the Clerk being actually preſented in Purſuance of the corrupt Contract.

Forfeiture by an Uſurper, &c.

The Clerk, as well as the Patron, ſuffers by Simony; for if any Simoniacal Contract be made, by reaſon of which a Clerk is preſented to a Church, though it be but by a Friend, and the Preſentee was no Way Party or Privy to it, yet the Preſentation, Inſtitution and Induction of ſuch Preſentee, are abſolutely void by the Statute of 31 *El.* to all Perſons that are concerned, without Sentence Declaratory in the Spiritual Court, *Paſ.* 17 *Jac. March*, *p.* 84. becauſe though he be not, for Want of *Privity*, *Simoniacus*, yet he is *Simoniace Promotus*. *Trin.* 8 *Jac. Co.* 12. *f.* 101. in Dr. *Hutchinſon*'s Caſe, and by *Co. Mich.* 13 *Jac. King* v. *Zaker*, 3 *Bulſtrode* 88. *Mich.* 42 & 43 *Eliz. Baker* v. *Rogers.* 3 *Cro.* 788. 3 *Inſt.* 71. *Paſch.* 19 *Car.* 2. *The King* v. *Truſſell*, 1 *Siderfin* 329. 2 *Keble* 204. before-mentioned: For being privy to, or knowing of the Simony by the Clerk or Patron, is not material, but only the corrupt Agreement; for by that Simony is committed, and the Church made void; and the Notice is a difficult Matter to be proved; and if that were neceſſary, the Statute might eaſily be evaded by truſting Friends in ſuch Caſes to make the corrupt Agreement, and preſenting before Notice of it. *Mich.* 4 *W. & M. C. B. Reve* v. *Epiſcopum Norwich. Hide* and *Boughton*, 3 *Levinz* 337. And this holds, not only where the Perſon preſenting or collating hath Right to preſent or collate, but alſo to any Perſon or Perſons, Bodies Politick or Corporate, that do uſurp, as having no Title,

Sufferers by Simoniacal Contracts.

What is chiefly material.

3 *Inſt.*

Simony, &c.

How such Contracts void againſt the King.

Void unto the Ordinary.

3 *Inſt. c.* 71. *f.* 153. Firſt, they are void as to the King, ſo that he may preſent another, without any Deprivation, or Removing of the Incumbent by *Quare Impedit. Paſch.* 17 *Jac. Booth* v. *Potter*, 2 *Cro.* 533. And they are void unto the Ordinary, ſo that he may admit the King's Preſentee. *Mich.* 4 *Car. Steven*'s Caſe, *Littleton's Rep.* 165, 176. But not ſo as that he can, without Notice firſt given of the Voidance, take Advantage of Lapſe, if the Patron preſent not within ſix Months from the Time ſuch Simoniacal Perſon was inſtituted and inducted; for this is expreſly provided for by the ſaid Statute.

31 *El. c.* 6. §. 7.

Notice.

That no Title to confer or preſent by Lapſe, ſhall accrew upon any Avoidance mentioned in this Act, until Six Months next after Notice given of ſuch Avoidance, by the Ordinary to the Patron. Which is to be intended of ſuch Voidances only by reaſon of Simony, where the Preſentation is not given from the Patron to the King; (that is) where the Perſon obtains his Orders, Admiſſion, Inſtitution, Induction, *&c.* ſimoniacally; for no Lapſe can incur at all, where the Right of Preſentation is in the King: So to ſuch Preſentee, and to all that claim under him for his Inſtitution, will not be a Super-Inſtitution, and they are void unto the Pariſhioners; ſo that if ſuch a Perſon ſue them for Tithes in the Eccleſiaſtical Court, or for treble Damages at Common Law, they may plead him no Incumbent, becauſe of the Simony, in *Winchcomb* and *Pulleſton*'s Caſe, *Hobart* 168. *Penn*'s Caſe, 2 *Brownlow* and *Gouldsborough* 7. *Mich.* 40 *Eliz. Com. Banc. Risby* v. *Wentworth*, 3 *Cro.* 642. *Trin.* 14 *Car.* 2. *Knight* v. *Dauncer*, 1 *Keble* 312. And if that Plea, being duly made and proved, be not allowed as a ſufficient Bar to the Proceedings in the Eccleſiaſtical Court, 'tis ſaid a Prohibition lieth. *Mich.* 15 *Jac. Winchcomb* v. *Pulleſton*, *Noy* 25. and in *Hobart* 168. *Mich.* 8. *Jac. Penn*'s Caſe, 2 *Brownlow* and *Gouldsborough* 7. *Trin.* 8 *Jac.* Dr. *Hutchinſon*'s Caſe, 12 *Co.* 103. Becauſe if the King preſent, and his Preſentee be received, the Pariſhioners muſt not pay Tithes to both; and to whom he ſhall pay is at his Peril. But there is no Remedy againſt ſuch a Simoniacal Incumbent for the Tithes and Profits which he hath actually received; *per Hutton. Mich.* 4 *Car. Steven*'s Caſe, *Littleton Rep.* 177. But though the Preſentation, Inſtitution and Induction be void, as to all theſe, and to others that have Intereſt, yet they are not void to an Uſurper: For a Man without Right cannot preſent unto any ſuch Benefice, as to a Church void; neither can the Ordinary excuſe himſelf, if he receive the Clerk of an Uſurper, by pleading the Simony; for he is none of them that have Intereſt, ſaith *Hobart*, in his Argument in *Winchcomb* and *Pulleſton*'s Caſe, *Hob.* 168.

Prohibition.

No Remedy for Tithes received.

Uſurpation.

Advantage to Pariſhioners.

Forfeiture by the Perſon contracting.

31 *El. c.* 6. §. 5.

If a Simoniacal Contract be made by a Clerk or other Perſon, although the Patron doth after preſent the Clerk *gratis*, yet the Perſon contracting doth forfeit the double Value of the Church, as I conceive: For the Words of the Statute 31 *Eliz.* are, **That all and every Perſon and Perſons, Bodies Politick and Corporate, that from thenceforth ſhall give or take any ſuch Sum of Money, Reward, Gift or Benefit directly or indirectly; or that ſhall take or make any ſuch Promiſe, Grant, Bond, Covenant, or other Aſſurance,** &c. **ſhall forfeit the double Value of one Year's Profit.** *Parſon's Counſellor, fol.* 50. And by the Opinion of *Tanfield*, Chief Baron, in his Argument of *Calvert* and *Kitchyn*'s Caſe, If a Clerk ſeeketh for Money to obtain a Preſentation unto a void Church, although afterwards the Patron preſent him *gratis*, yet his Simoniacal Attempt hath diſabled him to take that Benefice. *Hughes* 1816. and *Parſon's Law, cap.* 18. 135.

How doth it appear, that this was the opinion of Tanfield? It is not so stated in Hughes's Abr. & I cannot find any thing to this effect by Tanfield or any other in Degge's Parson's Counsellor. On further search, I find, that the opinion here given to Tanfield is warranted by the margin of Hughes's Parson's Law chap. 15. p. 106. of 1st ed.

Simony tho' Preſentation be *gratis*.

If

If Judgment be given againſt the Simoniſt, and he, by the Aſſent of the Parties, being to continue a certain Time in the Benefice, will not (the Time agreed upon being expired) remove, but commits Waſte upon the Houſe or Glebe; [*Coke*] ſaid, If this Stay had been by Rule of Court, an Attachment ſhould have been granted againſt the Simoniſt for his Contempt: But when it is only by Aſſent of Parties, there is no Ground for an Attachment; neither can a *Vi laica removenda* be had in this Caſe, becauſe he is a Clergy-man; but the Remedy is by Way of Indictment of forcible Entry, or by an *Ejectione firmæ*; for that one may be indicted for a forcible Entry into a Church, is agreed. *Hill.* 14 & 15 *Car.* 2. *The King* v. *Larking*, &c. 1 *Keble* 438. 1 *Siderfin* 101. And to ſtop him in doing Waſte, a Prohibition may be had by the Patron, Incumbent, or any other Perſon, becauſe that is the King's Writ; and any one may pray a Prohibition for the King, and it is grantable *ex debito Juſtitiæ*, and not *ex gratia*, or in the Diſcretion of the Court. Serjeant *Moreton*'s Caſe, 1 *Siderfin* 65. *Hob.* 247. But if ſuch Perſon be in Fact removed by a *Vi laica removenda*, (which is to remove *omnem vim laicam*) and the Sheriff hath not only thereby diſpoſſeſſed him, but (which is more than he is enabled to do by the Writ) put another into Poſſeſſion, yet he ought not to be reſtored, neither hath he any Remedy, he being for ever diſabled by reaſon of the Simony. *King* v. *Zaker*, 3 *Bulſtrode*, *fol.* 91, 92.

Simony, &c.

Attachment when.

Vi laica removenda.

Ejectment or Indictment.

Prohibition.

Though the Preſentation, Inſtitution and Induction of a Perſon, that by any Ways or Means comes into a Church upon a Simoniacal Contract, are meerly void; yet if the Clerk is not privy, or conſenting to the Corruption, he ſhall not be diſabled from taking the ſame Benefice at the Preſentment of the King, or of the Patron that firſt preſented him, after the King's Turn is ſerved; in Dr. *Hutchinſon*'s Caſe, *Mich.* 8 *Jac.* 12. *Co.* 101. *Hill.* 8 *Jac. Kitchen* v. *Calvert*, *Lane* 73, 103. *Inſt.* 3. *cap.* 71. And yet where the Father (the Church being void) dealt with the Patron to permit another to preſent his Son, and (as was alledged) without the Privity of the Son, it was adjudged, that the Son's Preſentation, Inſtitution and Induction were void, and that he was a Perſon for ever after diſabled to accept of that Benefice. *Mich.* 13 *Jac. The King* v. *Biſhop of Norwich*, *Cole*, *&c.* 2 *Cro.* 385. *Roll's* 2 *Rep.* 236, 237. 3 *Bulſtrode* 91. *Paſch.* 17 *Jac. Booth* v. *Potter*, 2 *Cro.* 533. 1 *Inſt.* 120. *a.* But in this Caſe, the Father did procure the King's Preſentee to be deprived for ſome Crimes, and ten Days before the Deprivation, procured a Grant of the next Avoidance to a Stranger; and ten Days after the Avoidance by Deprivation, procured the Stranger to preſent his Son the ſecond Time; upon which laſt Preſentment, *&c.* this Action was brought, and the Judgment by all the Court was, That his ſecond Preſentation was void, and that he was incapable of the Benefice for ever. Sir *Simon Degge*, in his *Parſon's Counſellor*, takes the firſt Opinion to be more rational than the latter, by reaſon of the penning of the ſaid Statute; the Words of which are, **That the Perſon ſo corruptly taking, procuring, ſeeking or accepting, ſhall,** &c. **from thenceforth be adjudged a diſabled Perſon in Law, to have or enjoy,** &c. And though the Incumbent in this Caſe take and accept the Benefice upon the corrupt Contract, yet as to him it is not corruptly taken. *Parſon's Counſellor*, but *Quære.* However, it is clear, that if the Preſentee be either Party, or Privy to the Simoniacal Contract, by reaſon of which he is preſented, he is for ever diſabled to hold that Benefice for which the Contract was made, and doth forfeit the double Value of one Year's Profit of every ſuch Benefice by the Statute; and the Forfeiture of the double Value of one Year's Profit of the Church, is not

Where the Clerk not privy, may be preſented again.

Econtra.

Procurement by a Father for his Son.

Q.

Forfeiture, if the Preſentee be Party or Privy.

Simony, &c.

to be accounted according to the Valuation in the King's Books in the First-Fruits Office, but according to the full and true yearly Value of the Benefice, as the same may be rented, which shall be tried by Jury. *Co. Inst.* 3. *c.* 71, 154.

Where the King or true Patron cannot enable the Simonist.

And though the King (to whom the Turn goeth) would present him before, or after he is convicted of the Simony, with a *Non obstante* the Simony, yet he cannot enjoy that Church, as being by the Statute utterly disabled during his Life. *Trin.* 4 *Car. Hall* v. *Blundell, Hetly* 104. Yea, though the true Patron never presented him, but only an Usurper. *Pasch.* 13 *Jac. King* v. *Cole* and *Saker*, 2 *Cro.* 385. And the same Case, *Roll's* 2 *Rep.* 235. And though the King should say, that the Simonist should still continue in his Benefice he had gotten, and thereupon he should not be removed till Death; yet (by *Coke*, Chief Justice) the King shall have the next Presentation. *Mich.* 13 *Jac. King* v. *Saker*, 3 *Bulstrode* 88. And though the King Grants a Special Pardon to the Simonist of his Crime, yet, as *Hobart* held, in *Winchcomb* and *Pulleston*'s Case, *Pasch.* 14 *Jac. Hobart* 167. the Church remaineth still void as to his Presentation. The Reason of the Opinion is, that the King cannot enable him, whom an Act of Parliament (as in this Case) hath disabled. *Saker*'s Case, 2 *Cro.* 386. *Trin.* 10 *Jac.* Dr. *Hutchison*'s Case, 12 *Co.* 101. 1 *Inst.* 120. *a.* For the Law being absolute and direct, cannot be dispensed withal by any Grant or *Non obstante*, as it may be when a Thing is prohibited *sub modo*, as upon a Penalty given to the King, or King and Informer. 1 *Inst.* 120. *a.* 3 *Inst. c.* 71. And there is ever observed a Difference betwixt him, that is *Simoniacus*, and him that is *Simoniace Promotus*; for *Simoniacus* is he who makes the Contract or Promise for a Benefice, or is consenting and privy to it, and is disabled to take the same; and is therefore by the Canon Law to be deprived of any Benefice that he had before: But *Simoniace Promotus* is he, on whose Behalf a Simoniacal Contract or Promise is made by another, without his Privity or Consent, and he shall only be deprived of that Benefice to which he is corruptly preferred. *Pasch.* 17 *Jac. B. R. Lapthorn*'s Case, *Booth* v. *Potter*, 2 *Roll's Abr. Kitchin* v. *Calvert*, *Lane* 103. *Snow* v. *Philips*, 1 *Keble* 781.

The Reason.

Difference between *Simoniacus* and *Simoniace Promotus.*

General Pardon after the Simony.

So if a Man be preferred to a Benefice by Simony, and afterwards comes a general Pardon, which finds him in Possession; though such Pardon (Simony not being excepted) doth discharge the Punishment of Simony, both as to the Patron and Incumbent, so that the Forfeiture of the double Value of the Benefice is not recoverable upon either; yet that will not enure to the Settling of him in that Benefice, which was never full by Reason of the Simony. *Trin.* 41 *Eliz. Smith* v. *Shelbourn*, 3 *Cro.* 685. and in *Owen* 87. Neither will Simony be pardoned by the general Words of a Pardon (as all Things that the King can or may Pardon;) but there ought to be special and particular Words to that Purpose. 15 *Car.* 2. *C. B. Philip*'s Case, 1 *Sid.* 170. *Mich.* 16 *Car.* 2. *B. R. Snow* Lessee of *Crawly* v. *Philips*, 1 *Sid.* 221, 222. The same Case, 1 *Keble* 780. It was resolved in these Cases, That although Simony should be included within the Words of a General Pardon, yet that should be only as to the Forfeitures, but not so as to enable the Person to hold his Benefice; and *Burton*'s Case in 6 *Co.* 13. that seems to be to the contrary, was denied for Law. *Trin.* 27 *Car.* 2. *C. B. The King* v. *Turvil*, 2 *Modern Rep.* 52. And as to these pecuniary Forfeitures by the aforesaid Statute 31 *Eliz.* §. 8. **One Moiety of them shall be to our Sovereign Lady the Queen,** &c. **and the other**

Special Words.

Forfeitures to whom.

other Society to him or them that will sue for the same, by Action of Debt, Bill, Plaint or Information, in any of her Majesty's Courts of Record; in which no Essoin, Protection, Privilege or Wager of Law shall be admitted or allowed. Simony, &c.

The Courts of Record to be here understood, are the Chancery, King's Bench, Common Pleas and the Exchequer, but not any inferior Court of Record. *Gregory's* Case, 6 *Co.* 20. And the Privilege and Protection herein mentioned, are to be taken for the common Protection and Privileges of Officers and Courts, but are not to be extended by those general Words, to the Privilege or Protection of Parliament, as is observed by *Parson's Counsellor* 67. And this Act doth not only extend to Benefices with Cure, but to Dignities, Prebends, and all other Ecclesiastical Livings. 1 *Inst.* 120. *a.* And there is a Saving of the Eccclesiastical Jurisdiction, as to these Cases, *viz.* §. 9. **That this Act, or any Thing herein contained, shall not in any wise extend to take away, or restrain any Punishment, Pain or Penalty limited, prescribed or inflicted by the Laws Ecclesiastical, for any the Offences before in this Act mentioned, but that the same shall remain in Force, and may be put in due Execution, as might before the making of this Act; this Act, or any Thing therein contained to the contrary thereof, in any wise notwithstanding.** And therefore the Ecclesiastical Court may proceed against a Simonist *pro salute animæ*, and upon Examination and Evidence deprive him for that Cause. *Trin.* 41 *Eliz. Smith* v. *Shelbourn*, 3 *Cro.* 685. though he was not Privy to the Contract, because there be not any Accessaries in Simony; and though he was presented by an Usurper, and the true Patron did recover the Advowson and Presentation. *Mich.* 42 & 43 *Eliz. Baker* v. *Rogers*, *Moor* 914. Yea, and though a General Pardon did follow the Simony, in which Simony is not excepted, yet the Ecclesiastical Court may proceed to Sentence Declaratory, that the Simonist was an Intruder, and that his Admission, Institution, *&c.* are utterly void, as if they had never been: For though the Punishments of Simony are taken away by Pardon, yet the Church remaineth void. 41 *Eliz. Smith's* Case, *Owen* 87. 3 *Cro. ubi supra.* And when the Spiritual Court hath so sentenced the Simony, the Temporal Court ought to give Credence thereto, and ought not to dispute whether it be Error or not: For the Temporal Court cannot take Cognisance of their Proceedings herein, whether they be lawful or not; which is the Reason, that in the Temporal Court it sufficeth to plead a Sentence out of the Spiritual Court briefly, without shewing the Manner thereof, and of their Proceedings. And though it was said, that in the Spiritual Court they ought not to have intermeddled to devest the Freehold, which is in the Incumbent after Induction. True indeed, they could not alter the Freehold; but they by their proceeding, meddle only with the Manner of obtaining the Presentment, which by Consequence only devesteth the Freehold from the Simonist, by the Dissolution of his Estate, when his Admission and Institution are voided, and therefore may proceed. *Mich.* 42 & 43 *Eliz. Baker* v. *Rogers*, 3 *Cro.* 789. *Trin.* 41 *Eliz. Smith* v. *Shelbourn*, 3 *Cro.* 686. Or rather, the Church being made void by Act of Parliament, he who pretends to be Incumbent thereof hath no Freehold therein; so depriving of him, cannot be said to devest any Freehold from him. However, it is best, that not any of the Articles to be examined upon in this Case, be such as may expresly draw the Right and Title of the Benefice into Question, lest Occasion be taken from thence to bring a Prohibition.

In what Courts of Record.

To what Benefices.

What Proceedings in the Spiritual Court against a Simonist,

to which the Temporal Court ought to give Credence.

Freehold not to be altered.

Caution.

Hill.

Simony, &c. *Hill.* 11 *Jac.* Sir *William Bowyer* v. *High-Commiſſion Court*, 2 *Bulſtrode* 182. And *Warburton* then ſaid, That if one be preſented by Simony, and he who is preſented is Party, or Privy to the Simony, he ſhall be deprived, and alſo diſabled to take any other Benefice; but if he be preſented by Simony between two Strangers, whereto he is not privy, he is deprivable by reaſon of the Corruption, but not diſabled to take any other; for ſo (ſaid he) is the Rule of the Civil Law. *Mich.* 42 & 43 *Eliz. Baker* v. *Rogers*, 3 *Cro.* 789.

Simony between two Strangers.

Voidance by Reaſon of the Preſentment itſelf.

As by Corruption preceding a Preſentment, a Church may remain void in Law, ſo by Reaſon of the Preſentment itſelf: for, in all Caſes where a void Preſentment is made to a void Church by one that hath no Right, though Inſtitution and Induction follow thereupon; or where Collation (which is in effect Preſentation and Inſtitution) is made by the Biſhop to the Church of another, before he hath Title by Lapſe to collate, the Church doth remain void at all Times after the ſix Months, to the Preſentation of the very Patron. For Inſtance: If a Clerk (a Church of the Patronage of a common Perſon being void, and not lapſed to the King,) doth obtain a Preſentation from the King, which declareth, That the Title doth belong to him *Ratione lapſus*, ſuch Preſention is void, becauſe it ſuppoſeth a Right in the King, when there was none, and was obtained by Miſ-information, whereby the King was deceived, who intended no Uſurpation or Wrong; and therefore the King in ſuch Caſe can be no Uſurper, but the Inſtitution made by Reaſon of ſuch void Preſentment, ſhall be but as a Collation of the Biſhop's, which makes no binding Plenarty againſt the true Patron; ſo that he may not only bring his *Quare Impedit* when he will, but alſo preſent his Clerk ſeven Years after; and if the Biſhop doth receive his Clerk, the other is out *ipſo facto*; yet till then he is, as to all others, a full Incumbent, and not in the Nature of a Curate only, and may ſue for Tithes, and is capable of a Confirmation from the King, (but *Quære* as to that) as the Book is. 11 *H.* 4. 7. And therefore the Chief Juſtice *Hobart* was of Opinion, That if the Patron brought a *Quare Impedit* in this Caſe, the Incumbent muſt be named, or elſe he could not be removed; and alſo, that ſuch a Plenarty did bar the Lapſe of the Metropolitan and the King. *Hill.* 17 *Jac. Gawdy* v. *Biſhop of Canterbury*, &c. *Hobart* 302.

King deceived in his Preſentation.

Quare Impedit by the Patron.

Voidance through Default of the Preſentee.

Though Inſtitution and Induction do follow, upon a good Preſentment, yet the Church may remain void in Law, by reaſon that ſomething required to be done by the Preſentee, before Admiſſion, was not performed. And therefore if a Preſentee be admitted to a Benefice with Cure, unleſs he hath firſt ſubſcribed the Articles of Religion agreed upon in the Year One thouſand five Hundred and ſixty-two, in the Preſence of the Ordinary, his Admiſſion, Inſtitution and Induction are meerly void in Law, as if they never were. *Stat.* 13 *Eliz. c.* 12. But becauſe the Preſentation is not alſo made void, it ſeems by the Reaſon and Authority of ſome Books, that Lapſe doth not run till after Notice given by the Ordinary of ſuch Non-ſubſcription, as *Trin.* 17 *Car. C. B. The Biſhop of Hereford* and *Oakley*'s Caſe, *March* 119. *Parſon's Law*, *c.* 18. *Parſon's Counſellor* 76. 1 *And.* 62.

Notice.

CHAP.

CHAP. VI.

Void Admissions by Simony, &c.

Church void by taking Orders, Admission, Institution, &c. Simoniacally; or for not subscribing the Articles, &c. And of Deprivation, the Causes thereof, &c. and of the Archbishops Power in Depriving Bishops.

IT hath been shewed in several Instances in the former Chapter, that notwithstanding Presentation, Admission, Institution and Induction had, a Church by the Act of the Law may remain void; and there are yet several other Cases, whereby a Church, by the Act of the Law, may become void: **For it is enacted, by** 31 Eliz. c. 6. **That if any Person, for any Sum of Money, Reward, Gift, Profit or Commodity whatsoever, directly or indirectly (other than for usual and lawful Fees;) or for or by reason of any Promise, Agreement, Grant, Covenant, Bond, or other Assurance, of or for any Sum of Money, Reward, Gift, Profit or Benefit whatsoever, directly or indirectly, admit, invest, institute, instal, induct or place any Person in, or to any Benefice with Cure of Souls, Dignity, Prebend, or other Living Ecclesiastical, that then every Person so offending, shall forfeit and lose the double Value of one Year's Profit of every such Benefice, Dignity, Prebend and Living Ecclesiastical. And that thereupon, immediately from and after the Investing, Installation or Induction thereof had, the same Benefice, Dignity, Prebend, and Living Ecclesiastical, shall be eftsoons merely void; and that the Patron or Person to whom the Advowson, Gift, Presentation or Collation, shall by Law appertain, shall and may by Virtue of this Act present or collate unto, give and dispose of the same Benefice, Dignity, Prebend or Living Ecclesiastical, in such sort, to all Intents and Purposes, as if the Party so admitted, instituted, installed, invested, inducted or placed, had been or were naturally dead;** and by the said Stat. 31 *Eliz. c.* 6. *sect.* 10. *pars posterior*, **If a Clerk so corruptly entring into the Ministry, or receiving Orders Simoniacally, doth at any Time within seven Years after accept and take any Benefice, Living, or Promotion Ecclesiastical, immediately from and after the Induction, Investing or Installation thereof, or thereunto had, the same Benefice, Living and Promotion Ecclesiastical, shall be eftsoons meerly void, and the Person to whom the Right of presenting doth appertain, may present, or collate to, or bestow the same, as if the Person inducted or installed were naturally dead.** But Note, That the Living is not void in either Case, but from and after the Investing, Installation or Induction, and therefore, until after Induction, the Patron hath no Advantage: And though after the Clerk is inducted or installed, in the aforesaid Cases, the Patron may present; yet if he doth not, no Title to confer or present by Lapse

31 *Eliz. c.* 6. Against taking Monies, or Rewards, *&c.* for Admission and Induction, *&c.*
See *Cro. Eliz.* 642. *Cro. Jac.* 385. *Cro. Car.* 330.

If a Clerk entring Simoniacally, take a Benefice seven Years after.

Yet Patron has no Advantage till after Induction.

Declaration, &c. not ſubſcribed.

Stat. 14 *Car.* 2. *c.* 4. *ſect.* 8 & 9.

doth accrue, but after ſix Months next after Notice given of ſuch Avoidance by the Ordinary to the Patron, by the ſaid Stat. 31 *Eliz. c.* 6. *ſect.* 7. and in *Winchcomb* and *Pulleſton*'s Caſe, 14 *Jac. Hobart* 167. So by 14 *Car.* 2. *c.* 4. **If any Perſon or Perſons be to be admitted to any Deanery, Canonry or Prebend of any Cathedral or Collegiate Church, or to any Maſterſhip, Headſhip, Fellowſhip of or in any College, Hall, Houſe of Learning or Hoſpital; or to any Profeſſor's Place, Reader's Place in either of the Univerſities, and in any College elſewhere, or to any Parſonage, Vicarage, Eccleſiaſtical Dignity or Promotion, Curate's Place, Lecture and School, publick or private, and do not at or before his or their reſpective Admiſſion to be Incumbent, or have Poſſeſſion thereof, ſubſcribe the Declaration or Acknowledgment,** [mentioned in the ſaid Act, *viz.* ſo much thereof as now by Law is in Force, to be ſubſcribed unto] **ſuch his reſpective Deanery,** &c. **ſhall be void, as if ſuch Perſon ſo failing were naturally dead.** See the Declaration to be ſubſcribed *Chap.* 15.

Declaration to be ſubſcribed.

Before whom to be made.

If the Admiſſion be to a Maſterſhip, Headſhip or Fellowſhip in any College, Hall or Houſe of Learning, or to a Profeſſor's or Reader's Place in any of the Univerſities, the Subſcription is to be made before the Vice-Chancellor of the reſpective Univerſities for the Time being, or his Deputy. And if the Admiſſion be to any of the other aforeſaid Preferments, the Subſcription is to be made before the reſpective Archbiſhops, Biſhops, or Ordinary of the Dioceſe. And every ſuch Parſon, Vicar, Curate and Lecturer, (after ſuch Subſcription made) is to procure a Certificate under the Hand and Seal of the reſpective Archbiſhop, Biſhop, or Ordinary of the Dioceſe (who are bound upon Demand to make and deliver the ſame) and publickly and openly to read the ſame, together with the Declaration or Acknowledgment beforementioned, upon ſome Lord's Day, within three Months then next following, in his Pariſh Church where he is to officiate, in the Preſence of the Congregation there aſſembled, in the Time of Divine Service: And every Perſon failing therein, doth loſe ſuch Parſonage, Vicarage or Benefice, Curate's Place or Lecturer's Place reſpectively, and is utterly diſabled, and *ipſo facto* deprived of the ſame; and ſuch Parſonage, Vicarage or Benefice, Curate's Place or Lecturer's Place doth become void, as if he was naturally dead.

Certificate to be read.

Stat. 14 *Car.* 2. *c.* 4. §. 6. Clauſe of the Stat. for reading the Morning and Evening Prayers, &c.

Alſo every Perſon, that ſhall hereafter be preſented, or called, or put into any Eccleſiaſtical Benefice or Promotion within this Realm of England, **Dominion of** Wales, **and Town of** Berwick **upon** Tweed, **ſhall in the Church, Chapel or Place of publick Worſhip, belonging to his ſaid Benefice or Promotion, within two Months next after he ſhall be in the actual Poſſeſſion of the ſaid Eccleſiaſtical Benefice or Promotion, upon ſome Lord's Day, openly, publickly and ſolemnly read the Morning and Evening Prayers appointed to be read by, and according to the Book of Common-Prayer, at the Times thereby appointed; and after ſuch Reading thereof, ſhall openly and publickly, before the Congregation there aſſembled, declare his unfeigned Aſſent and Conſent to the Uſe of all ſuch Things therein contained and preſcribed, according to the Form appointed: And that all and every ſuch Perſon, who ſhall (without ſome lawful Impediment, to be allowed and approved by the Ordinary of the Place) neglect or refuſe to do the ſame, within the Time aforeſaid, or (in caſe of ſuch Impediment) within one Month after ſuch Impediment removed, ſhall,** ipſo facto, **be deprived of his ſaid Eccleſiaſtical**

Benefices and Promotions; and that from thenceforth it shall and may be lawful to and for all Patrons and Donors of all and singular the said Ecclesiastical Benefices and Promotions, or any of them, (according to their respective Rights and Titles) to present or collate to the same, as though the Person or Persons so offending or neglecting were dead. Common-Prayer not read.

But by Sect. 16. 'tis provided, That no Title to confer or present by Lapse, shall accrue by any Avoidance or Deprivation ipso facto, by Virtue of this Statute, but after six Months after Notice of such Avoidance or Deprivation given by the Ordinary to the Patron, or such Sentence of Deprivation openly and publickly read in the Parish Church of the Benefice, Parsonage, Vicarage, becoming void, or whereof the Incumbent shall be deprived by Virtue of this Act. This Act, or any Thing therein contained, shall not be prejudicial or hurtful unto the King's Professor of the Law within the University of Oxford, for or concerning the Prebend of Shipton, within the Cathedral Church of Sarum, united and annexed unto the Place of the same King's Professor for the Time being, by the late King James of Blessed Memory. *Ibid.* §. 16.

This Clause of the Statute concerning the Reading of the Morning and Evening Prayers, and declaring an unfeigned Assent and Consent to the same, doth extend to meer Stipendiary Priests, who come in without any Presentation, *&c.* although the Words be, **That the Patron shall present,** as if the Offender was dead; for where the Case was, That the Dean of *Lincoln* demised the Rectory of *M.* to one *P.* for three Lives, and the Lessee covenanted to provide and find a sufficient Minister or Priest to serve in the said Church of *M.* to be allowed of by the Dean and his Successors; it was adjudged, that a Stipendiary Minister found by the Lessee, pursuant to his Covenant, was to read the Morning and Evening Prayers, and declare his Assent, according to the Clause of this Statute; and for Want thereof, is to be taken as a Person deprived, uncapable to recover any Thing for his serving there. *Mich.* 33 *Car.* 2. *C. B. Carver* v. *Pinkey*, 3 *Levinz* 82. How far the Clause doth extend.

Likewise every Person that is admitted to any Benefice with Cure, except that within two Months after his Induction, he doth publickly read the Thirty-nine Articles agreed upon in the Year 1562, in the same Church whereof he shall have Cure, in the Time of Common-Prayer, with Declaration of his unfeigned Assent thereto, he shall be upon every such Default, *ipso facto*, immediately deprived. *Stat.* 13 *Eliz. c.* 12. The Declaration of unfeigned Assent aforesaid must be absolute, without Condition; and therefore a Clerk having read the Articles, and said, *I give my Consent unto them, so far forth as they agree with the Word of God*; the Ecclesiastical Court was suffered to proceed to a Deprivation of him, though he sued to stop Proceedings there, by a Prohibition from the Temporal Court. *Mich.* 33 & 34 *Eliz. Smith* v. *Clarke*, 3 *Cro.* 252. Not reading the 39 Articles. *Vid. Ib. Sect.* 17 & *Stat.* 13 *El. c.* 12. Forfeits his Living.

If the Articles be not read, as aforesaid (though the Ordinary may deprive for the Cause, by Judicial Proceedings) yet the Church, upon such Neglect, is absolutely void at the End of two Months, as to the Person inducted into it; nor will a General Pardon extend to a Restoration of him, for that such Pardons are generally to be extended only to Offences and Contempts, for which a Person may be punished by Indictment; but in this Case the Punishment is, to lose his Living. *Trin.* 41 *Eliz. Baker* v. *Bret* and *Robinson*, 3 *Cro.* 690. *Trin.* 35 *Eliz.*

Green's

39 Articles not read.

See 6 *Co.* 69. *Dyer* 377, 346, 360. Notice to Patron. *Vide poſtea.*

Green's Caſe, 6 *Co.* 29. However, though it be void as to the Incumbent by his Neglect, ſo that the Patron may preſent again; yet not ſo, as that he muſt of Neceſſity preſent to avoid a Lapſe: For it is enacted, by 13 *El. c.* 12. §. 8. **That no Title to confer, or preſent by Lapſe, ſhall accrue upon any Deprivation,** ipſo facto, **but after ſix Months after Notice of ſuch Deprivation given by the Ordinary to the Patron.** *Trin.* 17 *Car. The Biſhop of Hereford* and *Okeley*, *March*, Caſe 196. *Hill.* 22 & 23 *Car.* 2. *Shute* v. *Higden*, *Vaughan* 129. 2 *Jones* 18. And though the Patron hath a perſonal and manifeſt Knowledge that his Clerk hath not read the Articles, according to the Statute, as if he by Suit hath obtained a Declaratory Sentence of the Avoidance for that Cauſe, yet he ſhall not be bound thereby to preſent a void Lapſe, but may ſafely expect the Ordinary's Intimation; nor doth the Intimation of another ſatisfy the Law. *Paſch.* 22 *El. Dyer*, *f.* 369. *Trin.* 44 *El. Green*'s Caſe, 6 *Co.* 29. *b.* In like Manner, by 26 *H.* 8. *c.* 3. & 2, 3 *Ed.* 6. *c.* 20. **If any Sum of Money being once due by any Incumbent, of any Dignity, Benefice or Spiritual Promotion, charged with the Payment of Tenths to the King, and reaſonably demanded and required, (any Time after the Feaſt of the Nativity of our Lord, at their Dignities, Hoſpitals, Colleges, Churches, Chanteries, or Houſes, by the Archbiſhop or Biſhop, or ſuch as ſhall be charged with the Collection of any Part of the ſaid Penſion, or by any other their Miniſters, Servants or Officers, to pay ſuch Portion of the ſaid Penſion and yearly Rent, as they ſhall be taxed and aſſeſſed) be not truly contented and paid unto ſuch Archbiſhop or Biſhop, or their Miniſters and Officers, and to ſuch other Perſon or Perſons, or their Miniſters or Servants as ſhall have the Charge of Collection thereof, every Year yearly, at the Time of ſuch Requeſt and Demand thereof; or elſe within forty Days next after every ſuch Requeſt, at the fartheſt: Then every Incumbent making ſuch Default of Payments, after ſuch Default certified thereof into the King's Exchequer in Writing, under the Seals of any Archbiſhop, Biſhop, or of ſuch as be limited and charged to the Collection of the Penſion, by the Act of** 26 H. 8. c. 3. **ſhall be adjudged,** ipſo facto, **deprived of that only Dignity, Benefice or other Eccleſiaſtical Promotion, by what Name ſoever it be called, whereof ſuch Certificate ſhall be made, ſo that ſuch Dignity, Benefice, or other Eccleſiaſtical Promotion, whereof any Incumbent making ſuch Default of Payment ſhall be adjudged deprived, as is aforeſaid, ſhall be clearly void and deſtitute of an Incumbent in Law, to all Intents and Purpoſes, as if ſuch Incumbent, making ſuch Default of Payment, were dead indeed.** Compare Stat. 26 *H.* 8. *c.* 3. with Stat. 2 & 3 *E.* 6. *c.* 20.

Voidance by not paying Tenths to the King.

Biſhop's Certificate of Non-payment, may be traverſed.

When a Biſhop doth certify, as aforeſaid, any Perſon's Refuſal or Neglect to pay his Tenths, his Certificate is not peremptory; becauſe the Biſhop doth it only as an Officer, and not as a Judge, as in the Caſe of *Baſtardy*: And therefore the Party concerned in ſuch Certificate, may be admitted to his Traverſe of it, and the Default in not paying, ſhall be tried by Jury; and though the Biſhop hath certified the Refuſal to be after Demand duly made, yet if the contrary be found by Verdict, the Judges are to rely upon the Verdict, and not the Certificate. That the Certificate may be good, there ought to be an expreſs Demand to pay the Tenths; and the Officer of every Biſhop that doth demand them, ought to be Authorized to receive them; wherefore a Demand made by an Apparitor is not good, and the Officer cannot appoint them to be paid to another Perſon

Demand.

Authority.

as

as his Deputy, or at any other Place than where the Incumbent is to pay them, *viz.* his own Houſe, or Church; or if a Member of a Cathedral, at his Stall in the Quire, (for upon Non-payment, the Place of Demand muſt be certified) and that they were demanded in the Name, and by the Authority of the Biſhop. *Mich.* 29 & 30 *El. The Queen* v. *Blancher*, 3 *Cro.* 80. the ſame Caſe. *Moor* 915. *Mich.* 39 & 40. *El. Reyner* v. *Parker*, *Moor* 541. *Paſch.* 22 *El. Savile*, Caſe 2. 1 *Leonard* 269. And if the Tenths, after that they are demanded, and before the Time limited by the Statute be expired, be paid by any Incumbent into the Receipt of the *Exchequer*, and the Biſhop of the Dioceſe doth after certify, that the Incumbent hath not paid his Tenths, this Certificate is not of any force. *Paſch.* 22 *El. The Biſhop of Coventry* and *Litchfield* v. *Beacon. Savile*, Caſe 63. When any Avoidance is upon Certificate of Refuſal, or Non-payment of Tenths, the Ordinary is not bound to give Notice to the Patron of ſuch Avoidance, but the Patron muſt take Notice, and preſent at his Peril, within ſix Months after ſuch Certificate duly made. *Paſch.* 7 *El. Dyer*, *fol.* 237. And ſo it is in all Caſes, where an Avoidance is made (as here) by Act of Parliament, unleſs it be ſpecially provided thereby, that Lapſe ſhall not run but from Time of the Notice.

Tenths, &c. not paid.

Place.

Payment before Certificate made.

The laſt Means by which a Church doth become void, by the Act of the Law, is, by the Deprivation of the Incumbent thereof, by Sentence in the Eccleſiaſtical Court, grounded upon ſome Act or Defect, there duly proved againſt ſuch Party deprived. In all Caſes before-mentioned, where a Church doth either remain, or become abſolutely void, by the Act of the Law, as to the Pariſhioners, *&c.* as well as the Patron, yet if the Perſon inſtituted and inducted thereinto doth continue therein afterwards as Incumbent, the Ordinary may examine the Matter, and declare the Church void, by Sentence in the Eccleſiaſtical Court. And in Caſes where the Church is void by the Act of the Law, notwithſtanding Inſtitution and Induction had, and Lapſe doth not run, but from the Time of Notice from the Ordinary, the Ordinary ought to proceed to a Judicial Inquiry, and to declare the Church void by Sentence, before he may give Notice of ſuch Avoidance. But by this Act of his, the Church is not properly void by the Deprivation, but only hereby declared to be voided by the Law, before ſuch Sentence came. And therefore a Church, properly ſpeaking, is void by Deprivation, when it was only voidable before the Sentence, by reaſon of ſome Defect or Crime, and by the Sentence is made actually void. For Inſtance, If a meer Lay-man, or a Deacon, not being three and twenty Years of Age, be admitted to a Benefice with Cure, their Admiſſion, Inſtitution and Induction, (as before is ſhewed, *c.* 5.) are meerly void in Law without Deprivation. Or if the Deacon admitted to a Benefice, be not admitted to Adminiſter the Sacraments within a Year after his Induction, if he be not admitted before; that is, ordained Prieſt. *Stat.* 13 *El. c.* 12. But if a Lay-man be only admitted to a *Sine-Cure*; or if a Deacon being three and twenty Years of Age be admitted to any Benefice, whether with or without Cure, their reſpective Benefices ſeem to be only voidable by Sentence of Deprivation in the Court Chriſtian. And the Reaſon of the Difference is, becauſe in the firſt Caſe, the Statute of 13 *El. c.* 12. doth not only Prohibit the Admiſſions of ſuch to Benefices with Cure, but alſo declares the Admiſſions, Inſtitutions and Inductions of them, to be meerly void. But in the later Caſe, the Statute of 14 *Car.* 2. *c.* 4. doth only make ſuch Perſons incapable of being admitted to Benefices, upon Pain to forfeit for every Offence the Sum of 100 *l.* but

Voidance by Deprivation.

By Sentence of the Ordinary.

Lay man or Deacon admitted, with Cure.

Lay-man admitted to a *Sine-Cure*, &c. Voidance by Deprivation.

13 *El. c.* 12.

Forfeiture by 14 *Car.* 2. *c.* 4.

Oath, &c. refuſed. Illiterate, &c.

doth not make their Admiſſion void: And (as hath been ſhewed) a Lay-man might have been admitted to, and enjoy a *Sine-Cure*, and a Deacon might have been admitted to any Benefice; yea, and tho' a Lay-man, who, by Law, was ever incapable of holding a Benefice with Cure, had been admitted to ſuch Benefice, yet this, at the Canon and Common Law, had not been a meer Nullity, before the Stat. 13 *El. c.* 12. but the Church was full of ſuch a Lay-man to all Intents, notwithſtanding his Incapacity, until ſuch Time as it was voided by Sentençe of Deprivation. *Mich.* 12 & 13 *El. Dyer* 292. and by *Anderſon*, in *Beneſield* and *Pickering*'s Caſe. *Hil.* 36 *El. B. R. Popham* 37. However *Quære*, Whether, when an Act of Parliament doth make any Perſons incapable of being admitted to Eccleſiaſtical Benefices, under a Penalty, it doth not alter the Caſe, ſo as only by declaring them incapable, all Admiſſions, *&c.* of them, are void without Deprivation? But ſuppoſing that the Admiſſions and Inſtitutions of ſuch Perſons, in the Caſes put, are good, yet the Ordinary may void them by Sentence Declaratory in the Eccleſiaſtical Court, elſe ſuch diſabled Incumbents would hold their Benefices, without Remedy, and a Perſon made incapable of being admitted to a Benefice by Act of Parliament, ſhould become capable of enjoying it by Inſtitution and Induction, by the ſole Favour of the Biſhop and his Arch-Deacon. The like Law ſeems to be, in caſe any Perſon hath peremptorily and obſtinately refuſed to take the Oath of the King's Supremacy, (being duly offered before his Admiſſion to any Dignity, Eccleſiaſtical Promotion, Office or Miniſtry) and ſhould notwithſtanding be admitted; for ſuch Perſon ſo refuſing, is preſently to be adjudged a diſabled Perſon in Law, to receive, take, or have the ſame Promotion Spiritual or Eccleſiaſtical. *Stat.* 1 *El. c.* 1. So if a Perſon utterly illiterate, be duly preſented, inſtituted and inducted, he is an Incumbent *de Facto*; becauſe he hath all Ceremonies to make him ſuch; yet his Inability is examinable, and his Church, for that Cauſe, voidable by Deprivation, as *Hobart* holds, in the Caſe of *Colt* and *Glover* v. *Biſhop of Litchfield*, *Hobart* 149. Alſo any Incumbent may loſe his Church by Deprivation, by reaſon of ſome Crimes; and for ſome Crimes, he is, *ipſo facto*, deprivable; for others, not till after Admonition firſt given. If a Clerk be convicted of Homicide or Murder at Common Law, he is, *ipſo facto*, to be deprived of all his Eccleſiaſtical Benefices, by the Eccleſiaſtical Law: But if there be a Fame only, that a Clerk is guilty of the ſaid Crime, or if the Fact be notorious, yet the Eccleſiaſtical Judge may not originally examine this Crime, to make a Man criminous; for neither Felony, nor any other Capital Crime, is examinable in the Eccleſiaſtical Court, *Hun*'s Caſe, *Kelloway* 181. no, not for Purpoſes that are determinable there, as is this Cauſe of Deprivation: But the Eccleſiaſtical Judge muſt expect, till ſuch Time as the Criminal hath been convicted in the Temporal Court, and hath had his Clergy there: And then may he be convented and libelled againſt. But there the Libel ought not to ſay, that he is an Homicide, or guilty of Manſlaughter, *&c.* for elſe a Prohibition lieth: But only that he was convicted of Homicide, *&c.* and ſo the Sentence of Deprivation ought to be grounded only upon the Conviction in the Temporal Court, without any further Examination of the Matter, by which the Verdict there given is not to be impeached, but affirmed; and though the Perſon convicted doth deſire, that he may be admitted to his Defence in the Spiritual Court, to prove his Innocency againſt the Verdict, yet that may not be allowed him, becauſe this would be to Impeach in a Court improper a Sentence given in a proper Court.

Q. If not void without Deprivation.

Oath of Supremacy refuſed.

Illiterate Perſon inducted.

Deprivation for Crimes.

Homicide, *&c.*

Caution.

Hobart 121, 288. *Searl's* Caſe, and *Trin.* 15 *Jac.* the ſame Caſe. 3 *Cro.* 430. Deprivation for Crimes.

A Pariſh Clerk was guilty of many enormous Crimes which were puniſhable at the Common Law; the Spiritual Court was prohibited to proceed againſt him *pro Reformatione morum, & Salute Animæ*, but was allowed to proceed againſt him to deprive him. This Clerk was appointed by the Vicar generally; the Court held he was in for Life, and was deprivable, though not puniſhable, in the Spiritual Court, for an Offence which was puniſhable in the Temporal Court. 2 *Ld. Ray.* 1507, *&c. Townſend* v. *Thorpe.*

18 *El. c.* 7. for Benefit of Clergy.

In the Time of Queen *Elizabeth*, an Act was made, **That every Perſon and Perſons, which ſhall be admitted or allowed, to have the Benefit or Privilege of his or their Clergy, ſhall not thereupon be delivered to the Ordinary, as hath been accuſtomed; but after ſuch Clergy allowed, and Burning in the hand, according to the Statute in that behalf provided, ſhall forthwith be enlarged and delivered out of Priſon, by the Juſtices before whom ſuch Clergy ſhall be granted, that Clauſe notwithſtanding.** Before this Statute the Law was, that if any Clerk had prayed his Clergy, and was delivered to the Ordinary, he was re-examined by twelve Spiritual Perſons, yet only *de Credulitate*; and if he was acquitted, he ought not to be deprived; but now being diſabled to make his Purgation, he unavoidably falls under the Cenſure; nor doth his being ſet at large, and exempted from Purgation by the Statute, diſaffirm the Judgment in the King's Court, which is the only Ground of the ſaid Deprivation; becauſe the Purgation before being only *de Credulitate*, did not diſaffirm it, though thereby he was acquitted. *Trin.* 15 *Jac. Searl's* Caſe, 2 *Cro.* 430.

Cauſes of Deprivation.

Note; There are many other Cauſes of Deprivation in the Eccleſiaſtical Court, beſides thoſe before-mentioned, and generally all Deprivations are by Reaſon either, 1ſt, of Incapacity, or 2dly, for Matter of Crime. Now for Matter of Crime, Deprivation is allowed of by the Common and Statute Law of this Realm in the following Caſes, *viz.*

Adultery (See Incontinency *infra*) *Vide* 6 *Co.* 13. *Latch* 22. *& poſt.* Atheiſm, Blaſphemy, Baſtardy, Forgery, Perjury, or other Facts *mala in ſe* after a Conviction in the Temporal Court. *Dyer* 293.

Common-Prayer, refuſing to Uſe it, 1 *El. c.* 2. is Deprivation, *ipſo facto*, or not reading it within two Months after Induction, or preaching in Derogation of it. 19 *Car.* 2. *c.* 4. *Vide* 5 *Co. Cowdry's* Caſe.

Articles of Religion, not reading them within two Months after Induction, and a general Pardon does not reſtore, which extends only to Offences for which Indictment lies; but this is not puniſhable in that Manner.

So not ſubſcribing them on taking a ſecond Living, makes the firſt void without any Declaratory Sentence. *Vide ante.*

So wilfully maintaining any Doctrine againſt them; but here Notice is neceſſary to be given to the Patron; otherwiſe the Biſhop can't collate by Lapſe, as before is ſhewn. *Vide* 13 *El. c.* 12. 6 *Co.* 23. 1 *And.* 136. *Dyer* 369.

Dilapidation by the Opinion of my Lord *Coke*, 3 *Inſt.* 204. is a good Cauſe of Deprivation, but ſome think the Authorities he cites in the Margin, do not prove it, *viz.* 29 *E.* 3. *f.* 16. Where 'tis true there is not one Word to that Purpoſe, and 3 *H.* 4. *f.* 3. is only the Opinion of Serjeant *Tyrwhit*, where *Thirning* Chief Juſtice is of Opinion, That if a Biſhop,

Deprivation and Appeal.

Biſhop, Archdeacon, *&c.* committed Waſte in cutting Wood which they had in Right of the Church, they were not puniſhable at Common Law, and then Demands of the Bar how the Party could be puniſhed in the Principal Caſe. Whereto *Tyrwhit* Anſwers, he ſhall be depoſed as a Dilapidator of his Houſe; and *Thirning* replies, Let that be as it will, (*i. e.* by Common Law) yet by the Law of the Land he is not puniſhable. Notwithſtanding which, I think that clearly at Common Law an Action of Waſte lay at Common Law for Dilapidations in Eccleſiaſtical Houſes and Buildings, and that therein the Place waſted was recoverable, which was *Tantamount* to a Deprivation; and this ſeems clear, by 11 *E.* 2. 332. 41 *E.* 3. 23. 7 *H.* 6. 18. 10 *H.* 7. 5, *&c.*

And in the 9 *E.* 4. *f.* 34. 'Tis held by *Moile*, *Juſtice*, That if a Son give an Abbot, *&c.* 10 *l.* to pray for the Soul of his Father, and he ſpends the Money, he ſhall not be deprived, becauſe he received the Gift *in jure proprio*, (or *in jure Perſonæ*); but if he aliened, *&c.* any of the Abbey Lands, he might be deprived, for thoſe he had *in jure Domûs*. And it ſeems to me there is the like Reaſon for a Deprivation, where Waſte is done in Houſes or Lands held *in jure Eccleſiæ*. See more of Dilapidations at the End of *Chap.* 39.

And of the ſame Opinion was the late learned Biſhop of *Worceſter* in his Treatiſe on the Subject, *f.* 61. who there cites *Saccar*'s Caſe in *Mo.* 917. Where a Prohibition was granted againſt Dilapidations, cutting Trees, or doing any Waſte on the Parſonage. *Vide* 1 *Lev.* 107. 1 *Sid.* 152. 2 *Bulſ.* 279. 3 *Bulſ.* 158. And *Quære* if the old Statute, *Ne Rectores proſternant arbores in Cœmeterio, &c.* was any other than a Declaration of the Common Law. *Vide c.* 39.

One excommunicated for forty Days, is to be deprived.

So may one Incontinent, *Hob.* 293. *Cro. El.* 41. 789. or one illiterate, *Hob.* 149. But in theſe Caſes there muſt be a Declaratory Sentence.

So may a Lay-man, but there muſt be a Sentence, and Notice thereof by the Ordinary to the Patron. 5 *Co.* 102. 1 *And.* 16. *Dyer* 293.

For Nonage under twenty-three the Patron muſt have Notice. *March.* 119. *Vide ante.*

Ordinary Diſobedience to him. See 2 *Cro.* 37.

Plurality, This is void *ipſo facto* by the Statute 21 *H.* 8. as before is ſhewn, and ſo no need of a Sentence, and the Patron is to take Notice thereof. *Vide ante, & Cro. Car.* 357.

Sacraments not adminiſtring them in the Form preſcribed.

Surplice, not wearing it, *&c.*

Tenths, *&c.* when demanded at the Churches or Houſes of Clergymen by the Collector, and not paid in forty Days, *&c. Vide ante.*

Simony, ſee before, *c.* 5. and *Note* this was a Cauſe of Deprivation before 31 *El. c.* 6.

Appeal upon Sentence of Deprivation.

If a Church be only voidable by Deprivation, and the Eccleſiaſtical Judge hath actually pronounced a Sentence of Deprivation againſt the Incumbent, yet if the Perſon deprived doth make his Appeal, the Church is not actually void, ſo long as the Appeal dependeth; and if the Sentence of Deprivation upon the Appeal be declared void, the Clerk is perfect Incumbent, as before, without any new Inſtitution. *Fitzherb. Abr.* 2 *Ri.* 2. *Quare Impedit* 143. 27 *H.* 7. *Gard.* 118. *Trin.* 7 *Eliz. Dyer f.* 240. ſee *Mich.* 33 & 34 *El. Gayton*'s Caſe, *Owen* 12. *Packman*'s Caſe, 6 *Co.* 18.

Where Appeals will lye or not.

Now as to Appeals in Eccleſiaſtical Cauſes, we may here obſerve from Authorities in the Common Law, That ſuch Appeal does not lye from a local

Deprivation and Pardon.

a local Viſitor, or in any Cauſe of a Temporal Nature. See *Dyer* 209. 13 *Co.* 70. Nor did it lie from the High Commiſſion Court when in Being; becauſe they themſelves were the King's Delegates, as acting by an immediate Commiſſion from him: And there was no Remedy againſt their Sentences, but a new Commiſſion to others, grantable by Virtue of the Royal Prerogative Independant on the Authority given by the Statute 25 *H.* 8. *c.* 19. or any other Statute. *Vide Moor* 782. 4 *Inſt.* 340.

If the Appeal in the Caſes of Deprivation be to the King in Chancery, and the Deprivation be affirmed by the King's Delegates; or if the Deprivation be immediately made by the Lord Chancellor or Keeper, for that the Incumbent is viſitable immediately by the King, I conceive, that no Appeal lies, and that the only Remedy that the Perſon deprived hath, is to get a Commiſſion of Review, which is only grantable of Grace by the King, and not of Right, nor is there any Remedy at Common Law, if the Cauſe of the Deprivation was Eccleſiaſtical; for there the Sentence is binding, and not thereby examinable: And therefore, if a Perſon be deprived by the Authority aforeſaid, and another be inſtituted to his Benefice, the new Incumbent's Title ſtands good, till it be reverſed upon the Commiſſion of Review: For this was ſaid, in the Caſe of a Clerk deprived by the High Commiſſioners. *Trin.* 4 *Jac. Bird* v. *Smith*, *Moor* 781.

Commiſſion of Review.

If a Perſon be deprivable by Canon Law for ſome Offences, yet the King hath Power to Pardon the Offence, and his Pardon is ſufficient to prevent a Deprivation, before the Crime doth *Tranſire in rem Judicatam*, 2 *Car. Boſton*'s Caſe, *Latch* 22. and is good againſt all Suits *pro Salute Animæ*, or *Reformatione Morum*, and againſt all Suits, *Ex Officio*, whatever in the Eccleſiaſtical Court, *Hall*'s Caſe, 5 *Co.* 51. ſaving, that the King cannot Pardon, or Diſpenſe with a Diſability made by Act of Parliament: And therefore, if a Deacon of the Age of three and twenty Years be inſtituted and inducted into a Benefice with Cure, tho' he is Incumbent in Fact, till Deprivation comes, yet no Diſpenſation, or Pardon, from the King, can make him Incumbent thereof *de Jure*, ſo as he ſhall not be ſubject to Deprivation: And that not only becauſe the Perſon is diſabled by Act of Parliament, but alſo when he is unable to ſerve the Cure, or unqualified for it, the King cannot diſpenſe with him to hold the ſame, and therefore not with a meer Lay-man, or with a Perſon utterly illiterate; becauſe it is *Malum in ſe*, as *Hobart* ſaith, in *Colt* and *Glover*'s Caſe v. *Biſhop of Litchfield*, *Mich.* 10 *Jac. Hobart* 149.

Where the King may Pardon the Offence.

Not of a Diſability by Act of Parliament.

As the King's Particular Pardon, ſo a general Pardon, doth ſecure a Clerk deprivable againſt Deprivation; and if a Crime be committed before the Pardon comes, and the Sentence of Deprivation be given after, the Sentence is void. *Hill.* 9 *Jac. Mortimer* v. *Freeman*, 1 *Brownlow* and *Goulds.* 70. and *Latch* 22. So if a Miniſter be deprived in Time of Parliament for an Offence, and the Offence be afterwards pardoned by an Act of the ſame Parliament, the Deprivation is void, and the Party need not ſue to have it reverſed by Sentence, becauſe the Pardon relateth to the firſt Day of the Seſſion of Parliament, in which it was made. *Trin.* 27 *Eliz. Fox*'s Caſe, 3 *Cro.* 41, 782. 2 *Leonard* 170, 172, 177. *Paſch.* 2 *Car. Boſton*'s Caſe, *Latch* 22. And in the Caſe of one *Burton*, the Law is ſaid to be taken to be, That if a Pardon by Parliament doth extend to the Pardoning of the Crime, it doth alſo extend to the Annulling of the Sentence given thereupon, tho' as well the Sentence, as the Crime, had a Being before the Pardon,

General Pardon.

Act of Parliament.

Deprivation and Pardon.

which takes its Date from the firſt Day of the Seſſion of that Parliament in which it is made, in the Interpretation of Law: And therefore, if a Crime be committed this Year by a Clerk, and he be for the ſame deprived by Sentence in the next, and in the next Year after the Sentence a Parliament is called, and then an Act made, which Pardons all Crimes committed before the firſt Day of that Parliament, the Crime for which the Clerk was deprived before the Pardon, or the Parliament that made it was in Being, being pardoned by ſuch Pardon, the deprived Clerk is Incumbent of his Church again, as before, by Judgment in Law, and is not driven to have the Sentence of Deprivation reverſed in the Eccleſiaſtical Court; no, not tho' another was in the mean Time become Incumbent of his Church; as the Caſe is *Hill.* 29 *Eliz. Burton*'s Caſe, 6 *Co.* 13. ſee *Davis*'s Caſe, *Trin.* 2 *Car. Latch* 141. But it ſeems a ſtrange and hard Conſtruction, that a Pardon extending to diſcharge Crimes committed at any Time before the Pardon, ſhould be conſtrued to take in ſuch Crimes, for which Sentences of Deprivation were given, it may be, ſome Years before; and to the Settling of ſuch Criminals in their Benefices again, to the Outing of honeſt Men, that came legally to the ſame, and which, it may be, left other Livings, to take thoſe voided juſtly by Deprivation, or at leaſt loſt Opportunities thereby of being otherwiſe provided for. And this Caſe of *Burton*, mentioned by my Lord *Coke*, hath been ſeveral Times denied for Law, as it is ſaid by Juſtice *Windham*, *Mich.* 15 *Car.* 2. in the Caſe of *The King* v. *Wainwright* and *Jeofferies*, 1 *Siderfin* 164. Beſides *Coke* refers us to find this *Burton*'s Caſe in *Dyer*; but no ſuch Caſe is to be found in the Printed *Dyer*; but as I have heard, the Caſe is in ſome manuſcript Reports of *Dyer*, but not as *Coke* gives it, but is the very ſame Caſe, in effect, with *Fox*'s Caſe, in 3 *Cro.* 41. mentioned before; (that is) *Burton* was ſentenced for Adultery, during a Seſſions of Parliament, and afterwards, in the ſame Seſſions, there paſſed a General Pardon, which related to the firſt Day of that Seſſions, ſo over-reached the Sentence of Deprivation, and by Conſequence made it void. *Vide Latch Rep.* 22.

Hard Caſe.

If a Real Cauſe of Deprivation by Law ceaſeth.

In *Windſor*'s Caſe, *Paſch.* 41 *Eliz.* 5 *Co.* 102. and in 3 *Cro.* 686. and in *Moor* 558. *Paſch.* 40 *Eliz. Loveden* v. *Windſor*, 'tis ſaid, that one *Parry* was deprived in the Time of Queen *Mary*, becauſe married, and a Favourer of the Religion in the Time of *E.* 6. and that another thereupon was inſtituted and inducted into his Benefice, who therein continued until the firſt of *Elizabeth*, when by the High-Commiſſioners, the ſecond Incumbent was deprived, and the firſt Sentence againſt *Parry* was repealed, and he reſtored to enjoy by Force of his firſt Preſentation, Inſtitution and Induction, the Benefice he loſt; and the Reaſon, upon which the Caſe is reſolved, ſeems to be, that the Sentence of Deprivation being declared void, and *Parry* thereby reſtored to his Living, by Relation, he was in upon his firſt Inſtitution and Induction, ſo the Church cannot be ſaid ever to have been void; or as I conceive, upon this Ground, that when a real Cauſe or Deprivation by Law ceaſeth to be a Cauſe thereof, a Sentence of Deprivation that was well given when the Cauſe of Deprivation was warrantable in Law, and the Effects thereof, (as the Inſtitution and Induction of another into the Benefice of the deprived) at ſuch Time when the Law ſhall make the Offence, upon which the Deprivation was grounded, to ceaſe to be an Offence, ſhall be ſaid void, or at leaſt voidable: For the firſt Sentence was well given; becauſe, for a Prieſt to be married, or to be a Favourer of the Religion received in

the Time of *E.* 6. as the Law ſtood in the Time of Q. *Mary*, were ſufficient Cauſes of Deprivation, until the Law was again altered, 1 *Eliz.* and ſo the other lawful Incumbent, until the ſecond Deprivation came, or at leaſt until ſuch Alteration was made. Notice of Deprivation.

In the Caſes aforeſaid, and ſo in all others, where the Church is only voidable before Deprivation, and by that made void, the Ordinary is to give Notice of the Avoidance to the Patron, and the Patron hath ſix Months after the Notice, in which he may preſent before Lapſe can run to the Ordinary. *Mich.* 15 *Eliz.* 3 *Leonard* 45. *Hill.* 43 *Eliz.* *Leake* v. *Biſhop of Coventry*, and Dr. *Babington*, 3 *Cro.* 811. *Mich.* 15 & 16 *Eliz.* *Dyer*, *fol.* 327. 1 *H.* 7. 9. *b.* *Doctor and Student*, *Lib.* 2. *c.* 13. 5 *E.* 4. 3. *b.* *Hill.* 9 *Car.* *King* v. *Prieſt*, *Jones* 337. *Hill.* 36 *Eliz.* *B. R.* *Popham* 37. Notice to the Patron.

And ſeeing that in all Caſes when the Church is ſo void, that the Patron is not bound to take Notice of the Avoidance thereof, for the preventing of a Lapſe, and the Biſhop cannot have Advantage of the Lapſe, until ſix Months after he hath given Notice of the Avoidance to the Perſon of the Patron (if he be within the County when he gives Notice,) *viz.* to him that is to preſent to the preſent Avoidance, altho' the perpetual Inheritance of the Advowſon be in another, (yet if he doth only give Notice to ſome ſuppoſed Patron, his Notice is vain) it may be a Queſtion, what Courſe in ſuch Caſe the Biſhop is to take? As to which, if the Biſhop doth not certainly know who is Patron, and ought to preſent to the void Turn, his way (by the Opinion of *Hobart*) is to award a *Jure Patronatus*, with ſolemn Premonitions *Quorum Intereſt*, and then Inquiry being made who is Patron, the Ordinary is to give him Perſonal Notice, who is found to be ſo by the Verdict; that is, if he be then within the County, otherwiſe by publick Edict at the void Church, *Dyer* 328. 3 *Cro.* 119. and if he doth not preſent within ſix Months after, the Ordinary may Collate: And tho' by the *Jure Patronatus*, not he that is the true Patron, but a Stranger, is found to be Patron, yet this Proceeding ſhall excuſe from Diſturbance upon the ſpecial Matter ſhewed: But if he that is found to be Patron, upon the *Jure Patronatus*, doth preſent, and the ſix Months do incur, *Quære*, If the true Patron be bound, ſince there was no Notice given him? And I am of Opinion, (ſaith he) that tho' without Notice the Patron is not bound by the Lapſe, yet that is nothing to ſave the Uſurpation of another pretended Patron, who is not ſubject to give Notice. Sir *William Elvis*'s Caſe v. *The Archbiſhop of York*, *Taylor* and *Biſhop*, *Hob.* 318. *Jure Patronatus* by the Biſhop. To give the Patron Notice.

And accordingly when a Clerk was deprived for the Cauſe of not ſubſcribing the Articles upon the Statute of 13 *Eliz. c.* 12. and the Biſhop gave Notice thereof in theſe Words: *R. Epiſcopus C. univerſis Rectoribus, Vicariis, Curatis, non Curatis, Clericis & literatis quibuſcunque infra Diæceſin noſtram Ciceſtrenſem ſalutem. Cum Ri. Clericus Vicarius perpetuus Vicariæ perpetuæ Eccleſiæ Parochialis de C. noſtr' Diæceſis non ſubſcripſit Articulis, &c. juxa Statutum, &c. Mandamus eis omnibus, & præcipue Curato de C. ad Declarandum in Dicta Eccleſia de C. dictam non ſubſcriptionem, &c.* which were read in *Engliſh* by the Curate, in the Pulpit, in the ſaid Church of *C.* in the Time of Morning Prayer, and after were fixed to the Door of the Church, by a Publick Apparitor; theſe Exceptions were taken thereto: Firſt, That there was no Mention of the Patron, or his Name, in the Intimation. Secondly, That no expreſs Mention is made of the Deprivation, according to the Proviſo in the Statute aforeſaid, nor of any Qualification of the Perſon deprived, by which he Notice of Deprivation.

Notice of Deprivation.

he ought, or it was needful for him, to ſubſcribe the ſaid Articles. Thirdly, That he is called, *Vicarius Perpetuus*, and not *Nuper Vicarius*; which implies, That he was not deprived at the Time of the Intimation, by which no Deprivation was, or could be notified. Fourthly, That it was not made to the Perſon of the Patron: And the Opinion of the Civilians is, That the aforeſaid Intimation is not ſufficient to prejudice the Patron, for that it was upon a Statute Penal, both to the Incumbent and Patron, and ſo ought to be, *Vere, proprie, & perſonaliter, non fictè*; but ought to notify, that the Ordinary had deprived him by Declaratory Sentence, *Pro non Aſſenſu & Subſcriptione Articulis ſecundum Statutum.* And ſo reſolved for the Cauſes aforeſaid by all the Juſtices and Chief Baron, except *Harper* and *Mounſon*, *abſente Gawdy*. *Hill.* 18 *Eliz. Dyer* 346.

The Notice ought to be *Vere, proprie, & perſonaliter, &c.*

Quære Biſhop *Watſon's* Caſe.

As to the Power of an Archbiſhop, *&c.* in depriving Biſhops, a Queſtion has lately ariſen, Whether he has any Power to deprive a Biſhop for any Cauſe whatſoever, or whether it ought to be done in Convocation. And thoſe who deny the Archbiſhop's Power herein, do affirm, That he hath no ſuch Authority either by the Canon, or the Statute Law.

The Canons (ſay they) are expreſly againſt it, for thoſe direct, that a Biſhop ſhall be deprived in a Synod of the Province, or if that cannot be aſſembled, then by the Archbiſhop and twelve other Biſhops at leaſt, not as Aſſiſtants, but Co-judges with him.

That ſome Inſtances of this Method of Proceeding are as early as the third Century, as in the Caſe of *Fortunatus*, whom ſome Schiſmaticks of *Carthage* had ſet up for Biſhop of that Place in Oppoſition to St. *Cyprian*, who did not think fit to depoſe him by his ſingle Authority, but had it done in a full Council of the *African* Biſhops, *&c.*

And that in the ſame Age, *Baſilides* and *Martialis* were depoſed by Another Council of *Spaniſh* Biſhops; and that many more ſuch Inſtances may be found in the Fathers, and they urge, That all this was done in Conformity to the *Ancient Canons* of the Church.

But as to the Inſtance of St. *Cyprian* we may obſerve, That as he paid a ſingular Reſpect to Councils, ſo he had no leſs a Regard to the Opinion of his Flock or People, for in his ſixth Epiſtle he ſays; *I reſolved with my ſelf from the Time of my Entring on the ſee to do nothing by my own perſonal Authority, without the Advice of my Prieſts or Preſbyters, and the Conſent of my People.* And therefore 'tis no Wonder his humble condeſcending Temper ſhould ſubmit a Matter, wherein he himſelf was a Party concerned, to the Judgment and Determination of a General Council.

And as for the Practice of the *Spaniſh* Biſhops, or the Ancient Canons above-mentioned, I cannot find they were ever admitted here in *England*. On the contrary 'tis certain, the Practice here has been otherwiſe, and divers Biſhops have been deprived of their Biſhopricks by Commiſſioners appointed by the King: ſo was *Bonner* deprived of the Biſhoprick of *London*.

'Tis ſaid indeed, That ſuch Commiſſions were iſſued at that Time from the Crown, by Virtue of a Supremacy lodged in our Kings, becauſe a Biſhop could not then be deprived in a Synod ſo ſoon after the Reformation; for the Popiſh Biſhops and Clergy were then too numerous in thoſe Aſſemblies for the Proteſtants, and therefore 'twas thought proper to proceed by ſuch Commiſſions.

But

Advowſons, &c.

But it was no Objection againſt *Bonner*'s Deprivation, that it was uncanonical as being done by the King's Authority, but only becauſe ſome of the Commiſſioners were Lay-men. Which no doubt might lawfully be, for this Matter is not merely Spiritual, but of a mixt Nature, and therefore Lay-men may well join in ſuch a Cenſure of Deprivation.

Beſides, ſince a Biſhop here in *England* is veſted with that Dignity by a Commiſſion or Authority derived from the King, 'tis reaſonable he ſhould be deprived (where there is juſt Cauſe) by the ſame Authority. For tho' the Pope did formerly aſſume a Juriſdiction to deprive Biſhops, yet that being by Uſurpation on the King's Prerogative, when the Pope's Power became aboliſhed, the Kings of *England* were not only reſtored to, but have ever ſince enjoyed their Ancient Right herein.

And therefore not only *Bonner* Biſhop of *London*, *Gardener* Biſhop of *Winton*, *Heath* Biſhop of *Worceſter*, *Day* Biſhop of *Cheſter*, *Tunſtall* Biſhop of *Durham*, and others were formerly deprived of their reſpective Biſhopricks by Commiſſioners appointed by the King, notwithſtanding theſe and other Objections, *viz.* That the Commiſſioners proceeded *ex Officio* contrary to the King's Eccleſiaſtical Laws; That Interrogatories were drawn up, *&c.* without the Biſhop's Knowledge; That the Witneſſes were examined privately, and not on Oath, and that the Commiſſioners would not ſuffer the Biſhops to croſs examine them. That they refuſed to receive any Appeal, and deprived them *pendente appellatione*; to which we may add the well known Caſe of Dr. *Watſon*, late Biſhop of *St. Davids*.

CHAP. VII.

Of the Original of Advowſons and Right of Patronage, and the Nature thereof both Appendant and in Groſs, and of a Right by Uſurpation, &c.

IN an old Canon Law Gloſſary, printed *Anno* 1500, I find the Word *Advocatus* defined to be *qui alio nomine, quaſi legatus*, Patronus *vocatur*; *quia in forenſibus ſeu extraneis negotiis* (*præ-eminentibus*) *præbet litigantibus ſuum* Patrocinium, &c. *Et inde venit verbum* Advocare, *quod eſt*, poſtulare pro opponente, & Deſiderium *ejus coram judice* exponere & patrocinium *in cauſa præſtare*; which Words ſeem to juſtify that Diſtinction of *Spelman* and *Cowell*, That Eccleſiaſtical Advocates or Patrons were of two Kinds, *viz.* one of the Cauſe or Perſon, and the other of the Place or Church. *Spelman & Cowell in verbo.*

The former of theſe Advocates or Patrons are in the Canon Law called *Defenſores*, who were to be elected by a Licence from the Emperor at Diſcretion of the Biſhops, and were employed either to defend *Cod. Affric.* Canon 75, & 97.

Advowſons, &c.

the Rights of the Church, or to protect the Poor againſt the Rich. Which kind of Advocates were, as *Spelman* obſerves, introduced after the Conſulſhip of *Stilico* (*i.e. circa Ann.* 400). *Vide Spelman in verbo.*

The ſecond kind are by *Spelman* ſtiled *Advocati Eccleſiæ ratione ſoli*, and ſuch were the Founders of Churches or Monaſteries, or their Heirs, as in the Book of *Ramſey Abbey*. *Dux Ailwinus*, (who was the Founder) *proruit in Medium, ſe Rameſenſis Eccleſiæ* Advocatum, *ſe poſſeſſionum ejus Tutorem allegans*, and afterwards, *Piæ memoriæ advocatus noſter Ailwinus Aldermannus*. Alſo Earl *Alfgar* is in the Book ſtiled *Advocatus* (*i. e. Patronus*) *Eccleſiæ de Burwell*. And *Johannes Extraneus*, or *Le Strange*, *circa Temp. H.* 2. is alſo therein ſaid to be *Advocatus Eccleſiæ de Hulmo*. And *Glanvil* about the ſame Time ſays, *ſi quis* Advocatus *præſentavit perſonam ad Eccleſiam, &c.* And in another Place ſays, *Si is qui ſe perſonam gerit in Eccleſia ipſa, Advocet per unum* Advocatum, (or Patron) *& alius Patronus clamat eandem* Advocationem, *&c.*

Lib. Rameſ. Sect. 49. *Ib. Sect.* 77. *Ib. Sect.* 25. *Ib. f.* 37. *Glan. lib.* 13. *cap.* 19. *& lib.* 4. *c.* 7.

Spelman in verbo.

And the before cited Author obſerves, That the Word *Advocare* was in thoſe Times taken *pro Defendere & tutari. Dicuntur enim* Advocati *non* (*tantum*) *quòd vacanti Eccleſiæ Rectorem advocarent, quæſtum ex hoc* (*ut ſolent*) *facientes*; *ſed quod laboranti Eccleſiæ ſuccurrerent, tuerentur, defenderent, &c.* Thus far of the Ancient and Original Signification of the Words *Advocatus, Advocare, &c.* If any deſire to ſee other Significations thereof, he may peruſe beſides the Authors *ſupra*, *Rag. f.* 19 *&* 12. *in verbis* Advocator *and* Advowſon, *Gloſſary* in *Matt. Paris, & Skene de verbor' Significatione, Lambard's Saxon* Laws, *verb.* Advocare, *Couſtumier de Normandy, f.* 103, 104. *Seld. Janus, f.* 9. Hiſtory of Tithes 355. *Bracton* 249. *b.* 248. *Fleta, lib.* 2. *cap.* 71. *& lib.* 5. *cap.* 14. *Bodin* 105. *Doderidge* of Advowſons. *Co. Lit.* 17. *b.* 18, 47, 119. *b.* 122, 197. *b.* 332, 366, 374. *b.* And Note *Ryley's Placita Parliamentaria, f.* 82. *Homin. de Manupaſtu vel de advocatione Comitis Glouceſtriæ.*

Vide Cod. Affr. ſupra.

Biſhop *Gibſ. Cod.* 795.

The Original of Advowſons, or Right of Preſentation to Benefices here in *England*, we have already ſhewn in the Beginning of this Diſcourſe, and therefore ſhall only add in this Place the Obſervations or Collections of a Right Reverend Prelate, in his large and laborious Work touching Advowſons in general, *viz.*

De Jure Patron, c. 1. *cui, &c.*

The Right of Advowſon (called in Latin *Jus Patronatûs*) or of preſenting a Clerk to the Biſhop as oft as a Church becomes vacant, was founded in the Building, or giving Land to Build on, or in the Endowing of ſuch Church, and according herewith is that Definition of *Linwood*, *viz. Jus Patronatûs eſt Jus honorificum, oneroſum & utile, alicui in Eccleſiâ competens, pro eo quod de Diœceſani licentia, ſive conſenſu, illum* fundavit, dotavit *vel* conſtruxit *ipſe, vel is, a quo juſtam cauſam* (*præſentandi*) *habet.*

Original of Advowſons.

For although the Nomination of fit Perſons to officiate throughout the Dioceſe, was originally in the Biſhop, and in none elſe; yet when Lords of Manors of old were willing to build Churches, and to endow them with *Manſe* and *Glebe* for the Accommodation of fixed and reſiding Miniſters, (who before were as ambulatory Miſſionaries of the Biſhops), the Biſhops on their Part, (for the Encouragement of ſuch pious Undertakings) were Content that thoſe Lords ſhould have the Nomination of Perſons to be inſtituted to the Churches ſo built, and endowed by them, reſerving ſtill to themſelves the Right of judging of the Fitneſs of the Perſons ſo nominated.

And thus what was at firſt a Matter of Practice, became in Proceſs of Time the Law of the Church, and thereupon was founded this Conſti-

tution, *viz. Decernimus ut quamdiu* Fundatores *Eccleſiarum in hâc vitâ ſuperſtites exſtiterint pro eiſdem Locis* curam *permittantur habere* Solicitam, *atque* Rectores *idoneos in eiſdem Baſilicis iidem ipſi offerant Epiſcopis ordinandos.* And that other, *Si quis Eccleſiam cum aſſenſu Diœceſani* conſtruxit, *ex eo* Jus Patronatûs *acquiritur.*

Advowſons, &c.

Extra. l. 3. T. 38. c. 25.

Note the Words, *Curam habere ſolicitam ſupra*, ſeem to point out the Reaſon why they were called *Advocati* and *Patroni*, *i. e.* becauſe they were bound to Defend and Protect both the Rights of their Churches, and the incumbent Clerks from Oppreſſion and Violence.

Now the ſaid Right of nominating, (which at firſt was annexed to the Perſon building or endowing the Church) afterwards deſcending to his Heir, became by Degrees to be appendant to the Manor wherein it was built. For the Land and Endowment were ſuppoſed to be Parcel of the Manor and the Church itſelf, to be built by ſuch Lord for the Uſe of the Tenants and Inhabitants of his Manor, and the Tithes of the Manor were alſo annexed to the Church; upon all which Accounts it was thought very reaſonable, That the Right of Advowſon ſhould paſs with the Manor, or with ſuch Part thereof as might at any Time be granted or aliened together with the Advowſon, to which (whether to the Whole or Part) it is therefore ſaid to be appendant, *i. e.* to the *Demeſnes* which are of perpetual Subſiſtence, but not to Rents or Services, which (though Parcel of the Manor) may be extinguiſhed, and therefore cannot ſupport ſuch an Appendancy. See *Co. Lit. Sect.* 184. and *Hughes* and *Shepherd*'s Abridgments, *Tit.* Advowſon.

Vide poſt.

The Advowſon of a Vicarage may be appendant to a Manor. 1 *Ld. Ray.* 200.

And Note in every Advowſon or Rectorſhip, there ought to be three diſtinct and different Rights concurring, viz. 1. *Jus Præſentationis*, or the Patron's Right of Preſentation. 2. *Jus Ordinationis*, or the Ordinary's Right of Inſtitution, and 3. *Jus Poſſeſſionis*, or the Incumbent's Right of Poſſeſſion, *i. e.* the Right of the Parſon imparſonee. And the Word *Advowſon*, though it be generally taken for a Right of Preſentation or Collation to any Church, Chapel or Chantry, either preſentative, collative, donative or elective, yet it truly and properly ſignifies a Right of Preſentation to a Church parochial, thereof, or therein to be Incumbent with Cure of Souls, and may be either of a Parſonage or Vicarage. See *Co. Lit.* 119. 5 *Co.* 50. *F. N. B.* 33.

Three Rights in every Advowſon.

After a Clerk hath Knowledge that a Church is void, he is in the next Place carefully to inform himſelf who is the true and rightful Patron thereof; for otherwiſe he may be put to great and exceſſive Charges in defending his Patron's Title, and yet in the End loſe the Benefice; Therefore and in order thereunto he ought to underſtand how, and by what Means the Right of Patronage, (which is a Right of preferring a fit Clerk to a Spiritual Promotion) may come to any Perſon. And that the Way to the Knowledge of this may be the more clear; it is to be noted, that of Advowſons, ſome Advowſons are Appendant, and ſome in Groſs; ſome partly Appendant, and partly Groſs. To explain which, we muſt know that there are two Sorts of Inheritances, the one Corporate, ſuch are Meſſuages, Lands, *&c.* which have Subſtance in themſelves, and may continue for ever. The other Incorporate, as Advowſons, Ways, Commons, Courts, *&c.* And theſe latter may be, and often are Appendant to the former; ſo that an Advowſon Appendant is an Inheritance incorporate, that doth appertain to ſome corporate Inheritance, whereby he in whom ſuch corporate Inheritance is, hath Title to the Advowſon, as annexed thereto; But when an Advowſon, either originally Appendant (which

Of Advowſons.

Appendant, *&c.*

An Inheritance Incorporate.

can

Advowſons, &c.

can be only by building or endowing the Church, or the like, as aforeſaid) and afterward by Grant, Deed, Partition, or ſome other Legal Act, is ſevered wholly from that corporate Inheritance to which it was Appendant, it is then ſaid to be an Advowſon in Groſs; and when it is in Part, and at ſome Turn only ſevered from what it was Appendant, it is ſaid to be in Part Appendant, and in Part in Groſs.

An Advowſon in Groſs, &c.

The Original of appendant Advowſons, is thought to be by the ſame Means by which the Titles to the Advowſons themſelves were gained, *viz.* by giving either the Lands upon which the Church is built, or the Glebe with which it is endowed; and ſo the Land on which the Church is built, or the Glebe with which it is endowed, or both, are ſuppoſed to be Parcel of the Manor or Honour, to which we find the Church appendant as aforeſaid. But to ſhew that an Advowſon is appendant, 'tis not neceſſary to ſet forth the Original thereof; for that were impoſſible, being the Appendancy is ſuppoſed Time out of Mind, the Beginning and Commencement whereof is not to be known: And it doth in itſelf imply a Title by Preſcription, to the Owners of that Manor, *&c.* 11 *H.* 6. 11, *&* 12. 13 *Eliz. Dyer* 299. 1 *Inſt.* 121. But where the Advowſon hath at all Times, whereof the Memory of Man is not to the contrary, paſſed with the Manor by theſe Words, *Cum pertinentiis*, 33 *H.* 6. 4. *b.* it is to be taken as an Advowſon appendant: But a Preſcription for the Appendancy of an Advowſon is not good, where the Thing to which it is affirmed to be appendant is of that Quality, that thereto an Advowſon may not be ſaid to be perpetually appendant. 5 *E.* 6. *Dyer* 70. *b.* 8 *H.* 7. 4, *&* 5. *Plowden* 68. 1 *Inſt.* 122. Such are Things that are not of a perpetual Subſiſtence, as Rents and Services, that may be extinguiſhed; it ſhall therefore be ſhewed particularly to what Things an Advowſon may be appendant.

Vide 33 *H.* 6. 11, 12, *&* 33. Glebe.

Advowſon appendant, how.

To what Things.

Properly and originally, an Advowſon may be appendant only to Inheritances Corporeal, as to Manors, Caſtles, *&c. Plowd.* 170. *b.* 10 *H.* 7. 13. but moſt commonly it is appendant to ſome Manor; and an Advowſon in one County may be appendant to a Manor in another County; that is (I ſuppoſe) where the Manor did originally extend itſelf into divers Counties. 23 *H.* 6. 4. So two or more Advowſons may be appendant to one Manor, as where a Manor is extended into divers Pariſhes: And one Advowſon may be appendant to two Manors, as when two diſtinct Churches, appendant to two Manors, by Union, become one Church; in which Caſe the Advowſon is intire, and no Moieties, as is between Coparceners, Joint-Tenants and Tenants in Common; yet ſome Authorities are, that each of the ſame Patrons, after the Union, is ſeiſed *De Medietate Advocationis Eccleſiæ.* 14 *H.* 6. 15. *b. Dyer* 259. *b.* But if an Advowſon be originally appendant to one Manor, of which Manor another Manor is held, though the Manor which holds of the other, doth by Way of Eſcheat become Parcel thereof, yet the Advowſon is appendant only to that Manor to which it was originally appendant. *Coke Litt.* 122. Laſtly, the Moiety of an Advowſon may be appendant to a Manor, or to Part of a Manor. 33 *H.* 6. 11. *&* 12. *a. Dyer* 44. *b.* But when 'tis ſaid, That an Advowſon may be apppendant to a Manor, 'tis to be underſtood in reſpect of the Demeſnes only, which are of perpetual Subſiſtence and Continuance, and not in reſpect of the Rents or Services. *Paſch.* 39 *Eliz. Rot.* 2024. *Long*'s Caſe in *C. B.* 5 *E.* 6. *Dyer* 70. *Savile*'s Caſe 182, *fol.* 104. And generally, one Thing incorporate cannot be appendant to another Thing incorporate. *Plowden* 170. *Bracton, Lib.* 2. *f.* 53. *Co.* 4. *Tirringham*'s Caſe, 36. *b.* 1 *Inſt.* 121. *b.*

Appendant to Inheritances Corporeal.

Union.

Originally appendant.

Moiety.

Secondarily appendant.

An Advowſon may be appendant to ſome Things ſecondarily, to which it may not be appendant originally; for originally an Advowſon cannot be

Advowſons, &c.

be appendant to one or two Acres of Land, 33 *H.* 6. 12. *a.* yet by ſecondary Means it may. 18 *E.* 3. 52. *b.* 39 *E.* 3. 36. *b.* 19 *E.* 3. *Quare Impedit* 155. 28 *H.* 8. *Dyer.* 24. As if he that is ſeiſed of a Manor, to which an Advowſon is appendant, grants one or two Acres of the Manor, *una cum Advocatione*, the Advowſon is appendant to ſuch Acre, 5 *H.* 6. 10. *a. Fitz. Feoffment*, 155. 17 *Ed.* 3. 3. eſpecially after the Grantee hath preſented. 44 *Ed.* 3. 16. 17 *Ed.* 3. 3. *b.* 5. *a. Adjudg. ib.* 21. *B.*

Owner of a Manor grants one Acre *una cum Advocatione.*

But this Feoffment of the Acre, with the Advowſon, ought to be by Deed, to make the Advowſon appendant, 17 *E.* 3, 4. *B.* 18. *B.* and the Acre of Land and the Advowſon ought to be granted by the ſame Clauſe in the Deed: For if one having a Manor with an Advowſon appendant, grant an Acre Parcel of the ſaid Manor, and by another Clauſe in the ſame Deed, grants the Advowſon, yet the Advowſon ſhall paſs in Groſs, and not appendant to the Acre; but if the Grant had been of the intire Manor, the Advowſon would paſs as appendant. *Paſch.* 33 *H.* 8. *Dyer* 48. 2. 44 *E.* 3. 4. *b.* 48 *E.* 3. 4. *b.* So if an Huſband ſeiſed in Right of his Wife, of a Manor, to which, *&c.* alien the Manor, by Acres, to divers Perſons, ſaving one Acre, the Advowſon ſhall be appendant to that Acre. 17 *E.* 3. 22. *b.* Or if Leſſee for Life of a Manor, to which an Advowſon belongs, alien one Acre, with the Advowſon appendant, the Advowſon is thereby appendant to that Acre. 18 *E.* 3. 44. 17 *E.* 3. *a.* So if in ſuch Caſe he alien one Acre, with the Advowſon appendant, and after alien the reſt of the Manor, the Advowſon is appendant to the Acre aliened with it. 17 *E.* 3. 22. *b.* 19. *b.*

By Deed.

Clauſe.

One Acre ſaved.

If a Partition be made of a Manor to which an Advowſon is Appendant, and the Advowſon is excepted, the Appendancy is deſtroyed, and the Advowſon is become in Groſs. 1. *Ld. Ray.* 198. By *Powell* J. in the Caſe of *Reynoldſon* v. *Blake* and the Biſhop of *London.*

A Reverſioner of a Manor to which an Advowſon is appendant, uſurps, the Advowſon is become in Groſs: But if the particular Eſtate determines, the Advowſon is become appendant again. *Hob.* 323. cited 1. *Ld. Ray.* 302. in the Caſe of *The King* and *Queen* againſt *The Biſhop of Cheſter, Piers* and *Scroope.*

Secondarily to a Meſſuage.

As an Advowſon may by ſecondary Means be appendant to one or more Acres; ſo though an Advowſon cannot originally be appendant to a Meſſuage, *M.* 33 *El.* in *C. B. Long* and *Hemming's* Caſe, 3 *Cro.* 209. yet ſecondarily it may. 7 *E.* 4. 23. As when a Meſſuage is built upon a Parcel of Land to which an Advowſon was appendant, the Advowſon becomes appendant to the ſame Meſſuage; and if the Meſſuage doth fall, or be pulled down, the Advowſon ſhall be as before, appendant to the Land. *Plowden* 170. *b.* 10 *H.* 7. 13. *b.* by *Keble.* In like manner an Advowſon of a Vicarage may be appendant to a Parſonage, as being derived and endowed out of the ſame. 18 *Eliz. Dyer* 350. *b.* 17 *E.* 3. 76. *a. Mich.* 16 *Jac.* Sir *George Shirly* v. *Underhil* and *Burſey*, *Moor* 894. Upon which Account it is, that if a Parſon be Patron of a Vicarage, and doth leaſe the Parſonage to another, the Patronage of the Vicarage ſhall paſs as incident thereunto. *Roll's Abr.* 2. 59. And upon the ſame Account the Rector of common Right is ever eſteemed Patron of the Vicarage, though by ſome Ordinance or Compoſition, or by the King's Grant it may be appointed and ſettled otherwiſe as before is ſhewn; and ſo may even an Advowſon of a Vicarage be appendant unto other Things, as to a Manor, by Reſervation upon the Appropriation, becauſe the Advowſon of a Rectory was appendant thereto. *Mich.* 16 *Jac. Sherley* v. *Underhil's* Caſe, *Moor* 894. *Mich.* 13 *Jac. B. R. The King* v. *Biſhop of Norwich, Cole* and *Saker*, 1 *Rol. Rep.* 235. as alſo by the Grant of the Parſon, before the

So to a Parſonage.

– See Fitzh. Abr. Grant 89. & Cro. Jam. 386.

Advowſons, &c.

Time of Memory. *Mich.* 13 *Jac. B. R. King* v. *Saker*, 2 *Cro.* 386. the ſame Caſe, 1 *Roll's Rep.* 235. *Mich.* 14 *Jac. The Dean and Chapter of Exeter* and *Corniſh*'s Caſe, *Roll's Abr.* 2. 336. And in this Caſe, altho' the Right of Appropriation be not extant, yet the Uſe of preſenting Time out of Mind, is a ſufficient Evidence of the Appendancy to the Manor, *&c.* contrary to the common Right. Sir *George Shirley* v. *Underhil* and *Burſey*, *Mich.* 16 *Jac.* *Moor* 894.

Of one Church to another.

Alſo an Advowſon of one Church may be appendant to another ſecondarily, tho' Things of the ſame Nature cannot originally be appendant to each other, *Fitz. Quare Impedit* 13. 24 *E.* 3. yet 'tis ſaid, one Advowſon cannot be appendant to another. *Roll's Abr.* 1. 231.

How appendant may become in Groſs, and made diſappendant.

An Advowſon (to what Thing ſoever it is appendant) may be ſevered from the ſame, and become an Advowſon in Groſs, by divers Means, by ſome of which it is made to be abſolutely diſappendant, by others only for a certain Time. An Advowſon is made diſappendant abſolutely; Firſt, by an Exception of the Advowſon upon a Grant of the Manor, or other Thing, unto which it is appendant in Fee-ſimple; or, by a Grant of the Advowſon alone, the Thing to which it belonged not being alſo conveyed. And tho' he that is ſeiſed of a Manor to which an Advowſon is appendant, doth grant one Acre of Land, Parcel of ſuch Manor, *una cum Advocatione Eccleſiæ*, which Grant alone makes the Advowſon appendant only to the Acre; yet, as hath been ſaid, if he firſt granteth the Acre, and then by a diſtinct Clauſe in the ſame Deed, he further giveth and granteth the Advowſon, ſuch Advowſon ceaſeth to be appendant to the Manor: For tho' theſe two Grants be but in one and the ſame Deed, yet becauſe they are by ſeveral Clauſes, they are as ſeveral Grants, and by the latter it is granted as an Advowſon in Groſs; for it ſhall be conſtrued, as all Grants are, *viz.* ſo as ſhall be moſt for the Benefit of the Grantee, and therefore to paſs in Groſs. 33 *H.* 8. 48 *Dyer*. And yet if the intire Manor be granted, and by the ſame Deed, the Advowſon that is appendant to it, tho' the Advowſon be named in a diſtinct Clauſe, and in Groſs, yet it ſhall paſs as appendant. 48 *E.* 3. 4. *b.*

By ſeveral Clauſes in one Deed.

By levying a Fine.

If upon the levying of a Fine, he that hath an Advowſon as appendant, doth acknowledge the Right to be in another, by ſuch Conuſance the Advowſon is ſevered from the Manor to which it was appendant, and can never become appendant again by any After-grant; but if in ſuch Caſe one Perſon doth by Fine acknowledge the Right of an Advowſon to be in him to whom it belongs, and upon this Conuſance, he to whom the Acknowledgment is made, doth grant, that the other, his Heirs and Aſſigns for ever, ſhall preſent by Turns; notwithſtanding the Acknowledgment that the Advowſon was in him, it ſhall be appendant as before, for ſo much of it as doth remain not granted away, *viz.* for every other Turn; and in Groſs, for that which is paſſed by the Fine; but if he who is ſeiſed of the Advowſon appendant, doth by Fine paſs it away to another, who by the ſame Fine doth render it back to him in Fee, yet the Advowſon by the Grant became to be in Groſs, and no Matter after that can make it appendant again. *Compleat Parſon* 58, 59. 43 *E.* 3. 35. *a.*

The Appendancy of an Advowſon to a Manor may be deſtroyed by a Fine *ſur grant & render* levied of the Advowſon. 1 *Ld. Raym.* 198. by *Powell* Juſtice, in the Caſe of *Reynoldſon* v. *Blake* and the Biſhop of *London.*

Accepting a Fine of a Stranger.

If a Man that is ſeiſed of a Manor, to which an Advowſon is appendant, doth accept of a Fine from a Stranger, by which the Stranger doth

acknowledge all his Right to him in the Advowſon, the Advowſon thereby is not in Groſs. 43 *E.* 3. 35. Alſo in the Caſe of a Fine levied of a Manor to which an Advowſon is appendant, if a third Part be rendred back for Life, the Remainder over, and the other two Parts, with the Advowſon in like manner, the Advowſon continueth in the ſame State it was before, *viz.* appendant. 45 *E.* 3. Or if a Man, having an Advowſon appendant, doth grant every ſecond Preſentment to another in Fee, yet the Advowſon doth continue appendant for the other Turn not granted, 43 *E.* 3. 35. and if he grant three or more Avoidances, theſe indeed are in Groſs; yet the Advowſon, as to the Remainder, is ſtill appendant, by *Hob. Paſch.* 17 *Jac.* in Sir *William Elvis*'s Caſe, *Hob.* 323.

Advowſons, &c. Render. 2. Turn.

Another Means, by which an Advowſon becomes abſolutely diſappendant, is by Preſentment: For if one doth preſent to an Advowſon that is appendant, as to an Advowſon in Groſs, by ſuch Preſentment the Advowſon loſeth its Appendancy. 21 *E.* 4. 2. And yet by the Union of Churches, no Alteration is made; for if two Churches, the Advowſon of one of which is appendant, the other in Groſs, be united, and it be ordained by the Ordinary, with the Aſſent of the Patrons, That they, their Heirs and Aſſigns for ever, ſhall preſent to that Church the Advowſon of which was before appendant, *Alternis vicibus*, and that the Patron of the Church in Groſs ſhall have the firſt Turn, yet the whole Advowſon ſhall not be in Groſs, but for the Turn only of him that was Patron of the Advowſon in Groſs, and be appendant for the Turn of him that was Patron of the Advowſon appendant. 9 *Eliz. Dyer* 259. *b.*

By Preſentment. Union.

An Advowſon appendant may be made diſappendant only for a certain Time, by divers Means; and firſt, By a Leaſe made of a Manor for Life, to which an Advowſon is appendant, excepting the Advowſon; for by the Exception the Advowſon is in Groſs, during the Eſtate for Life; but when the Leſſee dieth, it becometh appendant again to the ſame Manor, *Paſch.* 3 *Car. Hartop* and *Cox*'s Caſe, *Hutton* 88. *Paſch.* 3 *Jac. Hartop* and *Tuck* v. *Dalby*, *Hetley* 14. yea, and tho' the Leaſe be made without Deed, the Law is the ſame. 5 *Co.* 11. *b.* So if the King doth Leaſe a Manor for Life, to which an Advowſon is appendant, without mentioning the Advowſon, the Advowſon doth not paſs, but remains to the King as an Advowſon in Groſs: And in ſuch Caſe, if the King doth make a Grant of the Reverſion, *Habendum* the Reverſion of the Manor with the Advowſon, the Advowſon is not thereby paſſed with the Manor, becauſe it was ſevered, and became in Groſs by the former Grant. *Co.* 11. 47. *Lifford*'s Caſe. For in the Caſe of the King, an Advowſon in Groſs will not paſs by the *Habendum*, where it is not named in the Premiſſes of the Grant. 38 *H.* 6. 26. So if one hath an Advowſon appendant to a Manor, and grants the Advowſon for Life, and after infeoffeth another of the Manor *cum pertinentiis*, the Freehold of the Advowſon by the Leaſe is ſevered from the Manor, and will not paſs by ſuch Grant, yet the Reverſion of it remains appendant, and will paſs thereby. But if one leaſe his Manor for Life, ſaving to himſelf the Advowſon, and after grants the Reverſion of the Manor *cum Advocatione*, the Advowſon ſhall paſs as appendant to the Manor. *Ive*'s Caſe, 5 *Co.* 11. *b.*

For a certain Time only as a Leaſe. And Advowſon excepted. By Leaſe of the King, and Advowſon not mentioned. Severance. By Leaſe of Advowſon for Life.

In the firſt Caſe, the Advowſon being granted for Life, the Reverſion thereof continued notwithſtanding appendant to the Manor; but in the latter Caſe, the Manor being granted for Life, excepting the Advowſon, the Advowſon in Poſſeſſion cannot be appendant to the Reverſion of the Manor;

Of an Advowſon appendant, &c.

Advowſons, &c.

Manor; for that an Advowſon or other Thing in Reverſion may be appendant to, or Part of a Manor in Poſſeſſion; but an Advowſon, or other Thing in Poſſeſſion cannot be Part of, or appendant to a Manor in Reverſion, after a Leaſe for Life, but a Leaſe for Years *contra*, *Ive*'s Caſe, 5 *Co.* 11. *b.* 1 *Inſt.* 324, 325. *Hutton* 89. *Complete Parſon* 56, 57. *Plowden* 104. *b.* 38 *H.* 6. 36, 38.

Upon Account of Coparcenerſhip.

Alſo an Advowſon appendant may be made diſappendant for a certain Time, only upon the Account of Coparcenerſhip: For if a Manor, with an Advowſon appendant thereto, deſcend to two Coparceners, and the Advowſon be allotted to one, the Manor to another, the Advowſon is in Groſs: But if the Siſter who hath the Advowſon die without Iſſue, the Advowſon is again appendant to the Manor, though there was a Severance in Perpetuity, as 'tis ſaid in *Hartop* and *Tuck*'s Caſe *v. Dalby*, *Paſch.* 3 *Jac.* *Hetly* 14. Of if the Manor had been divided betwixt the Coparceners, without mentioning the Advowſon, the Advowſon remains in Coparcenary; and yet in every of their Turns it is appendant to that Part which they have. 1 *Inſt.* 122. But if they had made Partition of the Manor, with an expreſs Exception of the Advowſon, then the Advowſon remains not in Coparcenary, but in Groſs. 1 *Inſt.* 122. *a.* 13 *E.* 2. *Quare Impedit* 170, 58, 59. 17 *Ed.* 3. 38. *b.* So if Partition had been made, as well of the Advowſon as of the Manor, the Coparceners are Tenants in Common of the Manor, and of the Advowſon, as in Groſs; and yet, if all but one of the Siſters die, the Appendancy of the Advowſon is revived. 2 *H.* 7. 5. *b.* 19 *E.* 3. *Quare Impedit* 59. So if four Manors, to one of which an Advowſon is appendant, deſcend to four Siſters, and each Siſter hath a Manor allotted to her by Compoſition, ſhe to whom the Manor, to which the Advowſon is appendant, is allotted, will have the Advowſon as appendant thereto. But if upon the Partition, particular Exceptions ſhall be made of the Advowſon and Compoſition, that the Coparceners ſhall preſent thereto in their Turns, the Advowſon is ſevered from the Manor, and doth remain in Coparcenary, and in Groſs; and yet if all the Siſters die, ſave her that had the Manor, to which the Advowſon was appendant, the Advowſon is again appendant to the Manor. *H.* 7. *Br. Incident* 14.

Diviſion.

Exception.

Appendancy revived.

Four Manors amongſt Siſters.

Turns.

By tortious Acts.

Likewiſe an Advowſon appendant may be made diſappendant by tortious Acts; as if a Perſon ſeiſed of a Manor in Tail, to which an Advowſon is appendant, doth alien ſome Part of the Manor, with the Advowſon, and then the Alienee doth grant the Advowſon to a Stranger, the Advowſon is made diſappendant; yet if after, by bringing a *Formedon*, the Land aliened be recontinued to the Iſſue in Tail, the Advowſon alſo is reveſted again in him, as appendant to the Manor, and not to that Part of it only which was aliened, and from which it was ſevered by the Grant. 19 *H.* 6. 30. 1 *Inſt.* 363. *b.* And the like Law may be in the Caſe of Diſſeiſin: So if a common Perſon hath an Advowſon as appendant, and a Stranger doth preſent his Clerk, who is in by ſix Months, the Advowſon is made diſappendant, until ſuch Time as the rightful Patron hath re-continued it by his Writ of Right. But in the Caſe of the King, a Preſentment of a Clerk to his Church, who is in by ſix Months, makes no Diſappendancy, becauſe it puts not the King out of Poſſeſſion. *Mich.* 13 & 14 *Eliz.* *Hobart* 140. 18 *Eliz.* 3 *Leon.* 61. *Mich.* 14 *Eliz.* 3 *Leon.* 17.

Diſſeiſin.

Upon the King's Preſentation.

If the King doth preſent to a Church of another's Right, that is appendant, by theſe Words; *Ad noſtram Præſentationem Jure Prærogativæ Coronæ noſtræ Angliæ ſpectant'*, or *Ratione Lapſus*, ſuch Preſentment ſpeaking

ſpeaking of, and ſuppoſing a Right, where there is none, is void, and makes no Diſappendancy; or if the Preſentation had been made to a Church really lapſed, yet that makes no Diſappendancy neither. So if the King, without Right, preſent by theſe Words, *Ad noſtram Præſentationem ſive ex pleno Jure, ſive per Lapſum Temporis, ſive alio quocunque modo ſpectant*'; ſuch his Preſentment makes no Diſappendancy or Uſurpation: For when the King doth preſent by Wrong (to the making of an Uſurpation and Diſappendancy,) in his Preſentation he muſt not recite any Right, but muſt preſent to the void Church generally, and require Admiſſion. *Hill.* 11 *Jac. Gawdy* v. *Biſhop of Canterbury* and others, *Hobart* 302. Sir *John Tufton* v. Sir *Richard Temple & al. Hill.* 17 & 18 *Car.* 2. *Vaugh.* 14. Advowſons, &c.

But Note, it has been generally received for Law, That if one who is not a rightful Patron, do in due Form of Law without any corrupt Contract preſent a Clerk to a *preſentative Living*, in Time of Peace, and ſuch Preſentation take Effect, and Inſtitution and Induction be had thereupon, and the Clerk remains Six Months in Poſſeſſion before the true Patron commence his Suit; he thereby becomes a lawful Incumbent, and may enjoy the Living during his Life. Uſurpation, &c.

And though formerly the true Patron might on the next Avoidance recover his ancient Right in many Caſes, yet he could not do it in all, but in ſome was for ever barred of any Remedy, (ſee hereafter *Ch.* 13.) But this Miſchief is now remedied by the Act of 7 *Annæ*, for *preſerving the Rights of Patrons to Advowſons*, whereby 'tis now provided, *That he, or ſhe, that would have had a Right, if no ſuch Uſurpation had been, may preſent, or maintain a* Quare Impedit *upon the next, or any other Avoidance, notwithſtanding ſuch Uſurpation*, &c. Stat. 7 *Annæ*, cap. 18.

See the ſaid Statute at large, at the End of the next Chapter.

It may be proper here to add ſomewhat of Erecting and Conſecrating Churches.

No Perſon may erect a Church without the Leave and Conſent of the Biſhop; it was made an expreſs Law of the Church of *England* in a Council at *Weſtminſter*, *vide Spelm.* 2 *Vol. p.* 41. and this Right of the Biſhop could not be defeated by an Exemption of Religious Perſons from Epiſcopal Juriſdiction, *&c.* But by Lord *Coke*, by the Common Law and General Cuſtom of the Realm, Earls, Barons, and other Lay-Perſons might have built Churches in their own Poſſeſſions without Conſent of the Biſhop. *Codex, p.* 12. *Vide Noy* 67. 3 *Inſt. p.* 201.

After a new Church is erected, it may not be conſecrated without a competent Endowment; but Lord *Coke* ſays, Though they might build Churches without the King's Licence (which *Noy* denies, becauſe they are Sanctuaries) yet they could not make a Spiritual Politick Body to continue in Succeſſion, and be capable of Endowment, without the King's Licence. But by the Common Law before the Statute of Mortmain, they might have endowed ſuch Spiritual Bodies without any Licence whatſoever; which Body ſo incorporated is not diſſolved, though the Church is drowned, or otherwiſe deſtroyed. For in that Caſe one may be preſented to the Rectory, and ſhall be liable to Annuities and other Charges; the Church (in Conſideration of Law) being properly the *Cure of Souls* and the *Right of Tithes*. 3 *Inſt.* 202. *Noy* 117. 1 *Mod.* 200.

A Third Rule is, *That Churches may be conſecrated on any Day of the Week.* And

Erecting, &c. of Churches.

A Fourth Rule, *That at the Conſecration of Churches Divine Service ought to be performed.* Alſo

A Fifth Rule, *That in the Conſecration of new Churches Proviſion is to be made, That no Damage accrue in Point of Right or Revenues to any other Church.*

The Sixth Rule, *That a Church once conſecrated may not be conſecrated again*, is admitted to have ſome Exceptions, as where it is polluted with Blood, *&c.* in which Caſes the Canon Law injoins a *Reconſecration*, though the Common Method here in *England* has been only a *Reconciliation.* As where a Chapel in the Suburbs of *Hereford*, which once belonged to the Priory of St. *John* of *Jeruſalem*, had been from the Time of the Diſſolution applyed to ſecular and prophane Uſes, being a Stable for Horſes, *&c.* yet becauſe the Walls and Roof thereof were never demoliſhed, a Reconciliation was adjudged ſufficient; and a like Inſtance of another Chapel is there cited.

Codex 213. On the contrary, when the Church of *Southmalling* in *Kent* had not only been polluted *per Beſtias*, *&c.* but was alſo new built, and then uſed for Divine Offices without any new Conſecration, Archbiſhop *Abbot* interdicted the Miniſter, Church-Wardens and Pariſhioners, *ab ingreſſu Eccleſiæ*, *&c.* till the ſaid Church and Church-Yard were *reconſecrated.*

The Seventh Rule is, That the Law takes no Notice of Churches or Chapels, till conſecrated by the Biſhop; and therefore whether a Church or not, or a Chapel or not, ſhall be certified by the Biſhop: But the Canon Law ſuppoſes, That with the Biſhop's Conſent Divine Service may be performed, and the Sacraments adminiſtred in Churches or Chapels not conſecrated; and there have been many Licences to that Effect granted on ſpecial Occaſions:

The Eighth and laſt Rule is, *That a reaſonable Procuration is due to the Biſhop, who conſecrates a Church, from thoſe who pray ſuch Conſecration*; not for the Conſecration of the Church, but for the neceſſary Refreſhment of the Biſhop and his Servants. For that this draws him oftentimes to a great Diſtance from his Palace, where proper Accommodations cannot be eaſily procured; and therefore, though at firſt the Demanding or Taking any thing for Conſecration was forbid, yet afterwards 'twas admitted, but limited to a certain Price: But this by Uſage is now become different in different Dioceſes.

Note; In Archbiſhop *Warham*'s Time, there is charged as Procuration Money for conſecrating three Churches in the Dioceſes of *Bath* and *Wells*, 10 *l. i. e.* 3 *l.* 6 *s.* 8 *d.* each.

CHAP.

CHAP. VIII.

Right of Patronage.

Of the Right of Patronage, to whom it ſhall be ſaid to belong. Of Coparceners, and Tenants in Common. And of the Statute 7 Annæ, *of preſerving the Rights of Patrons to Advowſons.*

Right of Patronage, how acquired.

THESE Things being premiſed, we may more eaſily ſee how, or by what Means the Right of Patronage may come to any Perſon: If we conſider it with reſpect to its Original, we may ſay, it is acquired only by theſe two Means; (*viz.*) Either by being the ſole Founder and Endower of a Church; for thereby a Perſon doth make himſelf abſolute Patron of ſuch Church, and may reſerve to himſelf, his Heirs or Succeſſors, the Right of conferring to the ſame, ſo oft as it ſhall happen to become void. *Paſch.* 9 *E.* 3. *Quare Impedit* 30. Or elſe not by founding or building a Church, but by giving the Land upon which it is built; or only by endowing the ſame with Land, or other Profits and Immunities, after it is built; that is, If upon the Occaſion of any of theſe Acts, the Ordinary, by his Ordinance, and other Perſons (whoſe Conſents are requiſite in this Behalf) by their Agreement, do ſettle the Advowſon of the Church upon ſuch Founder or Endower reſpectively, their Heirs or Succeſſors. *Doderidge's Complete Parſon, p.* 56. and 25. *Hughes's Abr.* Tit. *Advowſon.* Upon the Plague which happened in 1625. the Church-yard of St. *Margaret, Weſtminſter*, not being large enough to bury the dead, the Inhabitants of that Part of the Pariſh which now reſort to the new Chapel built there, petitioned the Dean and Chapter of *Weſtminſter* (who were Lords of the Manor) to grant them a waſte Piece of Ground to bury their dead, which accordingly the Dean and Chapter did under their Seals, and it was conſecrated; afterwards theſe Inhabitants obtained the Royal Licence, and built a Chapel there; the Veſtry-men and Chapel-wardens had ever ſince 1653. elected the Miniſters who were to preach there, but now the Dean and Chapter claimed a Right to name him.

By Founder and Endower.

By Lord Chancellor (*Macclesfield*): When the Dean and Chapter gave this Ground, they did not reſerve any Power to nominate the Preacher; and the Inhabitants were at the Expence of building the Chapel. The Building and Endowing of a Church, was what at Common Law originally intitled the Patron to the Patronage: Here the Inhabitants built the Chapel, and by the Pew-Money have endowed it. It is not reaſonable to ſay that the Dean and Chapter, as Parſon appropriate, have a Right to ſupply every Chapel built within the Pariſh, with a Preacher; it would be an Expence and Hardſhip upon them; neither ought it to be at their Election to ſupply it.

But afterwards on the Hearing the Court decreed, that the Right of Nomination of the Miniſter did belong to the Dean and Chapter. 1 *Wms.* 773, *&c. Herbert & al'* v. *Dean and Chapter of Weſtminſter* and. Dr. *Broderick*, and *econtra.*

The

Right of Patronage.

The Commencement, and firſt Titles of Advowſons came by Founding or Endowing of Churches, and thereby the firſt Proprietors gained a Right, not only to themſelves, but alſo to their Heirs and Succeſſors for ever; and ſuch their Heirs are ſaid to have them by Deſcent: Now as to Deſcents, there cannot be any Deſcent thereof from the Brother to the Siſter of the intire Blood, by the Maxim of *Poſſeſſio Fratris, &c.* but the ſame ſhall deſcend to the Brother of the half Blood, unleſs the firſt hath preſented to it in his Life-time, and then it ſhall deſcend to the Siſter, ſhe being the next Heir of the intire Blood, 19 *E.* 2. *Fitz. Quare Impedit* 177. *Co. Lit.* 15. *b.* which is to be underſtood of Advowſons in Groſs only.

By Deſcents.

Poſſeſſio Fratris.

By Four Siſters Coparceners.

See the Stat. 7 *Annæ infra.*

If an Advowſon doth deſcend to Four Coparceners, and the Church after the Death of their Anceſtor doth become void, if they do not all agree in a Preſentment, the Clerk of the eldeſt Siſter ſhall be received; and at the ſecond Avoidance, the ſecond Siſter ſhall prefer her Clerk, and ſo the reſt in their Order. 21 *E.* 3. 38. *Mich.* 12 *H.* 7. *Keil. p.* — *Co. Lit.* 18. *b.* 17 *E.* 3. 30, 37. 21 *E.* 3. 39. 35 *H.* 8. *Dyer* 55. 19 *E.* 3. *Quare Impedit* 59. 13 *E.* 1. *Rot.* 3. Or if they do agree for one or more Turns to preſent jointly, and after do not ſo agree, the eldeſt Siſter ſhall preſent to the void Turn, and the reſt to the After-Avoidances, according to their Seniority. *Paſch.* 34 & 35 *H.* 8. *Dyer* 55. And this Privilege given to the eldeſt of preſenting firſt, ſhall go to her Iſſue and Aſſigns. 24 *E.* 3. 52. *Co. Lit.* 166. *b.* 186. *b.* And alſo to her Huſband, as Tenant by Courteſy. *Paſch.* 25 *Eliz. Horris* and *Hays* v. *Nichols*, 3 *Cro.* 18. *Co. Lit.* 186. *b.* 166. *b.* But Coparceners are compellable to make Partition; if they do make Compoſition to preſent, it may be done without Writing, becauſe they are all privy, and as one Heir by the Common Law. *Hill.* 28 *H.* 8. *Dyer* 29. 1 *Inſt.* 169. *a. Roll's Abr.* 2. *p.* 255. 1 *Inſt.* 196. *a.* But if ſuch Compoſition be made againſt Common Right, as that the eldeſt, after ſhe hath preſented once, ſhall preſent in the ſecond Turn, then it doth not bind without Deed. 17 *E.* 3. 38. But properly ſpeaking, Coparceners cannot make Partition of an Advowſon in Groſs, as to the Right, for that it is intire; for tho' they make Partition, yet this is but as to the Preſentment, ſtill the Advowſon doth continue in Right in Coparcenary, for they ought to join in a Writ of Right afterwards. *Roll's Abr.* 2. *p.* 255. *Corbet's* Caſe, 1 *Co.* 87. *a.* But the Law herein ſeems to be now altered by Virtue of the ſaid Statute 7 *Annæ*, which ſee *infra.* But if a Manor to which an Advowſon is appendant, deſcends to Two Coparceners, and they make Partition, and the Manor is allotted to the one, and the Advowſon to the other, this is ſaid to make a Severance of the Advowſon in Perpetuity from the Manor, *Hetley* 14. which admits that the Partition in this Caſe muſt affect the Right as well as the Poſſeſſion; and it is ſaid, that anciently Advowſons were not partible among Coparceners at Common Law. *Mirror* 107. So Tenants in Common of an Advowſon, (which are ſuch who have equal Right to an Advowſon, but hold by divers Titles) if they make Compoſition to preſent by Turns, it muſt be in Writing; and till each of them have preſented according to his Turn, by Virtue of the Compoſition, if a *Quare Impedit* be brought betwixt them, it is neceſſary to ſhew the Compoſition, becauſe it was not executed; but otherwiſe, after it ſhall be executed. *Hill.* 28 *H. Dyer* 29.

Turns.

Courteſy.

Partition.

Not of an Advowſon in Groſs.

Severance of an Advowſon from a Manor.

Compoſition by Tenants in Common.

By Aſſignment in Chancery.

If Partition be made, and an Advowſon aſſigned to one Coparcener in Chancery, the others being within Age, yet at their full Age they may preſent, either according to the Compoſition, or by Turn, as if no Com-

Compoſition had been made. 17 *E.* 3. 37. *b.* 30. *b.* And if an Advowſon be allotted in Chancery to the youngeſt Coparcener, ſhe may preſent, and maintain her *Quare Impedit* againſt the others, until it be defeated. 17 *E.* 3. 38. *Co. Lit.* 171. *b.* Right of Patronage.

If an Advowſon doth deſcend to two Coparceners, the one being within Age, and in Ward, and the Guardian doth marry with the elder, and after the Church being void, the Guardian doth preſent in the Name of both Siſters, this ſhall not ſerve for any Turn to the eldeſt, but at the next Avoidance, if they cannot agree in preſenting, the Eldeſt ſhall preſent alone, as if no Preſentation had been made, after the Deſcent to them. *Dyer*, 35 *Hen.* 8. 55. By Guardian.

If a Coparcener of an Advowſon, or any other that hath Title to preſent to an Avoidance, doth in his Courſe preſent his Clerk, who by being Preſented, Inſtituted and Inducted, and by performing all Things required by Law in ſuch Caſe, is become Complete Incumbent, tho' he be afterwards deprived for Crime, or other Cauſe, yet that ſhall ſerve for his Patron's Turn; and he that hath the Right of preſenting next, ſhall preſent upon ſuch Avoidance. But if after Preſentation, Inſtitution and Induction, the Church is not only voidable, but actually void, by reaſon that the Law pronounceth the Admiſſion, Inſtitution and Induction of the Clerk preſented, meerly void, as for not Subſcribing, or not Reading the Articles of Religion, *&c.* whether the Church be declared void by Sentence, or not, the Preſentation, Inſtitution and Induction, in ſuch Caſe, ſhall not ſerve for a Turn, but the Preſentor may preſent again. *Paſch.* 41 *Eliz. Windſor*'s Caſe, 5 *Co.* 102. That is, unleſs the Preſentation, *&c.* of his Clerk were void by Simony, in which Caſe the Turn goes to the King; and then he that hath the next Turn after him, muſt expect till the Church doth become void of the King's Incumbent. But if Simony be committed in gaining Inſtitution or Induction, the Clerk being inſtituted and inducted, makes a Plenarty, and he that preſented him having but that Turn, ſhall not preſent again, tho' the Church by ſuch Simony be alſo void, but he that hath Right to the next Avoidance. *Stat.* 13 *Eliz. c.* 6. and in *Winchcomb* and *Pulleſton*'s Caſe, *Paſch.* 14 *Jac. Hob.* 167. Patron's Turn ſaved after Deprivation. Simony.

Of if a Patron doth preſent one that obtained his Orders by Simony, at any Time within Seven Years after his corrupt Entring into the Miniſtry, the Living is not void till after Induction, Inveſting, or Inſtallation; and therefore there being once a Plenarty, if he that preſented had but one Turn that is ſatisfied, and he that hath the next ſhall preſent, in *Winchcomb* and *Pulleſton*'s Caſe, *Paſch.* 14 *Jac. Hob.* 167. Orders obtained by Simony.

So if one that hath a Turn doth preſent one that is *Mere Laicus*, who is Inſtituted, *&c.* and it be declared by Sentence, that he was uncapable of the Church, and therefore that it was void *ab initio*; yet for that the Church was full, until the Sentence Declaratory came, this ſhall ſerve for a Turn, as is ſaid. *Paſch.* 41 *Eliz. Windſor*'s Caſe, 5 *Co.* 102. But of this I doubt; for in the ſame Caſe 'tis ſaid, That where the Admiſſion and Inſtitution are made meerly void, then without doubt it ſhall not ſerve for a Turn; and in caſe a meer Layman, who is no Deacon, be admitted, inſtituted and inducted to any Benefice with Cure, ſuch Admiſſion, Inſtitution and Induction are meerly void, as if they never were, by *Stat.* 13 *Eliz. c.* 12. Beſides, this ſame Caſe is reported both by *Croke* and *Moor*, and no ſuch Matter as this which *Coke* mentions, concerning a meer Layman being preſented, is taken Notice of by either of them. But if an Incumbent of a Church be *Mere Laicus* preſented. *Qu.* If not void by 13 *Eliz. c.* 12. *Nota.*

Right of Patronage.

legally deprived, and he that hath the next Turn doth preſent his Clerk, who thereupon is admitted, *&c.* If afterwards a Sentence doth come, by which the ſecond Clerk is deprived, and the firſt reſtored by Force of the firſt Preſentation, Inſtitution, *&c.* and dies Incumbent, tho' the ſecond Clerk was Incumbent, for the Time, to all Purpoſes, and the firſt, for that Time, no Incumbent; yet the Preſentation and Incumbency of the ſecond Clerk ſhall not ſerve for a Turn, but he that preſented the ſecond Preſentee ſhall preſent again, after the Death or Removal of the firſt. But if the firſt Clerk had died before the ſecond Sentence, or had not reverſed the former Sentence, he that preferred the ſecond Clerk had enjoyed his Turn. *Paſch.* 40 *Eliz. Loveden* v. *Windſor* and *Hitch, Moor* 558. *Paſch.* 41 *Eliz. Windſor*'s Caſe, 5 *Co.* 102. Same Caſe, 3 *Cro.* 686.

Preſentment *de novo.*

Note; For remedying of ſome Inconveniencies in the Law, as it ſtood on 13 *Ed.* 1. *c.* 5. with reſpect to *Uſurpations of Rights of Preſentation*, and the Incertainty of the Rights and Intereſts of Coparceners, Jointenants and Tenants in Common, in *Advowſons*, &c. a Statute was made 7 *Annæ*, Entitled, *An Act to preſerve the Rights of Patrons to Advowſons*, viz.

Stat. 7 *Annæ cap.* 18.

For more eaſy Recovery of Patron's Rights.

Sect. 1. **Forasmuch as the pleading in a Quare Impedit is found very difficult, whereby many Patrons are either defeated of their Rights of Preſentation, or put to great Charge and Trouble to recover their Right, which is occaſioned by the Law, as it now is: For Remedy whereof be it enacted by the Queen's moſt excellent Majeſty, by and with the Advice and Conſent of the Lords Spiritual and Temporal, and Commons in Parliament aſſembled, and by the Authority of the ſame, * That no Uſurpation upon any Avoidance in any Church, Vicaridge, or other Eccleſiaſtical Promotion ſhall diſplace the Eſtate or Intereſt of any Perſon entitled to the Advowſon or Patronage thereof, or turn it to a Right; but he or ſhe that would have had a Right, if no Uſurpation had been, may preſent or maintain his or her Quare Impedit upon the next, or any other Avoidance (if diſturbed), notwithſtanding ſuch Uſurpation.**

No Uſurpation ſhall diſplace the Eſtate.

* *Vide* 13 *E.* 1. *cap.* 5. *ſect.* 1. *Poſt. cap.* 13.

Or hinder maintaining a *Quare Imp.* on any Avoidance.

Sect. 2. **And if Coparceners, or Jointenants, or Tenants in Common, be ſeiſed of any Eſtate of Inheritance in the Advowſon of any Church or Vicaridge, or other Eccleſiaſtical Promotion; and a Partition is or ſhall be made between them to preſent by Turns, that thereupon every one ſhall be taken and adjudged to be ſeiſed of his or her ſeparate Part of the Advowſon, to preſent in his or her Turn. As if there be two, and they make ſuch Partition, each ſhall be ſaid to be ſeiſed, the one of the one Moiety to preſent in the firſt Turn, the other of the other Moiety to preſent in the ſecond Turn. In like Manner, if there be three, four, or more, every one ſhall be ſaid to be ſeiſed of his or her Part, and to preſent in his or her Turn.**

Coparceners, Jointenants, and Tenants in Common after Partition, to preſent by Turns, and each to be ſeiſed ſeparately.

A. and *B.* are Jointenants of an Advowſon in Groſs, they muſt make Partition to preſent by Turn; and that will divide the Inheritance *aliquatenus*, and create ſeparate Rights, ſo that the one ſhall preſent in the one Turn, and the other in the other, which is a ſufficient Partition. 1 *Ld. Raym.* 536. By *Holt* C. J. in the Caſe of the Biſhop of *Salisbury* v. *Philips.*

In Caſe of Coparceners, they, being Privies in Blood, may make Partition of an Advowſon by Parol; but between Tenants in Common it muſt be by Deed. 1 *Ld. Raym.* 537. By *Holt* C. J. in the Caſe of the Biſhop of *Saliſbury* v. *Philips.*

CHAP.

CHAP. IX.

Right of Preſentation.

Right of Preſentation, by what Means it may paſs from one Perſon to another. How it may come to the King by Prerogative; of the Lord Chancellor's Right, and of the Archbiſhop's Right of Option, *&c.*

IF we conſider the Right of Patronage, as in the Hands of others than the Founders and Endowers of Churches, their Heirs or Succeſſors, we may ſay, that it may come to a Perſon, either by the Act of the Law, or by the Act and Conſent of the Perſon entitled to it, or by his Fault or Negelect: In ſome of which Reſpects it doth paſs only in Part; in others, ſometimes in Part, and ſometimes wholly.

By Act, Conſent or Neglect.

By the Act of the Law, the Right of Patronage may wholly paſs to a Stranger: For when there is no Heir, General or Special, to whom the Land or Manor to which an Advowſon is appendant doth deſcend, the Advowſon, with the Land or Manor, doth eſcheat to the Lord of that Manor of which ſuch Land or Manor was held. *Co. Litt.* 122. And it is ſaid, That if a Man doth grant an Advowſon in Groſs, to another in Fee, and the Grantee doth die without Heir, it ſeems that this ſhall revert to the Grantor, not being held of any Man; for 'tis a Thing which cannot vaniſh, but ought to be in ſome Perſon: But in that Caſe, if the Grantor cannot have it, the King ſhall have it as Supreme Patron; and for that Reaſon ought to preſent, where no other hath Right. *Roll's Abr.* 1. 816.

By Act of Law for want of Heir.

Reverter.

To the King.

Alſo by the Act of the Law, the Right of Patronage doth paſs in Part, that is, the Right of preſenting for one or more Turns; or for ſo many as ſhall happen within a certain Time, from the Heir, upon the Account of Marriage, and from him and others upon the Account of Death, and of Prerogative. Accordingly, if a Feme that hath an Advowſon, or Part of an Advowſon, to her and her Heirs, doth take an Husband, the Husband may not only preſent jointly with his Wife, or in his own Name, during the Coverture, but alſo having Iſſue by her, after her Death, (tho' the Right of Patronage (ſo far as it was in the Wife) deſcends to her Heir, and tho' the Wife did never preſent to it, but died before the Church voided) the Right of Preſenting during the Husband's Life is lodged in him, as Tenant by Courteſy, tho' his Wife had but a Seiſin in Law, becauſe he could by no Induſtry attain to any other Seiſin. 1 *Inſt.* 29. *a.* And if the Church, in this Caſe of the Husband, void during his Life, and then he die before the Church is filled, yet the Heir ſhall not have the Turn, but the Huſband's Executor; and ſo is the Law in moſt Caſes, where the Intereſt determines after the Church is void, and before Preſentment; by *Finch*, 38 *E.* 3. 36. *Bro. Preſentation al' Egliſe* 18. 21 *H.* 6. 56. If the Church being void, the Wife dies, having had no Iſſue, ſo that the Huſband

Paſſing in Part.

By Husband, Tenant by the Courteſy, *&c.*

By his Executor.

Right of Presentation.

Husband is not Tenant by Courtesy, yet he shall present to the void Turn. 21 *H.* 6. 56. *b.*

Two Turns by the Heir, and one by the Wife.

If a Man that is seised of an Advowson takes a Wife, and dies, the Heir shall have Two Presentments, and the Wife the Third; yea, and tho' the Husband in his Life-time had granted away the Third Turn, *William*'s Case v. *Bishop of Lincoln*, and the Bailiff and Burgesses of *Bedford*, 2 *And.* 173. *Trin.* 28 *H.* 8. *Dyer* 35. *b.* That is, The Wife

As her Dower, &c.

may in a proper Action, recover the Third Presentation as her Dower, or it may be assigned to her for her Dower, but without such Recovery or Assignment the Wife cannot make Title to the Advowson, or to any Presentation, no more than she can enter by her own Authority into any other Lands or Tenements to which she hath Right of Dower. 1 *Inst.* 32. *a.* 34. *b.* 37. Or if a Manor, to which an Advowson is appendant, doth descend to an Heir, and he assigns Dower to his Mother of the Third Part of the Manor, *cum pertinentiis*, she is thereby endowed of the Third Part of the Advowson, and may have the Third Presentment. *Doderidge* in his Description of Advowsons, *p.* 6.

Presentation passing upon Account of Death.

In the second Place, as the Right of presenting for one or more Turns, doth pass from him that is seised of the same to others, upon the Account of Marriage, so upon the Account of Death: For if a Testator hath only a next Avoidance by Grant, and having made his Will dieth, the Church being full of an Incumbent, or void, the Avoidance or Turn not being devised by Will, the Right of Presenting thereto doth go to the Executor; and in case the Church is not fallen void, the Executor may make a Grant of that Turn to another, before he proves the Will. *Mich.* 3 & 4 *Phil.* and *Mary*, *Smithly* v. *Cholmly*, *Dyer* 135. *Pl.* 13.

When a Chattel.

So if one seised of an Advowson in Fee, and the Church doth become void, the void Turn is a Chattel; and if the Patron dieth before he doth present, the Avoidance doth not go to his Heir, but to his Executor. *Mich.* 31 & 32 *Eliz.* *The Queen* and *Fane* v. *Archbishop of Canterbury*, 4 *Leon.* 109. 1 *Inst.* 388. *a.*

Incumbent seised and dies.

But if the Incumbent of a Church be also seised in Fee of the Advowson of the same Church, and die, his Heir, not his Executors, shall present; for altho' the Advowson doth not descend to the Heir till after the Death of the Ancestor, and by his Death the Church is become void, so that the Avoidance may be said in this Case to be severed from the Advowson before it descend to the Heir, and vested in the Executor; yet both the Avoidance and Descent to the Heir happening at the same Instant, the Title of the Heir shall be preferred as the more ancient and worthy. *Mich.* 33 *Car.* 2. *C. B. Holt* v. *Episcopum Winton'*, &c. 3 *Levinz* 47.

Testator and Executor.

If the Testator present, and his Clerk not being admitted before his Death, then his Executors present their Clerk, the Ordinary is at his Election, which Clerk he will receive. *Trin.* 31 *Eliz.* *Smallwood*, &c. v. *Bishop of Litchfield* and others, 1 *Leon.* 205. *Savil* 95, 118.

Disturbance. Action by Executors.

If a Disturbance be before the Patron's Death, his Executors, by Special Writ upon the Case, may recover the Presentment, and prefer their Clerk, by the Equity of the Statute of 4 *Ed.* 3. and in such Case, if the Executors bring their Action upon the Disturbance made to the Testator, and yet shew that the Church still continues void, so that they might present themselves, or bring the Action upon a Disturbance made in their own Time; yet the Declaration is good, for that the shewing that the Church still remains void, are but Words of Form. *Smallwood*'s Case

before, 1 *Anderſon* 241. *Mich.* 32 *Eliz. C. B. Leonard* 4. *Caſe* 53. and *Savile, Caſe* 174, 188. And if the Teſtator be diſturbed in preſenting, and in a *Quare Impedit* doth recover, and then dies, the Heir ſhall not have Execution, becauſe it is not a real Action, but the Executor, *Brownlow* and *Gouldsborough* 1. 158. and by *Rhodes* in *Beverly* and *Cornwall*'s Caſe, *Mich.* 29 *Eliz. C. B.* 1 *Leonard* 63. But if a Husband be diſturbed in preſenting to an Advowſon which he held in the Right of his Wife, and dies, 'tis ſaid, that the Wife ſhall have a *Quare Impedit* for this Diſturbance. 3 *E.* 3. *Fitz. Quare Impedit* 57. 3 *H.* 5. *Quare Impedit* 71.

Right of Preſentation.

Husband and Wife.

But in the Caſe of a Biſhop, the void Turn of a Church, the Advowſon whereof he is ſeiſed in the Right of his Biſhoprick, by his Death doth not go to his Executor; but when the Temporalties of the Biſhoprick are ſeiſed into the King's Hands, the King doth not only preſent to ſuch Benefices as become void during the Seiſure, 18 *E.* 3. 31. *b.* 21 *E.* 3. 5. *a.* 29. *a.* 30. *a.* 24 *E.* 3. 26. 5 *E.* 2. *Fitz Quare Impedit* 165. 19 *E.* 2. *Quare Impedit* 178. and as were void after the Death of the Biſhop, and before the Seiſure, 12 *E.* 3. *Fitz. Quare Impedit* 56. by *Shard*, but alſo of all ſuch as were void when the Biſhop died. 50 *E.* 3. 26. 9 *H.* 6. 16. *b. Admit.* 24 *E.* 3. 26. *Lib. Parl.* 21 *E.* 1. Prior *de Bermondſea*'s Caſe, 24 *E.* 3. 30. 1 *Inſt.* 90. *b.* and 388. *a.* Yea, and to ſuch to which the Biſhop had at any Time preſented or collated, if his Clerks had not taken as well Induction, as Inſtitution or Collation before the Biſhop's Death, becauſe nothing but Induction fills the Church againſt the King, *Liber Parliamentorum*, 21 *E.* 1. the Prior of *Bermondſea*'s Caſe, adjudged in *Parl.* 24 *E.* 3. 30. 11 *H.* 4. 9. *a. Fitz. N. B.* 34. *k.* 36. *k.* 38 *E.* 3. 3 & 4. *Hobart's Rep.* 208. much more to ſuch to which the Biſhop had only preſented, and to which his Clerk was not inſtituted, 44 *E.* 3. 3. and if the Biſhop doth die the ſame Day after Induction, the King is not barred. 44 *E.* 3. 3. Yea, and whether the King doth of Grace grant the Temporalties before Conſecration, or Livery of them be ſued out of the King's Hands afterwards by the Succeſſor; the King, tho' he hath not then preſented to ſuch Benefice, the Right of Preſenting to which came to him by reaſon thereof, may at any Time after preſent to the ſame. 18 *E.* 3. 1. *a.* 24 *E.* 3. 26. *b.* And the Privilege that the King hath of Preſenting, by reaſon of the Temporalties of a Biſhoprick being in his Hands, ſhall be extended unto ſuch Preferments, unto which the Biſhop, of Common Right, might preſent, tho' by his Compoſition he hath transferred his Power unto others. And therefore when the Temporalties of the Archbiſhoprick of *York* are in the King's Hands, the King ſhall preſent to the Deanery of *York*, altho' by Compoſition betwixt the Archbiſhop and the Chapter there, the Chapter are to elect him: and this becauſe the Patronage thereof, *de Jure*, doth belong to the Archbiſhop, and his Compoſition cannot bind the King, who comes in Paramount, as Supreme Patron: For of the whole Biſhoprick the King is Supreme Patron, altho' it be diſmembred into divers Branches, as Deans, and other Dignities; and of ancient Time all the Biſhopricks were of the King's Gift; but after the King gave Leave to the Chapters to elect, yet the Patronage notwithſtanding remains in the King. 17 *E.* 3. 40. And if the Caſe be ſuch, that the King doth preſent to a Church void *Ratione Temporalium Epiſcopi ſede vacante*; and before Inſtitution doth repeal his Preſentment, and the Repeal notwithſtanding, the Preſentee is afterwards inſtituted and inſtalled, although that the

Biſhop ſeiſed and dieth.

Induction only fills againſt the King.

The King's Privilege by reaſon of Temporalties.

Repeal of Preſentment,

King's Prerogative.

King, reciting that the Preſentee was canonically inſtituted upon his Preſentation, doth ratify and confirm the Preſentation, ſo that ſuch Clerk is taken to be, and doth die as Incumbent; after a new Biſhop is created, yet the King ſhall preſent again, as if he had never preſented, becauſe the Clerk was never in *ex Præſentatione Regis*, and ſo the Confirmation void. *Trin.* 12 *Eliz. Dyer* 292. It concerns the Biſhop therefore to ſee that the King preſent upon ſuch Intruder, or to declare the Church void judicially, and to ſequeſter it, if the King will not preſent. But if a Biſhop, being Patron of a Church, doth collate thereto, and the Biſhoprick becoming void, the Biſhop's Clerk is elected Biſhop of the ſame Biſhoprick, and then the King doth grant to him his Temporalties before Conſecration, the King ſhall not preſent to his Benefice that was voided by his Conſecration, but the new Biſhop, becauſe it was not void before the Conſecration, at which Time the Temporalties were not in the King's Hands; but otherwiſe it had been, if the Biſhop be conſecrated before he hath the Temporalties. 41 *E.* 3. 5. *Br. Preſentation*, &c. 3. 46 *E.* 3. 32. But *Quære* of this Caſe, becauſe the King had alſo a Right to preſent by his Prerogative, the Incumbent being made a Biſhop; ſo that although the granting away the Temporalties before Conſecration, had prevented the King's Right of preſenting, by reaſon of the Avoidance of the Biſhoprick, yet it did not give away the King's other Right, which he had by the Incumbent's being made a Biſhop.

Caution.

Conſecration.

Q.

If the King doth bring a *Quare Impedit* for a Church, upon the Account that he hath Title to preſent, the Temporalties being in his Hands, and doth alledge, that they were in his Hands, by the Death of *A.* it is no Plea to ſay, that the Church did not void during the Time that the Temporalties were in the King's Hands by the Death of *A.* late Biſhop; for if they were in his Hands by the Death of any other, or by other Means, yet the King ſhall preſent. 24 *E.* 3. 26.

Plea.

King's Prerogative favoured.

Laſtly, The Right of Preſenting doth go from him that is ſeiſed of the Patronage to the King in other Caſes, by reaſon of his Prerogative: For tho' it hath been a Queſtion, Whether (when a Church becomes void, by creating the Incumbent thereof a Biſhop) the King, or the very Patron of the Church, ſhall preſent upon ſuch Avoidance? And anciently the Law was taken to be, that the rightful Patron ought to preſent. 21 *H.* 4. 37. or 34. 41 *E.* 3. 5. 5 *E.* 3. *Fitz. Quare Impedit* 35. 21 *E.* 3. 40. 7 *H.* 4. 25, 26. 44 *E.* 3. 25. and *Temp. E.* 1. *Quare Impedit* 181. *Hill.* 6 *Eliz. Dyer* 228. *Mich.* 38 *&* 39 *Eliz. Wentworth* v. *Wright*, 3 *Cro.* 527. and *Hill.* 41 *Eliz.* in *Owen* 144. However, the King's Prerogative in ſuch Caſe hath been favoured of late, and the Law taken to be, that the King ſhall preſent upon ſuch an Avoidance. 41 *E.* 3. 5. *Br. Preſentation al' Egliſe* 7. 5 *Mariæ*, *Preſent. al' Egliſe* 61. *Mich.* 42 *Eliz.* Sir *Robert Baſſet* v. *Gee*, 3 *Cro.* 790. *Mich.* 22 *Jac. Woodley* v. *Biſhop of Exeter*, *Manwaring* and *Edwards*, 2 *Cro.* 691. by *Winch. Contra Hutton. Roll's*, *Tit. Preſentment*, *p.* 343. *Paſch.* 37 *Eliz. Wright's* Caſe, *Moor* 399. *Paſch.* 19 *Car.* 2. *Henry Edes* v. *Waller* Biſhop of *Oxford*, *Vaughan* 19. And this (however repugnant to Reaſon) hath lately been ſettled accordingly in the Caſe of the Biſhop of *London* and Dr. *Birch* v. *The Attorney General* for the King, 1 *Ld. Raym.* 23, 24. and in the Caſe of *The King and Queen* v. *The Biſhop of London* and *Lancaſter*, *Mich.* 5 *W. & M.* 3 *Levinz* 377, 282. *Caſes in Parliament* 164. *Vide poſt. c.* 12.

Notwithstanding if the King doth not take the Benefit of the first Avoidance, but suffers a Stranger to present, and the Stranger's Presentee to die Incumbent, his Prerogative shall not be extended to give him the Right of Presenting afterwards. *Mich.* 42 *Eliz.* Sir *Robert Basset* v. *Gee*, 3 *Cro.* 790. And so if a Benefice be held with a Bishoprick by *Commendam Retinere*, and the Bishop doth afterwards resign the Benefice, the Patron, and not the King, shall present. See *Mich.* 6 & 7 *Eliz.* *Dyer* 233. *Noy* 138. *contra.* Or if such Bishop doth not resign, but is translated to another Bishoprick, (in which Case, the Benefice which he held with his first Bishoprick becomes void) the rightful Patron, and not the King, shall present thereto (*Quære.*) And so the rightful Patron shall present, if the Church held by *Commendam Retinere* doth fall void by the Death of the Commendatory, for otherwise the rightful Patron may be ever kept from presenting. *Mich.* 22 *Jac.* *Woodley* v. *Bishop of Exeter*, *Manwaring* and *Edwards*, 2 *Cro.* 691. *Coke's Entries* 474. *Hele's* Case. See *Roll's Abr. Tit. Presentment*, *p.* 344. *Noy* 138. *contra.* And that the Patron shall present upon the Death of the Commendatory, was adjudged *per Curiam*, in the Case of *Hen. Edes* v. *Walter* Bishop of *Oxon*, for the Living of *Chinner*, within that Diocese. *Pasch.* 19 *Car.* 2. *Vaughan p.* 18. And the Reason of the Law in these Cases, is not only because that the Church in such Cases is void, otherwise than by Creation, in which only Prerogative takes Place; but because the King, by granting, that the Bishop shall hold the Church by *Commendam*, that would be otherwise void by Creation, doth thereby take the Benefit of his Prerogative, in that Way that best pleaseth him: For his Grant to hold the Church in *Commendam*, in such Case, is as it were a Presentation, and as advantageous; and therefore if a next Turn be granted to another when the Church is full of him that afterwards is made Bishop, and the King doth grant, that the Church shall be held in *Commendam*, the Grantee of the next Avoidance hath lost his Turn, as much as if the King had presented; and that the very Patron, and not such Grantee, shall present when the Church is void of the Commendatory, *Woodley* v. *Bishop of Exeter* and others before. Which plainly proves, that a Grant to hold in *Commendam*, is as much as to present, and shall serve for the King's Turn which he hath by his Prerogative. But if the King hath the next Turn, and he grants a Faculty, or Dispensation, to the Incumbent, being elected Bishop, before Consecration, to retain his Benefice, this shall not amount to a Presentation to satisfy the King's Turn, but that after the Death of that Incumbent, the King shall present again. *Davis* 77. 11 *H.* 4. 76, 80. But it hath been adjudged, That if the King Grants a *Commendam Retinere* for six Months only, or for two or three Days more than six Months, if it be granted before the Incumbent is consecrated Bishop, the King's Prerogative shall take Place at the Time the Church becomes void, when the *Commendam* is expired. *Mich.* 5 *W.* & *M.* *B. R. Rex* & *Regina* v. *Episc' London'* & *Lancastr'*, and Bishop of *London* and Dr. *Birch* v. *The Attorney pro Domino Rege* & *Regina*, *Cases in Parliament* 164. 3 *Levinz* 377, 382. 4 *Mod.* 190, 200. 1 *Show.* 164. 2 *Sal.* 540. 1 *Ld. Raym.* 26.

Lord Chancellor's Right.

If the King suffers a Stranger to present.

Commendam Retinere.

Note, That the Lord Chancellor, or Lord Keeper of the Great Seal for the Time being, have the Privilege of presenting to the King's Benefices under the yearly Value of twenty Marks, *viz.* in the King's Books. 38 *E.* 3. 3. 8, 9. *Bro. Quare Impedit* 65. But as I take it at this Day, the Use is for the Chancellor to present to Livings under the yearly

Presentment by Lord Chancellor, &c.

Archbiſhops Right of Option.

Option, a Privilege of the Archbiſhops of *Canterbury* and *York*.

Election of what Church he will.

yearly Value of 20 *l.* yet the King may preſent to any of his under-valued Benefices, if he pleaſe.

Alſo the Right of preſenting to a Living in the Province of *Canterbury*, may go from an inferior Biſhop for one Turn to the Archbiſhop of *Canterbury*, *viz.* When he doth conſecrate a Perſon to be Biſhop of any of the Biſhopricks within his Province; and this Privilege of the Archbiſhop, in this Caſe, is ſuch, that he hath the Election of all the Preferments of the Biſhop's Gift, whom he doth conſecrate, and when he hath made his Option, the new Biſhop is wont to make a Grant of the next Avoidance of the Church choſen, to him and his Executors; and if the Church which the Archbiſhop chuſeth, doth not come void before the Biſhoprick to which the Gift thereof belongeth, ſo that he doth conſecrate another Biſhop for the ſame See, he may make a new Option, and ſuch ſecond Biſhop is to make him a Grant of the next Turn of the Benefice then choſen, as before: But then his former Grant is void, and theſe Grants (Practice may be Proof, for I find nothing in the Books to warrant it) are good to bind the Succeſſor, notwithſtanding *Stat.* 1 *Eliz.* The Archbiſhop of *York*, within his Province, hath the ſame Privilege as the Archbiſhop of *Canterbury*.

Code 133. But further touching Option, we may here add, that Every Biſhop (whether created or tranſlated) is bound immediately after Confirmation to make a legal Conveyance to the Archbiſhop of the next Avoidance of one ſuch Dignity or Benefice belonging to his See, as the ſaid Archbiſhop ſhall chuſe and name; which is therefore called an Option. Of this we find early Mention in the Records of the See of *Canterbury*, among the Preſentations, Inſtitutions and Collations of the Archbiſhops; but with theſe two Variations. In ſome Places it is ſaid to be due, *ratione Conſecrationis*, and that anciently the Perſon to be promoted was named to the Biſhop, and not the Dignity or Benefice he was to be promoted to, as *An.* 1308. *Dominus contulit Gratiam Dom.* Walteri Reginaldi *Epiſc. Vigorn'*, *quem tenebatur facere ratione Conſecrationis ſuæ Dom* G. *de* Buton. Where the like Demand is alſo made of the Biſhops of *Exeter* and *Chicheſter*, and *Anno* 1310. *Litera directa Epiſcopo Elien' ad promovendum unum Clericum, quem Archiep'us ſibi nominaverit ratione Conſecrationis ſuæ.* And in Archbiſhop *Cranmer*'s Regiſter, among the Ancient Fees is, Item, *at the Conſecration of every Biſhop* (*by Prerogative*) *the Diſpoſition of the firſt Prebend, that becometh void after the Conſecration of the elected*, by Advowſon, to be granted to the Archbiſhop; of which Tenor alſo are moſt of the Options of Archbiſhop *Cranmer*. On the other Hand we find in the Regiſter of Archbiſhop *Reynold's* a Monition to accept and admit the Clerk named by the Archbiſhop, reciting that it was an ancient Right of the Archbiſhop for the Time being, *cuilibet Electo in Epiſcopum totius ſuæ Provinciæ poſt confirmationem ipſius, eidem unam perſonam idoneam per ipſum promovend' nominare*; and that, ſtrictly ſpeaking, it is to be conveyed immediately after Confirmation, appears alſo by the Preface of the Grants ſince the Beginning of Archbiſhop *Parker* at leaſt, as well upon Creations as Tranſlations of Biſhops. *Cum tam de antiqua laudabili longævaque & legitime preſcripta conſuetudine hactenus' inconcuſſe uſitat' & obſervat', quam etiam de ſingulari Prærogativâ Eccleſiæ Metropoliticæ Chriſti Cantuar' fuerit & ſit uſitatum & obſervatum, quod Archiep'us Cantuar' pro tempore Exiſtent' cuilibet ſuffraganeor'*

Winch, f. 47. *a.*

Ib. fo. 60.

Cranm. 80. *a.*

Reyn. f. 54. *a.*

ganeor' in Epiſcopum alicujus Eccleſiæ Cathedralis ſuæ Cantuar' Provinciæ elect' ſtatim poſt Confirmationem Electionis hujuſmodi unum Clericum idoneum nominare & preſentare poſſit, cui idem Electus confirmatus tenebitur, quamprimum facultas ſe obtulerit, in ſuâ Eccleſiâ cathedrali, de Canonicatu & Præbendâ, ſeu de alio competenti Beneficio Eccleſiaſtico providere; ac interim dictum Clericum ad Canonicatum & Præbendam ſeu Beneficium hujuſmodi ſic promovendum acceptare & admittere; nec non ſibi Penſionem annuam ſufficientem conſtituere, tantiſper ſolvend' & impendend', quouſque eidem Clerico de Canonicatu & Præbendâ vel alio competen' Beneficio hujuſmodi ſufficienter fuerit cautum & Proviſum.

Grants of Advowſons, &c.

By which Preamble it appears, That the ancient Method was to name the Perſon to be promoted; and not the Promotion, but ever ſince Archbiſhop *Cranmer*'s Time at leaſt (in whoſe Regiſter is the firſt Entry that I have found of a Grant in Form) the Way hath been to convey the Advowſon, either of the firſt Dignity or Benefice that ſhould fall, or of ſome one in certain, to the Archbiſhop, his Executors and Aſſigns at firſt for twenty-one Years, and afterwards for the next Avoidance. But in Caſe the Biſhop that grants it dies, or is tranſlated before the preſent Incumbent of the Promotion choſen by the Archbiſhop ſhall dye, or be removed, it is generally ſuppoſed, That the Option is void; in as much as the Grantor ſingly and by himſelf could not convey any Right or Title beyond the Term of his Continuance in that See.

The Maſterſhip of *St. Croſs* near *Wincheſter* was made an Option by Archbiſhop *Juxon*, upon the Confirmation of the Biſhop of *Wincheſter*, as appears by a Conteſt between Dr. *Pory* the Aſſignee, and Sir *William Juxon* the Executor, where the Diſpute was not, whether the Maſterſhip might be an Option (no Queſtion being made thereof), but to which of the two Perſons it belonged, as claiming under Archbiſhop *Juxon*. The Footſteps of which Diſpute appear in the Journal of the Houſe of Lords, where Sir *William* preſented a Petition to their Lordſhips, praying that Dr. *Pory* might be obliged to wave his Privilege as a Member of Convocation. But the Petition was diſmiſſed.

Journal Dom. Proc. 1668.

CHAP. X.

Advowſons, and Right of Preſentation, how granted over from one Perſon to another. What Grants are good, or not.

THE Right of Patronage may paſs from one ſeiſed thereof, to a Stranger, by the Act and Conſent of him that is ſo ſeiſed, and ſometimes the Inheritance of the Advowſon is conveyed, ſometimes only the Right of Preſenting for one or more Turns, as ſhall happen within

By Grant.

Grants of Advowſons, &c. Or Deviſe.

a certain Time, *&c.* And this is either by the Grant of the Party intereſted therein by Deed, or by Deviſe made thereof by Laſt Will and Teſtament.

That the Right of Preſenting may paſs by Grant, it is requiſite that the Grantor have ſuch an abſolute Right in the Advowſon, that he may convey the ſame, according to the Eſtate by him granted; and alſo, that he purſue the Methods the Law preſcribes in ſuch Caſes: For all Eſtates that one hath Power to grant, or lawfully may grant, are not, nor cannot be granted by the ſame Form of Conveyance: For if a Tenant in Tail grant his Advowſon to others, to the Uſe of himſelf and his Wife, and the Heirs Male of the Huſband, and the Wife ſurvives the Huſband, yet ſhe gains nothing by ſuch Grant, for that the Eſtate is determined by the Death of the Tenant in Tail. *Mich.* 30 *Jac.* Lord *Say* v. *Biſhop of Peterborough*, *Brownlow* and *Gouldsborough* 1. 161. So though the Son and Heir of that Tenant in Tail join with his Father in the Grant of a next Avoidance in Tail, yet the Grant upon the Death of the Father, is void againſt the Son and Heir that joined in the ſame; becauſe the Son had nothing in the Advowſon, neither in Poſſeſſion or Right, nor in actual Poſſibility at the Time of the Grant. Sir *Marmaduke Wivel*'s Caſe, *Hobart* 45. and *Paſch.* 12 *Jac.* *Wivell* v. *Epiſc. Ceſtriæ*, *Brownlow* and *Gouldsborough* 1. 165. And though the Grant ſhould be made to the Perſon that hath the Reverſion, when the Eſtate-Tail is determined for want of Iſſue, yet without a Fine levied in theſe Caſes by the Tenant in Tail, it is not good; and this is by Force of the Statute of *Weſtminſter* 2. 13 *E.* 1. *c.* 1. called the Statute *de Donis Conditionalibus*, &c. which prevents Tenants in Tail from making ſuch Grants to Prejudice their Iſſue, or thoſe in Remainder or Reverſion after the Eſtate Tail is determined; and when ſuch Grants made by Tenant in Tail are determined, and go to the Reverſioner, he hath it not as an Advowſon in Tail, but in Fee-ſimple. *Mich.* 37 *&* 38 *Eliz.* *The Queen* v. *Huſſey*, *Moor* 421. and *Cro.* 3. 519. When a Tenant in Tail of a Manor, to which an Advowſon is appendant, doth grant the next Avoidance and dies, the Grant is abſolutely void. *Noy* 143. *Paſch.* 13 *Jac.* *B. R.* *Bowles* v. *Walter*, *Roll's* 1 *Rep.* 190. 1 *Bulſt.* 313. And if Tenant in Tail of a Manor to which the Advowſon is appendant, doth diſcontinue one Acre with the Advowſon, and dies, the Iſſue in Tail may preſent at the next Avoidance before the Acre be re-continued, for that the Diſcontinuee did never preſent after the Diſcontinuance, this being the firſt Avoidance after. 34 *E.* 1. *Quare Impedit* 179. 1 *Inſt.* 333. *b.* However, Grants void by the Death of Tenant in Tail, in the Caſes before put, do ſtand good againſt the Tenant in Tail himſelf, during his Life.

Grant by Tenants in Tail.

How void.

Fine levied.

Diſcontinuance.

Tenant for Life.

So if Tenant for Life of an Advowſon in Groſs doth levy a Fine thereof, and before any Claim made by him in Reverſion the Church doth void, he in Reverſion ſhall not afterwards have Advantage of the Forfeiture, as to the preſent Preſentation; for that before Election made by him in Reverſion, the Eſtate of the Leſſee was not defeated nor deſtroyed, the which Election ought to have been by Claim, and then it was a Chattel veſted in the Leſſee before Election made by him in Reverſion, which cannot be deveſted after by the Preſentation of him in Reverſion. *Trin.* 13 *Car.* *B. R.* *Spring* v. Sir *Julius Cæſar*, adjudged upon Error brought. *Roll's Abr.* 1. 857.

Claim by Reverſioner.

Iſſue in Tail concluded by Fine.

If a Tenant in Tail of an Advowſon, doth grant by Fine the Advowſon in Tail, the Iſſue in Tail is concluded; or if ſuch Tenant doth grant

Grant of the Nomination of a Clerk.

to

to one by Fine the Nomination of a Clerk to the ſame Advowſon, when it becometh void, this Fine ſhall bind the Iſſue, by the Statute 32 *H.* 8. *c.* 36. *Smith* and *Stapleton*'s Caſe, *Plowd.* 435. *b.* becauſe the Preſentation and Nomination is in Effect the ſame Thing, and the Fruit and the full Profit of the Patronage the Thing intailed. But if Tenant in Tail of an Advowſon doth grant by Fine the Nomination of a Clerk to one and his Heirs, ſo that when the Church doth become void, the Grantee and his Heirs may nominate a Clerk to the Tenant in Tail and his Heirs, and that he or they ſhall preſent the Clerk ſo nominated to the Ordinary, and the Tenant in Tail dieth, ſuch Fine ſhall not bind the Iſſues in Tail, becauſe there the Nomination and Preſentation are diſtinguiſhed, and ſo the Fine is not of the Thing intailed, by *Dode-ridge* in his *Compleat Parſon*, *p.* 36. and *Plowd.* 435. So when one was Tenant in Tail, of the Nomination of a Clerk to an Abbot to preſent over, the Abbot preſented without any Nomination, and had his Clerk inſtituted and inducted, and then the Abbot did get a Releaſe of the Anceſtor collateral to the Tenant in Tail with Warranty; it was held, that the Iſſue in Tail ſhould be barred, for that the Induction by Uſurpation put the Tenant in Tail out of Poſſeſſion, ſo that there remained only a Right which was bound by the Warranty collateral. 1 *H.* 5. *f.* 1. vouched in *Hare* and *Buckley*'s Caſe, *Plowden* 529. *a.*

Grants of Advowſons, &c.

Induction by Uſurpation.

Upon a *Quare Impedit* brought by the Heir of a Tenant in Tail, the Defendant pleaded, That the Father of the Plaintiff gave the Advowſon by Deed to him and his Heirs, and that the Anceſtor collateral to the Plaintiff, to whom he is Heir, releaſed with Warranty for him and his Heirs the ſaid Advowſon to the Defendant, and that this Anceſtor is dead, *&c.* and it was adjudged a good Bar, affirmed in Error. *Jenkins*, *Cent.* 4. *Caſus* 83.

Releaſe by Anceſtor.

Alſo Eccleſiaſtical Perſons ſeiſed of Advowſons, in the Right of their Churches, have not ſuch an abſolute Right thereto, that they may convey the ſame from their Succeſſors: For if all Avoidances of an Advowſon that ſhall happen within a certain Time, or the next Avoidance only be granted by a Biſhop, the Grant binds not ſuch Biſhop's Succeſſor, by reaſon of the Statute 1 *Eliz.* as was adjudged upon a *Quare Impedit* brought, by reaſon of a Grant made of the Advowſon of an Arch-Deaconry for twenty-one Years, becauſe it is Parcel of the Poſſeſſions and Hereditaments of the Church, and not a Thing whereof any annual Rent or Profit can be reſerved. And ſuch Grants made by the Biſhops, though afterwards confirmed by their Deans and Chapters, are not only void againſt Succeſſors, but alſo againſt the King, when the Temporalties of the Biſhoprick come into his Hands. Earl of *Bedford*'s Caſe, *Coke's Rep.* 7. *f.* 7. But though theſe Grants are void againſt their Succeſſors and the King, yet the Grant of a Biſhop in ſuch Caſe is good againſt himſelf; ſo that he cannot void it during the Time that he continueth Biſhop, the Statute of the firſt of *Eliz.* being made only for the Benefit of the Succeſſors and the King, that by the preceding Poſſeſſors they might not be prejudiced in their reſpective Rights, but not to reſtrain thoſe in Poſſeſſion, that they ſhall not do any Thing to bind themſelves during their own Times; for then they could not demiſe Lands, not formerly let for Rent, but muſt retain them in their own Hands, nor have the Benefit of their Waſtes, but by their own Stock, *&c.* *Mich.* 37 & 38 *Eliz.* *Dean and Chapter of Hereford* v. *Biſhop of Hereford* and *Ballard*, 3 *Cro.* 440. *Paſch.* 34 *Eliz.* *Sale* v. *Biſhop of Coventry* and *Marſh*, 1 *Anderſon* 241. *Mich.* 32 & 33 *Eliz.* *Smallwood* and others v. *Bi-*

Succeſſors not bound upon a Biſhop's Grant.

Yet good againſt Biſhop himſelf.

Grants of Advowſons, &c.

Simile of Grants by Deans, &c.

v. *Biſhop of Coventry* and *Marſh*, 3 *Cro.* 207. *Trin.* 41 *Eliz. Armiger* v. *Biſhop of Norwich* and *Holland*, 3 *Cro.* 690. And the like Law is in the Caſe of Grants made by Deans and Chapters, for they void when the Dean (being principal Member of the Corporation) dies, and bind both Dean and Chapter during his Life only. *Stat.* 13 *Eliz. c.* 10. *Paſch.* 39 *Eliz. Hunt* v. *Singleton*, 3 *Co.* 60, *Rickman* and *Garth*, 2 *Cro.* 173.

By a Tenant for Years.

Notwithſtanding ſuch Advowſons as be appendant to Manors, or other Things uſually let, do paſs now, as well as before the ſaid Statute 1 *Eliz.* with the Things to which they are appendant, ſuch Things not being granted contrary to the Contents of that Statute. And if he that is poſſeſſed for a Term of Years of an Eccleſiaſtical Inheritance, to which an Advowſon is appendant, doth grant away the Avoidances, if any ſhall happen during his Term then in Being, and after doth ſurrender his Term to him in Reverſion, who accepts of the ſame, and makes a new Leaſe thereof to another, *cum Pertinentiis*; yet he to whom the Avoidances happening, during the Term, were granted by the firſt Termor, ſhall enjoy the ſame, becauſe the Limitation, **If any ſhall happen,** is no more than the Law in this Caſe would have ſaid. And if by ſuch after-Surrender a precedent Grant ſhould be avoided, it would be in the Power of the Grantor, at Pleaſure, to derogate from his own Grant; whereas by the Rule of Law, every one's Grant is to be taken moſt ſtrongly againſt himſelf, and beneficially to the Grantee. *Trin.* 8 *Jac. Davenport*'s Caſe, *Co.* 8. *fo.* 144.

Rule of Law.

By Maſters and Fellows of Colleges, &c.

Alſo the Law is the ſame in the Caſe of any Maſter and Fellows of any College, Maſter or Guardian of any Hoſpital, Parſon, Vicar, or other, having an Advowſon in the Right of their Church, College, or other Eccleſiaſtical Preferment. *Stat.* 13 *Eliz. c.* 10. Neither can any Grant or Leaſe for any Years or Lives, made by any of the Perſons aforeſaid, of an Advowſon in Groſs, held in Right of their Churches, Colleges, &c. hold good againſt the Succeſſors. However, it ſhall be confirmed, they having by the Statute 13 *Eliz. c.* 10. a Power left them only of granting Things Corporeal, as Lands, &c. of which a Rent may be reſerved, and not of granting Things that lie in Grant, of which Sort are Advowſons. *Rep.* 5. *f.* 3. *Jewel*'s Caſe, 5 *Co.* 15. 10 *Co.* 60. But ſpeaking properly, theſe Leaſes are rather voidable than void; for the Succeſſor may, as he pleaſes, make the ſame either void or valid as to himſelf; and if he will make ſuch Leaſe void, he muſt do it either by Entry upon the Thing in Leaſe, to which the Advowſon is appendant, or by Claim, where the Advowſon is in Groſs. And as he may, (and if he do) muſt by ſome Act make them void; ſo he may affirm, and make them good during his Time: For it hath been adjudged, That tho' the King, when the Temporalties of a Biſhoprick do come to his Hands, ſhall avoid a voidable Leaſe, during the Vacancy of the Biſhoprick, in Privity and Right of the Biſhoprick; ſo that if a Turn fall, he ſhall preſent to the void Church; yet that ſhall not void the Leaſe ſo abſolutely, but that the ſucceeding Biſhop may make good the ſame: And ſo may a Dean and Chapter, and any other Eccleſiaſtical Perſons in the aforeſaid Caſes. And ſuch Leaſes of Advowſons, whether they were let in Groſs, or paſſed as appendant, are made good by the Succeſſor againſt himſelf, by expreſs Agreement to the Leaſe of his Predeceſſor; or (in caſe the Advowſon was leaſed with a Thing Corporeal, as appendant thereunto) alſo by Agreement in Law, 1 *Inſt.* 211. *b. Co.* 7. *f.* 8. which is made either by Acceptance of Rent,

How to make ſuch Leaſes void or good.

By ſucceeding Biſhop, &c.

By Agreement.

or

Grants of Advowsons, &c.

or by distraining for Rent due, for the Thing to which the Advowson is appendant, at a Day after the Death of the Predecessor; or (in case such Lease be for one or more Lives) by bringing an Assise; but the Assise cannot be brought, in case such Lease be for Years; and therefore, being brought by the Successor, doth not affirm such Lease; and this extends as well to aggregate, as to sole Corporations; only in the Case of an aggregate Corporation, the Dean, or principal Member thereof, cannot by his sole Act devest any Right that is in him and the other Members, as was adjudged in the Case of *Magdalen* College in *Cambridge*. 11 *Co.* 77.

Husband and Wife.

So if an Husband be seised of a Manor, to which an Advowson is appendant, jointly with his Wife for Life, his Right is not so absolute, that he can convey from his Wife: For if he doth alien one Acre with the Advowson (by which the Advowson is appendant to the Acre) and dies, and then the Church doth void after the Wife hath re-continued the Acre, she may present, but not before, 17 *E.* 3. 5. 19. adjudged. *contra*, 22 *E.* 3. 7. 23 *Ass.* 8. But if the Alienee doth alien the Acre to another, saving the Advowson, and then the Husband dies, the Wife may present to the next Avoidance, because she cannot recover it with the Acre. 17 *Eliz.* 3. 5. 19. *b.* And so if the Husband had aliened the Advowson, as in Gross, and after doth alien the Manor to another, and dies, the Wife may present upon an Avoidance, before the Manor is re-continued, because the Advowson is in Gross. *Roll's Abr.* 2. *p.* 352. *contra*, 17 *E.* 3. 19. *b.* So if the Wife be endowed of the third Part of a Manor, and of the Advowson appendant; and after another Husband and Wife do purchase all the Manor, and then the Husband doth alien one Acre of the Manor with the Advowson, and after the second Presentment, the Husband dies, and the Tenant in Dower dies, the Wife may present to the third Turn, although that she hath not re-continued the Acre; for that the Advowson by the Alienation could not pass as appendant to the Acre, because that at the Time that the Husband aliened, he had but a Reversion in it. 23 *Ass.* 8. 22 *E.* 3. 7. the same Case. However, Husbands seised in the Right of their Wives, and all other Persons, may make their Grants according to the Interests that they have; and therefore, if there be four Jointenants of an Advowson, and One of them grants over his Interest, this is good for his Part against the Survivor; by *Anderson*, and not contradicted by *Windham* or *Rodes*; but *Fenner* against it, because it is a Thing intire. *Hill.* 30 *Eliz.* *Agnes Kemp* v. *Bishop of Winchester*, *Gouldsborough* 81.

Re-continuance.

Jointenants.

Words in such Grants.

That the Right of Presenting may pass by Deed or Grant, 'tis requisite that the Deed or Grant do contain such apt and proper Words as the Law allows to pass the same: For when the King giveth or granteth Land, or a Manor, with the Appurtenances, without he make express Mention in his Deed or Writing, of Advowsons of Churches, when they fall, belonging to such Manor or Land, at this Day the King reserveth to himself such Advowsons; albeit that amongst other Persons it hath been observed otherwise. *Stat.* 17 *E.* 2. *c.* 15. *Doctor and Student*, *c.* 20. *l.* 1. A Grant of a Manor *with all Advowsons*, &c. *thereunto belonging*, will not extend to an Advowson severed in antient Times, tho' it was appendant to the Manor 300 Years ago. *Comyns* 361. *The King* v. *Bishop of Durham*, the Chancellor, *&c.* of *Cambridge*, *& al.*

Grants of Advowsons, &c.

The King being seised of an Advowson in Gross, grants it as appendant; he is deceived in his Grant, and therefore it is void. 1 *Ld. Raym.* 297. by *Turton* J. in the Case of *The King and Queen* v. *Bishop of Chester, Piers* and *Scroope.*

In the King's Grants.

But if a Manor, to which an Advowson is appendant, doth come to the King's Hands by Escheat, or by Purchase, if the King giveth the Manor to a Man as intirely as such as one held the same before it came to the King's Hands by way of Escheat, or as such an one held it that infeoffed us, the Advowson doth pass, without saying, *cum Feodis & Advocationibus.* And the Reason is, because the Law doth intend in such Case, that the King is informed of his Right: and so in Judgment of Law such Words are equivalent to an express Mention of the Advowson, which the Statute requires. *Hill.* 10 *Jac. Whistler*'s Case, 10 *Co.* 62. *Pasch.* 18 *Eliz. Dyer* 350, 351. The King seised of an Advowson of a

Of a Prebend.

Prebend in Fee, which is presentative, grants *Totam Rectoriam sive Præbendam nostram de Itching Abbas in Com. South. cum omnibus Decimis quibuscunque eidem pertinentibus, &c. Monasterio de Winton, nuper spect. in tam amplis modo & forma,* as the late Abbatess held it; although the Abbatess was seised in Fee of the Advowson, yet the Advowson shall not pass by this Grant, but the King shall be understood to be deceived; for he intended to pass the Rectory and Tithes as a Laything, and not the Advowson. *Hill.* 14 *Jac. Roll*'s *Abr.* 2. *p.* 189. So if the King grants a Manor *Habendum una cum Advocatione,* the Advowson being appendant, it will pass by those Words. *Roll's Abr.*

Specially named.

2. *p.* 65. But if it be in Gross, it will not pass, unless it be specially named, not only in the *Habendum,* but in the Granting Part preceding it. 38 *H.* 6. 36. Abbess of *Sion*'s Case, *Pasch.* 3 *Car. Hartop* and *Tuck* v. *Dalby, Hetly* 14. So if a common Person doth grant a Manor, *Habendum una cum Advocatione* of another Manor, this is not good to pass the Advowson. *Roll's Abr.* 2. *p.* 65. And if in the former Part of the King's Grant of a Manor, *cum Pertinentiis,* the Advow-

After Words.

son is excepted; yet if afterwards there come Words sufficient to pass the same, all the Parts of the Letters Patent taking Effect at the same Time, the Advowson shall pass as appendant to the Manor. *Hill.* 10 *Jac. Whistler*'s Case, 10 *Co.* 65, 66. But if the King grant a Manor (to which an Advowson is appendant) with the Appurtenances and all Profits, Commodities and Hereditaments to the same belonging, the Advowson is not included in such Grant. *Mich.* 14 *Jac.* Chancellor and Scholars of *Cambridge* v. *Walsgrave, Hob.* 126.

Of a Rectory, and Advowson of a Vicarage.

If the King being seised of a Rectory, and of the Advowson of the Vicarage of the same Church, by Letters Patent gives *Rectoriam prædict' & etiam Vicariam prædictæ Ecclesiæ,* the Advowson of the Vicarage doth not pass, no not in the Case of a common Person, much less in the Case of the King, for that the Vicarage is another Thing than the Advowson. *Mich.* 31 & 32 *Eliz.* 3 *Cro.* 163. But by *Walmsley* Justice, if the King had granted *Ecclesiam suam de D.* it had passed. *Mich.* 31 & 32 *Eliz. Ashegell*'s and *Bennis*'s Case, 1 *Leonard* 191. But if

After Attainder.

an Advowson of a Vicarage that is appendant to a Rectory come to the King by the Patron's being attainted of Felony, and the King doth afterwards grant the Rectory, *Et omnia tenementa parcel' spectant' dictæ Rector' adeo plene & in tam amplis modo & forma,* as the Person attainted had it, the Advowson of the Vicarage doth pass. 18 *Eliz. Dyer* 350.

Grants of Advowsons, &c.

If the King be seised of the Rectory of *D.* and grants *Advocationem Ecclesiæ de D.* thereby the Advowson doth not pass, for that by the Appropriation the Advowson is gone, and is not in *Esse*, and by Consequence cannot be granted: And it was held not to be a Case within the Statute of 4 & 5 *Phil.* and *Mary*, of Confirmation of Grants of the King; for the said Statute doth but help Miss-recital, Miss-naming, Miss-taking, *&c.* but doth not make Grants good of such Things as are not. And if it were in the Case of a Subject, nothing would pass; by *Manwood*, Chief Baron. *Trin.* 26 *Eliz. The Queen* and *Lord Lumley*'s Case, 2 *Leon.* 80. *Hob.* 304.

4 & 5 *P.* & *M.* only helps Misrecitals, *&c.*

Two Parts of a Manor seised for Recusancy.

If the King, for Recusancy, doth seise two Parts of a Manor, to which an Advowson is appendant, thereby he shall have two Parts of the Advowson; and if he doth grant the Manor, with the Appurtenances and all Profits, Commodities and Hereditaments to the same belonging, for Twenty-one Years, if the Recusant continues such for so long Time, the two Parts of the Advowson are not thereby passed from the King. *Mich.* 14 *Jac.* Chancellor, *&c.* of *Cambridge* v. *Walsgrave*, *Hobart* 126. and by *Moor* 872. For Want of a more special Mention of the Advowson, according to the Statute 17 *E.* 2. *c.* 15. or of the Words, *Adeo plene & integre, & in tam amplis modo & forma prout, &c.* the Recusant had the Manor. But in Cases of Restitution, as in Restitution of the Temporalties of a Bishoprick, to a succeeding Bishop, Advowsons do pass from the King, without express Mention of them, or Words equivalent; for the Words of the said Statute are, **When the King giveth or granteth.** *Hill.* 10 *Jac.* in *Whistler*'s Case, 10 *Co.* 64. *b.* 41 *E.* 3. 5. 27 *Ass.* 48. *Trin.* 4 *Eliz. Wyllion* v. *Lord Barkley*, *Plowd.* 251 & 252.

Restitution of Temporalties.

Manor granted by a common Person.

In the Case of a common Person, by the Grant of a Manor, to which an Advowson is appendant, without any Mention of the Advowson, or saying, *Cum Pertinentiis*, the Advowson doth pass: And so it did in the Case of the King before the Statute of *Prærogativa Regis.* 17 *E.* 2. 15. 18 *E.* 3. 15. 8 *H.* 7. 4. 19 *E.* 2. *Bro.* 844. *Hill.* 10 *Jac.* 10 *Co.* 64. *b. Whistler*'s Case, *Roll's* 2 *Abr.* 60. *n. a.* And 'tis said, without mentioning the Advowson, or saying, *Cum Pertinentiis*, the Advowson passes, though the Feoffment of the Manor be without Deed. 39 *E.* 3. 21. *Mich.* 29 *Eliz. Gouldsborough p.* 42. *Co.* 10. 64. *Roll's Abr.* 2. 62. because it is Parcel of the Manor, and lieth in Tenure. 15 *H.* 7. 7. 8. But if the Grant be of the Third Part of the Manor, though the Words, *Cum Pertinentiis*, be added, if no express Mention of the Advowson be made, nothing of the Advowson doth pass. *Trin.* 30 *Eliz. Long* v. *The Bishop of Glouceſter*, &c. *Savile* 103. And yet if a Wife be endowed of a Third Part of a Manor, the Third Part of the Advowson shall pass therewith, as appendant to it. 6 *E.* 3. 44. *Quare Impedit* 40. And if another Husband and the Wife, after such Endowment, do purchase all the Manor, and present twice, and then alien one Acre of the Manor, with the Advowson appendant, the Third Part of the Advowson doth not pass as appendant to the Acre; for that the Husband hath but a Reversion in the Third Part at the Time of the Grant. 23 *Ass.* 8. adjudged. Besides, at this Day no Alienation of the Husband's shall be prejudicial to the Wife. *Stat.* 32 *H.* 8. *c.* 28. And yet note, that it is said, That if one doth demise a Manor, to which an Advowson is appendant, and saith not *Cum Pertinentiis*, the Advowson doth not pass, which was said in the Case of a Parson's Lease. *Pasch.* 25 *Eliz. C. B.* in *Higgin*'s and *Grant*'s Case, 3 *Cro.* 18. *Doctor and Student*

The Third Part of a Manor.

Husband and Wife.

Demise.

Grants of Advowsons, &c.

Student c. 20. *l.* 1. But this seems to be contrary to *Whistler's* Case, 10 *Co.* 64. before-mentioned, unless there may be a Difference between a Grant and a Lease.

By

Though it be before said, that without mentioning the Advowson, or saying *Cum Pertinentiis*, the Advowson passes with the Manor, though the Feoffment of the Manor be without Deed; yet if a Man be seised of a Manor, whereunto an Advowson is appendant, and maketh a Feoffment of Three Acres, Parcel of the Manor, together with the Advowson to two, to have and to hold the one Moiety of the Acres, and of the Advowson, to one and his Heirs; and the other Moiety of them, together with the other Moiety of the Advowson, to the other and his Heirs; this cannot be good without Deed, for the Feoffor cannot annex the Advowson to these Three Acres, and disannex it from the rest of the Manor without Deed. 1 *Inst. f.* 190. *b. Savil* 104. An Advowson appendant to a Manor is appendant properly to the Demesnes of the Manor; yet a Grant of the Demesnes, together with the Advowson without Deed will not pass the Advowson; for that the Manor is thereby destroyed, and consequently the Appendancy of the Advowson will be destroyed also; for as before it was appendant to the Manor, the Manor being destroyed by granting the Demesnes from the Services, the Advowson by such Grant cannot be made appendant to the Lands which were the Demesnes, but must remain in Gross. *Savile*, the same Case, 104. So an Advowson in Gross will not pass without Deed by Livery and Seisin only at the Door of the Church. *Roll's Abr.* 2. *p.* 62. 6 *H.* 7. 3. 16 *H.* 7. 3. Yet it is said, That if the Advowson be pleaded to be granted by Deed, an Issue is taken by a Stranger to the Deed, that he did not grant it by the Deed, if it be found that he did grant it without Deed, or by another Deed, it is good; for that the Deed is Surplusage, and the Effect of the Issue is upon the Grant, and not the Deed. 43 *E.* 3. 1. *b.* 2 *Roll's Abr.* 2. 681. For at this Time it was held, and so resolved in this very Case of 43 *E.* 3. that an Advowson would pass by Livery without Deed, but the contrary hath for a long Time, as appears before, been taken for Law.

Demesnes.

Issue taken by a Stranger.

Upon a Lease by a Prebendary.

If a Prebendary having an Advowson belonging in Fee to his Prebend, doth lease his Prebend, *cum omnibus Commoditatibus, Emolumentis, Proficuis & Advantagiis*, the Advowson doth not pass by such Words, because they imply only Things gainful, which are contrary to the Nature of an Advowson. *Mich.* 16 *Jac. John London* v. *The Chapter of the Collegiate Church of the Virgin Mary of Southwell, Hobart* 304. And yet an Advowson may be yielded in Value upon a Voucher, and be Assets in the Hands of an Executor; but Words in Grants shall be construed according to a reasonable and easy Sense, not strained to Things unlikely and unusual; and upon that Reason a Grant of all Woods and Trees doth not pass Apple Trees. 14 *H.* 8. 1. So a Prebend having a peculiar Jurisdiction, made a Lease of his Prebend with all Profits, Commodities and Advantages, *&c.* thereto belonging; and by the Chief Justice and *Windham* the Ecclesiastical Jurisdiction did not thereby pass to the Lessee, so as that he might make a Commissary, for that is annexed to the Spiritual Person, and not to the Corps of the Prebend; but *Keeling* and *Twisden* were of a contrary Opinion, that the Ecclesiastical Jurisdiction was annexed to the Corps of the Prebend, and did pass by the Lease. *Hill.* 15 & 16 *Car.* 2. *B. R. Sherrock* v. *Boucher*, 1 *Levinz* 125. 1 *Keble* 538, 639, 656. So an Appropriation will not pass by the Name of an Advowson, 44 *E.* 3. 33. yet an Advowson will be contained

By a Prebend of a peculiar Jurisdiction.

Of an Appropriation.

tained under the Name of a Tenement, and therefore Licence to purchaſe Lands and Tenements in Mortmain, extends to Advowſons, 13 *E.* 3. 18 *Eliz.* *Dyer* 350. and ſo Advowſons paſs by the Name of all Hereditaments lying where the Church lieth. 15 *Eliz.* *Dyer* 322. See *John London*'s Caſe before, *Hob.* 304.

Grants of Advowſons, &c.

Under the Name of Tenement.

Sometimes an Advowſon is called a Nomination or Preſentation, therefore if the Nomination of an Advowſon be granted, *Habendum* the Advowſon, the *Habendum* is ſufficiently purſuant; for though it vary in Name, yet it is all one in Nature, ſo that the Grant of the Nomination of an Advowſon, is in Subſtance the Grant of the Advowſon; for the Profit and Commodity of an Advowſon reſteth in the Nomination or Diſpoſition of the ſame: Hereof it enſueth, that if one grants the Advowſon, excepting the Preſentation, during his Life, ſuch Exception is void and repugnant to the Grant. 38 *H.* 6. 38. *b.* *Doderidge's Complete Parſon*, *p.* 63. And though Nomination and Preſentation are oftentimes in Law uſed for one and the ſame Thing, 14 *H.* 2. 22. by *Kingſmill*, yet Preſentation and Nomination may be ſo diſtinguiſhed, that one may have the Preſentation, and another the Nomination, as diſtinct Inheritances. And this may come to paſs by the Grant of him that is ſeiſed of the Advowſon; for if he that is ſo ſeiſed, doth grant unto another and his Heirs, That the Grantee and his Heirs, every Time that the Church doth become void, ſhall nominate to the Grantor and his Heirs, a Clerk to be preſented to the ſame Church; and that the Grantor and his Heirs ſhall preſent the Clerk ſo nominated, to the Ordinary of the Place to be admitted and inſtituted accordingly into the Church, this is a good Grant; and he who hath the Right of Nomination, is the only Patron of the Church, and ſhall maintain a *Quare Impedit* in his own Name; and he that is to preſent ſuch Perſon ſo nominated, in preſenting ſhall be but as Servant to him that hath the Nomination. 24 *E.* 3. 69. *b.* 14 *H.* 4. 11. *a.* 1 *H.* 5. 1, 2. and 16. 5 *E.* 4. 123. *a.* 21 *H.* 6. 17. *a.* *Paſch.* 2 *H.* 8. *Kell.* 161. Sir *George Shirley* v. *Underhill* and *Burſey*, *Mich.* 16 *Jac.* *Moor* 894. *Plowd.* 435. *b.* 529. *a.*

Under the Names, Nomination or Preſentation.

Diſtinctions.

And accordingly, if one hath a Nomination to a Benefice, and another the Preſentation, and he that hath the Preſentation granteth an Annuity to a Clerk, until he be advanced to a Benefice by the Grantor; if afterwards the Church doth become void, and the Grantee be nominated to the Grantor to be preſented over; and he being preſented accordingly, is admitted, inſtituted and inducted, yet the Annuity ſhall not ceaſe: For the Grantee was not thereunto preferred by the Grantor, although he preſented him. *Doderidge's Compleat Parſon*, *p.* 65. And yet if a Writ of Annuity be brought againſt the Parſon, the Aid is only grantable of him that hath the Preſentation, and not of him that hath the Nomination. *Paſch.* 5 *E.* *Moor* 49. 1 *H.* 5. *f.* 1.

One hath the Nomination, another the Preſentation.

Aid.

And if one hath the Nomination, and another the Preſentation, and ſuch Right of Preſentation doth accrue to the King, he that hath the Nomination, ſhall have all, by reaſon that it is indecent for the King to do any Thing as a Servant to another; by *Townſend* Serjeant. *Mich.* 32 *H.* 8. *Dyer* 48. 3 *H.* 4. 33. 4 *E.* 6. *Br. Caſe* 410. *Mich.* 1 *Car.* *Dickenſon* and *Greenhow*'s Caſe, *Popham* 158. But by *Doderidge*, the Nominator ſhall in ſuch Caſe nominate to the Lord Chancellor, who, in the Name of the King, ſhall preſent to the Ordinary. *Compleat Parſon*, *p.* 63.

The Preſentor only a Servant.

Grants of Advowsons, &c.

Though in the Case before, the Nominator is Patron, and he that is to present, is as his Instrument or Servant; yet if he that is seised of an Advowson doth grant to another, that at every Avoidance he shall nominate to the Grantor two Clerks, of which he shall present one to the Bishop, the Grantor (his Grant notwithstanding) remains Patron, because the Election is in him, which of the Parties named shall be presented, and have the Benefice. 14 *E.* 4. 2. However, if in these Cases Respect be had to each other, they are both Patrons after a Manner; and for Injury offered by either of them to the other, they may punish each other; as if he that hath the Nomination will present immediately to the Ordinary, he that hath the Presentation may bring a *Quare Impedit*, or a Writ of Right of Advowson against him, as his Case shall require: So if he that hath the Presentation, doth refuse to present the other's Clerk nominated unto him, or doth present one without his Nomination, the other may have his *Quare Impedit*, or Writ of Right against him; and his Writ shall be, *Quod permittat ipsum præsentare, &c.* and not *nominare*. For if so, the Writ shall abate; but in his Declaration he shall declare upon the special Matter. 14 *H.* 4. 11. 1 *H.* 5. 1. *Pasch.* 5 *Eliz.* *Moor* 49. *Mich.* 16 *Jac.* Sir *George Shirley* and *Underhill*'s Case, *Moor* 894. And though one hath a Writ to the Bishop against the other, yet that shall not out the other of his Possession. *Pasch.* 5 *Eliz.* *Moor* 49.

Election of Presentation in the Grantor.

Remedy against each other.

Grant by Deed.

As the Right of Patronage, or perpetual Interest in an Advowson, may pass by the Grant of him that is seised thereof, so the Right of Presenting to one or more Avoidances, or to so many as shall happen within a Time limited, may be conveyed by the same Means; but when a Grant is made of the next Avoidance of a Church, it must be done by Deed; for a Grant by Word only will operate nothing. *Mich.* 31 & 32 *Eliz.* *Crisp*'s Case, 3 *Cro.* 163. And if the King doth grant the next Avoidance of an Advowson belonging to the Duchy of *Lancaster*, this ought to be under the Duchy Seal, and is not good under the Great Seal. *Roll's Abr.* 2. *p.* 182.

Duchy Seal.

Of the next Avoidance only a Chattel.

If the Grant of the next Avoidance be to one, his Heirs and Assigns, yet it is but a Chattel, and shall go to the Executors. 39 *E.* 3. 37. 34 *H.* 6. 27. But if one doth make a Grant to *J. S.* for the Life of *J. S.* of the next Avoidance of his Church, so that he may present, if the Church void during his Life, this is a limited Grant; so that if no Avoidance happens during the Grantee's Life, the Executor shall not present, *Trin.* 4 *Car.* *Hyde* v. *Man*, *Jones* 407. 1 *Cro.* 505. and it is said to be adjudged 9 *Eliz.* That if a Manor be bargained and sold, the Advowson appendant will not pass, if the Deed be not inrolled. *Stamp* and *Clinton*'s Case, 1 *Roll. Rep. p.* 100. 1 *Inst.* 222. *b.*

Deed inrolled.

When Grantee must present at his Peril.

He that hath a Grant of the next Avoidance of a Church, ought to present to the next that happens after such Grant made, at his Peril; and if the Church being full, the rightful Patron doth grant *Præsentationem quandocunque & quomodocunque Ecclesia vacare contigerit pro unica vice tantum*; and adds, That this Grant shall remain in Force, until a fit Clerk by his Presentment shall be admitted, instituted and inducted, yet these general Words do not enable the Grantee to take any other than the next immediate Turn: For if they should, the true Patron would not know certainly when to present, and would be disabled by reason of Uncertainty to make any new Grant; nor could the Jury, upon a *Jure Patronatus* awarded, know how to return their

Verdict, and ſo the Church ſhould remain for ever litigious. But if in this Caſe the Grantee doth preſent in his Turn, and be diſturbed by any elder Title or Grant, this Grant ſhall remain in Force to enable him to preſent to the Church upon the firſt Avoidance, after the preceding Grant is ſatisfied. *Trin.* 8 *Jac. Starkey* v. *Pool*, 1 *Bulſtrode* 26. And this holds as well in the Caſe of the King, as of a common Perſon. *Trin.* 27 *Eliz. Baſkervil's* Caſe, 7 *Co.* 28. And the ſame Law is, where a ſecond Preſentment is granted to the King: For if he doth not take it whilſt he may, *viz.* either before the Church is filled, or after, by removing the Incumbent of the Uſurper, he ſhall never have it. *Paſch.* 26 *Eliz. Beverly* v. *Archbiſhop of Canterbury, Owen* 2.

Grants of Advowſons, &c.

If ſuch Grantee be diſturbed in his Turn.

But if the King hath the firſt and next Avoidance of a Church, and after doth grant a Diſpenſation to the Incumbent to retain the Benefice in *Commendam* after he ſhall be made a Biſhop, if the Incumbent doth hold it with a Biſhoprick accordingly, during his Life, yet this ſhall not amount to a Preſentation, but the King ſhall have his Turn after the Death of the Biſhop, *Mich.* 9 *Jac. King* v. *Horsfall* and *Wale, Davis* 77. becauſe the Grant of the *Commendam* was but a Continuance of the old Title, and doth only ſatisfy the King's Right by his Prerogative, which is to preſent to Churches void by Creation, and is not an Execution of the Right which he hath to the next Turn; and the Diſpenſation being granted before Conſecration of the Biſhop, it prevented the Church from being void, ſee *Chap.* 9. and the King's continuing the Church full of him that is made a Biſhop by *Commendam*, ſhall not prevent him of the next Preſentment after the Church is void of the Commendatory; yet if the next Turn be granted to a private Perſon, and the Incumbent is made Biſhop, but before his Conſecration obtains a Diſpenſation to retain his Living, the Grantee hath loſt his Turn; for as to him the *Commendam* was as a Preſentation, *Woodley* v. *Biſhop of Exeter*, &c. 2 *Cro.* 691. therefore *Quære.* But when the King making the Incumbent of a Church Biſhop, doth preſent thereto by his Prerogative, he that hath the Grant of the next Avoidance made to him when the Church was full, ſhall not have the next Turn after the Church ſhall be void of the King's Preſentee; reſolved in *Maring* and *Woodley's* Caſe, vouched by *Jones* in *Evans* and *Kiffin's* Caſe v. *Aſkwith*, *Palmer* 478. nor the King in this Caſe, if he be the Grantee of the next Avoidance, ſhall have the next Turn; becauſe then he doth not continue the old Incumbency, but preſents a new by a double Title.

Diſpenſation *Retinere in Commendam.* Of *Commendams vide Chap.* 18.

If one hath the Grant of a ſecond Avoidance, and he that hath the Grant of the firſt Avoidance doth preſent upon a Simoniacal Contract, though his Clerk be inſtituted and inducted, and the King doth afterwards preſent upon his Title of Simony, and his Clerk be alſo inſtituted and inducted, yet this ſhall not prevent him that hath the ſecond Avoidance from preſenting, when the Church ſhall be void of the King's Incumbent; becauſe the Inſtitution and Induction of the Clerk of him that had the firſt Avoidance is void, and the King doth preſent as to his Turn, and ſo only bars the Grantee of the firſt Avoidance from preſenting again, and not the other, when the King's Right is ſatisfied; but if one hath the Grant of the firſt Avoidance of a Church, and doth preſent a Clerk to the Biſhop, who doth obtain Admiſſion, Inſtitution, Inſtallment or Induction thereupon, for any Reward or Promiſe, *&c.* or doth preſent ſuch Clerk to his Avoidance, who within ſeven Years before his Acceptance, or taking of ſuch Benefice, had obtained Holy Orders

Upon a Grant of a ſecond Avoidance, *&c.*

Grants of Advowsons, &c.

Orders by reaſon of any corrupt Payment or Agreement, and the Clerk in either Caſe be inſtituted and inducted accordingly, this is a Plenarty, and his Turn ſerved, although the Church in both Caſes immediately upon the Induction be void; but the King in this Caſe hath not the Turn, but he that hath the Right to the next Avoidance after. *Stat.* 31 *Eliz. c.* 6. *Paſch.* 14 *Jac. Winchcomb* v. *The Biſhop of Wincheſter* and *Pulleſton, Hobart* 167.

The Church being void, Grant is made of the next Avoidance.

If when a Church is void, a Grant is made of the next Avoidance thereof, it ſhall extend to the next that falls after the Church is filled, and not of the preſent Turn; by *Fitzherbert* and *Shelly*. *Hill.* 28 *H.* 8. *Dyer* 26. *Mich.* 10 & 11 *Eliz. Agard* v. *Biſhop of Peterborough*, 1 *Anderſon* 15. But when the Church is full, if the Patron grants *proximam Advocationem* to one, and after doth grant *proximam Advocationem* to another, the ſecond Grant ſhall not extend to give the next Turn after that which was firſt granted; for that is not *proxima Advocatio*, but ſhall be void: And ſo if a Man being ſeiſed of an Advowſon in Fee, and having a Wife, doth grant the third Avoidance of the ſame Church, the Grantee ſhall not have the fourth Avoidance where the Feme hath the third for her Dower, unleſs in theſe Caſes the Deed is more ſpecial. *Mich.* 22 *Jac. Woodley* v. *Biſhop of Exeter*, *Manwaring* and *Edwards*, 2 *Cro.* 691. 20 *H.* 8. *Bro. Preſent. al Egliſe* 52. 35 *H.* 8. *ibid.* 55. 15 *H.* 7. 7. *Trin.* 29 *H.* 8. *Dyer* 35. *Co.* 8. *fol.* 144. *Mich.* 42 *Eliz. Williams* v. *Biſhop of Lincoln*, &c. 3 *Cro.* 791.

Of a third Avoidance.

Obligations.

If *A.* Patron of an Advowſon doth grant to *B.* and *C.* the next Avoidance, and doth become bound to *C.* in an Obligation, that *C.* ſhall enjoy the ſaid Preſentment without any Diſturbance or Claim of the ſaid *A.* and after *B.* doth releaſe to *A.* who (the Church becoming void) did offer to join with *C.* in preſenting to the Avoidance; yet it was held, that the Obligation was forfeited, although that *A.* had a Title of new, after the Obligation was entred into. *Mich.* 26 *Eliz. C. B. Blueſs*'s Caſe, 4 *Leon. f.* 18. Or if a Man bind himſelf in an Obligation to procure a Grant of the next Avoidance to be made to another, ſo that the other may at the next Avoidance preſent, and doth procure a Grant to be made accordingly, and then the Incumbent is made Biſhop, ſo that the King preſents by his Prerogative; in this Caſe the Condition is not performed by reaſon of theſe Words, ſo that the Grantee may preſent. *Hill.* 29 *Eliz. Bingham* v. *Squires*, *Leonard* 4. *f.* 61.

Next Nomination.

Whether the Patron of a Church doth grant *proximam Advocationem Eccleſiæ de D. hac vice*, or that another ſhall have the next Nomination of an able Clerk of his Church when it ſhall void; it is all one in Effect, and in the latter Caſe the Grantor is bound to preſent to the Biſhop ſuch Clerk ſo by the Grantee named; and if the Grantee be diſturbed, he ſhall have his *Quare Impedit* as Patron; by *Rede. Paſch.* 2 *H.* 8. *Keleway* 160. *b.*

Of what Intereſt the Grant muſt be.

That the Right of Preſenting may paſs by Deed or Grant, the Grant muſt be made of that Intereſt, which by Law may be granted: For tho' whilſt a Church is void, the next Avoidance or Avoidances that ſhall happen, or the Inheritance of the Advowſon, may be granted away, *Mich.* 42 & 43 *Eliz. Leeke* v. *Biſhop of Coventry*, *Owen* 131. yet the void Turn itſelf is not grantable by any common Perſon, for that it is a meer Spiritual Thing, and annexed to the Perſon of him that is Patron; and during the Time of the Vacation 'tis a Thing in Right,

Right, Power and Authority; a Thing in Action, and in Effect, the Fruit and Execution of the Advowſon, and not the Advowſon itſelf: and yet the Executor ſhall have it. *Paſch.* 11 *Eliz.* *Dyer* 282. *Paſch.* 2 & 3 *Phil.* and *Mary*, *Agard* v. *The Biſhop of Peterborough*, *Dyer* 129. *b.* and in 1 *Anderſon* 15. *Trin.* 10 *Eliz.* *Stephens* v. *Clark*, &c. *Moor* 89. *Mich.* 30 & 31 *Eliz.* *Brokeſby* v. *Wickham and Biſhop of Lincoln*, 1 *Leon.* 167. *Mich.* 42 & 43 *Eliz.* *Baker* v. *Rogers*, 3 *Cro.* 173. Grants of Advowſons, &c.

And as a void Turn is not grantable, ſo if two have a Grant made to them of a next Avoidance, and after the Church is void, one doth releaſe to the other all his Right and Title therein, the Releaſe is void; for that the Church being void, the Right of Preſenting not being a Thing in Poſſeſſion, but only in Action, cannot be releaſed, no more than it can be granted, and therefore they muſt both preſent, and if diſturbed, bring their Action in both their Names. *Hill.* 33 *Eliz.* *Brokeſby* v. *Biſhop of Lincoln*, 1 *Anderſon* 223. *Mich.* 31 & 32 *Eliz.* *Brokeſby*'s Caſe, 3 *Cro.* 173. But a Releaſe in this Caſe is good, if it be made before the Church is void, and the Party to whom the Releaſe is made, may preſent, and if diſturbed, may bring his Writ in his own Name. *Mich.* 39 & 40 *Eliz.* *Bennet* v. *Biſhop of Norwich*, 3 *Cro.* 600. *Trin.* 39 *Eliz.* *Lewis* v. *Bennet*, *Moor* 467. Void Turn not grantable. Where a Releaſe is void. Where good.

So if the King ſeiſe an Advowſon without Cauſe, *ignorans Tituli ſui*, and after the Church doth void, and then he that Right hath, comes, and hath *Ouſter le mayn*, *cum exitibus*; yet he ſhall loſe the Preſentment *hac vice*, for nothing doth paſs by the Word *Exitibus*, but the Rents and Profits of the Thing, and not the Preſentment; for that this is no Profit to the Patron, but a Pre-eminence only, and the Profit is to the Parſon. 24 *E.* 2. 29. and *Brooks*, *Iſſues* 21, 26. Seizure without Cauſe.

Though a Grant made of a void Turn by a common Perſon be void, yet ſuch Grant is good where the King is Grantor. *Paſch.* 11 *Eliz.* *Dyer* 282, 300. 9 *E.* 3. 16 *H.* 7. 8. in the Caſe of *Margaret* Counteſs of *Richmond*. *Trin.* 29 *Eliz.* Sir *Tho. George* v. *Dalton*, 3 *Leonard* 196. But if when a Church is void, the King Grants a Manor with all Advowſons appendant, the void Turn doth not paſs thereby, unleſs he alſo mention it in his Grant. *Mich.* 14 *Eliz.* *Leon.* 3, 17, 61. *Mich.* 13 & 14 *Eliz.* *Hobart* 140. *Mich.* 5 *Jac.* *Fane*'s Caſe, 2 *Cro.* 26. 30 *Eliz.* Sir *Tho. George* v. *Biſhop of Lincoln* and *Dalton*, *Gouldſborough* 73, and in *Owen* 53. and in 3 *Leon.* 196. and in *Moor*, *p.* 249. 9 *E.* 3. 26. *Quare Impedit* 31. *Hill.* 18 *Eliz.* *Dyer* 348. *Paſch.* 13 *Eliz.* *Dyer* 300. 4 *Leon.* *Caſe* 339. and 16 *H.* 7. 8. Againſt this, *Fitz. N. B.* 33. 11. *Dyer* 269. 2 *Roll's Abr.* 196. King grants a void Turn.

A Lapſe cannot be granted by the King, either before its Fall, or after, by *Hobart* 154, in *Colt* and *Glover*'s Caſe. And it is ſaid, That when the King hath two Titles to one Church, the one as Patron, the other by Lapſe, if the King grants the Advowſon without an expreſs Grant of the preſent Avoidance, the Grantee ſhall not have the Preſentment. 16 *H.* 7. 9 *E.* 3. *Hill.* 18 *Eliz.* *Dyer* 348. *Roll's Abr.* 2. *p.* 196. A Lapſe cannot be granted.

So neither the King, nor any Biſhop can bind themſelves not to fill a Church come to them by Lapſe; becauſe (ſaith *Hobart*) that were *Injuria & Malum in ſe*: Nor can the King, having a Lapſe, grant to an Intruder, that he will not preſent to the Church; nor to an Uſurper upon his Lapſe, that he will not remove his Preſentee: For this were a Breach of that Truſt which the Law repoſeth in him, as well for the May not bind himſelf not to fill a Lapſe.

Right of Preſentation forfeited.

How Preſentments paſs by Deviſe or Will.

Behoof of the true Patron, as for the Good of the Church; for by this Means the Patron ſhould loſe his Patronage: By *Hobart*, in *Colt* and *Glover*'s Caſe before, *Hob.* 154, 155.

The other Means by which the Right of Preſenting to a Church may be transferred over by the Act and Conſent of the Party ſeiſed of the ſame, is by Deviſe made thereof by Laſt Will and Teſtament; for thereby the Right of Preſenting to the next Avoidance, or an Inheritance of an Advowſon, may be deviſed to any Perſon. *Paſch.* 13 *Jac.* Sir *Edward Pinchin* v. Dr. *Harris*, 2 *Cro.* 371. And if ſuch Deviſe be made by the Incumbent of the Church, the Inheritance of the Advowſon being in him, it is good, tho' he die Incumbent; for tho' the Teſtament hath no Effect but by the Death of the Teſtator, yet it hath an Inception in his Life-time: And ſo it is, tho' he appoint by his Will who ſhall be preſented by the Executors, or that one Executor ſhall preſent the other, or doth deviſe that his Executors ſhall grant the Advowſon to ſuch a Man. *Trin.* 13 *Jac. Harris* v. *Auſtin*, 3 *Bulſtrode* 40. *Paſch.* 13 *Jac.* Sir *Edward Pinchin* v. *Harris*, 2 *Cro.* 371. *Trin.* 13 *Jac. Harris* v. *Auſtin*, *Roll's* 1 *Rep.* 210.

A. ſeiſed of the Manor and Patronage of *Waltham*, by Will gives 100 *l. per Annum* Rent-charge, and the Right of nominating to the Church to ſix Truſtees; and thoſe Truſtees when reduced to three, to chooſe others. *B.* the only ſurviving Truſtee, aſſigns his Truſt to others, who nominate to the Church, being a Donative. Decreed the Aſſignees of the Truſt, tho' the Aſſignment was made by one only who ſurvived, had the Right to nominate to the Church, and not the Owner of the Manor. 2 *Vern.* 748. Attorney General *ad relationem Tracy & Lapthorn & al.* v. *Dominam Floyer*, *Campion*, *Cooper & al'*.

By acknowledging a Statute.

Laſtly, It may be added, That the Right of Preſenting may paſs from one ſeiſed of the ſame, by the Patron's acknowledging of a Statute, *&c.* for if a Perſon having a Manor, to which an Advowſon is appendant, doth bind himſelf in a Statute-Merchant, *&c.* and the Statute be extended; if the Church doth become void during the Conuſee's Eſtate, the Conuſee may preſent. *Mich.* 32 *&* 33 *Eliz. C. B. Kent* v. *Wichall*, *Owen* 49. *Mich.* 32 & 33. Sir *John Arundel*'s Caſe, *Noy.* But I conceive that an Advowſon in Groſs is not extendable upon a Statute Merchant, or of the Staple. *Jo. Rep.* 24.

CHAP. XI.

Right of Preſentation, by what Means forfeited.

Right of Preſentation forfeited. *Vide ante, chap.* 8.

THE Right of Patronage, or Preſenting, may paſs from the rightful Patron to a Stranger, by Forfeiture, and that in ſeveral Reſpects: As firſt, upon the Account of a Simoniacal Contract; for in ſuch Caſe, the King hath the Right of preſenting for one Time, or Turn, to the Benefice for which ſuch Contract is made. *Stat.* 31 *Eliz. c.* 6. which

which ſee *Chap.* 5. That is, if the Clerk be preſented in Purſuance of the Simoniacal Contract, for the Words of the Statute are; **If any Perſon,** &c. **ſhall corruptly Preſent or Collate, or Give and Beſtow,** &c. And tho' a Clerk without the Privity or Conſent of the Patron, doth make a Simoniacal Contract with the Wife, or Friend of the Patron, and the Clerk is preſented accordingly, the King ſhall have the Turn. *Mich.* 13 *Jac. King* v. *Cole* and *Saker*, 2 *Cro.* 385. *Hill.* 11 *Jac.* Sir *William Bowyer* v. *High-Commiſſion Court*, 2 *Bulſtrode* 182. The ſame Law, tho' the Contract be only made amongſt Strangers, without the Privity either of Patron, or Incumbent. *Mich.* 9 *Car. Bawderock* v. *Mackaller*, 1 *Cro.* 331. *The King* v. *Truſſel. Paſch.* 19 *Car.* 2. 1 *Siderfin* 329. But if he that hath the Right of Preſentation only, upon a Nomination made by another, of a Clerk to him, without the Privity of him that hath the Right of Nomination; or if an Uſurper doth corruptly preſent to a void Church, the Patron, who ought to Nominate or Preſent, ſhall not thereby forfeit his Right. 3 *Inſt. c.* 71. For it was ſaid, *Mich.* 15 *Jac.* in *Winchcomb* and *Pulleſton*'s Caſe, *Noy* 25. That the rightful Patron may have a *Quare Impedit* after the ſix Months againſt an Incumbent of an Uſurper that is in by Simony; and (*per Cur'*) to ſay in that Caſe, that the Church was full by ſix Months, is no Plea; and the Reaſon is, becauſe the Preſentation of the Uſurper's Clerk being made by Simony, that, and the Inſtitution and Induction that followed upon it, were merely void, and ſo the Church never full of the Perſon of ſuch Clerk. *Hobart* 167.

Patronage forfeited. By Simony.

In an Uſurper.

If he that hath a Benefice by Simony doth enjoy the ſame, as if he was lawful Incumbent till Death, yet this doth not ſatisfy the King's Turn, but he may preſent afterwards, *Paſch.* 14 *Jac. Winchcomb* v. *Pulleſton*, in *Hobart* 165. and 15 *Jac.* in *Noy* 25. and in *Brownlow* and *Gouldſborough*; becauſe the Church, notwithſtanding the Inſtitution and Induction of the Simoniſt, remained void to the King's Preſentment before his Death, and his Death cannot make him Incumbent, that was none before, or otherwiſe alter the Caſe. And if upon the Death of the Simoniſt, the rightful Patron, or a Stranger, doth preſent a Clerk, who is alſo inſtituted, yet the King may preſent his Clerk; and if he doth, the Ordinary muſt admit him; and by his being inſtituted, the Church is actually full againſt the other. But if the firſt had been alſo inducted, the King could not have outed him, but by *Quare Impedit*, nor by *Quare Impedit* according to *Moor*, in *Winchcomb*'s Caſe, *Paſch.* 18 *Jac. Moor* 177. who holds, that by gaining (after the Death of the Simoniſt, and before the King's Preſentment) a Poſſeſſion of the Church upon the Patron's Preſentment, the King's Turn is abſolutely loſt; (of which I doubt.) However, if the King doth ſuffer the Patron's Clerk, that ſucceeds the Simoniſt, to die Incumbent, he hath then loſt the Turn, which by the Simony he was intitled to, as *Hobart* holds in *Winchcomb*'s Caſe, *Hobart* 166. And the Reaſon why the King may preſent when the Simoniſt is dead, or remove another's Preſentee, after Induction, is becauſe the Title being in the King after the Death of the Simoniſt, (in that the immediate Turn belongs to him) and neither he, nor other Perſon, having preſented before, whether the very Patron, or a Stranger, then preſented, he doth it but as an Uſurper: And therefore, he may, before the Church filled againſt him, preſent, or after the Induction of another's Clerk, as well remove him by Writ, as if he had been preſented and ſettled by Uſurpation upon the King in any other Caſe, and with as much Reaſon after, as before the Death of the Simoniſt; and that he may not preſent after

King's Turn not forfeited.

King's Turn loſt.

Wherefore the King may preſent when the Simoniſt is dead.

Patronage forfeited.

after the Clerk that filled the Church is dead, if he did not take his Advantage before, is, becauſe he was to have but one Turn only, and the firſt, which was ſerved by Uſurpation thro' the King's Neglect to revome the Uſurper's Clerk, even as it is in the Caſe of a Lapſe to him.

Law altered. By 1 *W. & M. c.* 16. in Favour of Patrons.

But the Law in this is now altered, in Favour of all Patrons not guilty of ſuch Simony, and their Clerks; for it is enacted: **Whereas it hath often happened, that Perſons Simoniack, or Simoniacally promoted to Benefices, or Eccleſiaſtical Livings, have enjoyed the Benefit of ſuch Livings many Years, and ſometimes all their Life-time, by Reaſon of the ſecret Carriage of ſuch Simoniacal Dealing; and after the Death of ſuch Simoniack Perſon, another Perſon innocent of ſuch Crime, and worthy of ſuch Preferment, being preſented or promoted by another Patron innocent alſo of that Simoniacal Contract, have been troubled and removed upon Pretence of Lapſe (or otherwiſe) to the Prejudice of the innocent Patron in Reverſion, and of his Clerk, whereby the Guilty go away with Profit of his Crime, and the innocent ſucceeding Patron, and his Clerk, are puniſhed contrary to all Reaſon and good Conſcience.**

If the Perſon or Patron were not convicted in the Life-time of the Perſon Simoniack.

For Prevention whereof, Be it enacted by the King and Queen's moſt excellent Majeſties, by and with the Advice and Conſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That after the Death of the Perſon ſo Simoniacally promoted, the Offence or Contract of Simony ſhall neither by way of Title in Pleading, or in Evidence to a Jury, or otherwiſe, hereafter be alledged or pleaded, to the Prejudice of any other Patron innocent of Simony, or of his Clerk by him preſented or promoted, upon Pretence of Lapſe to the Crown, Metropolitan, or otherwiſe, unleſs the Perſon Simoniack, or Simoniacally preſented, or his Patron, was convicted of ſuch Offence at the Common Law, or ſome Eccleſiaſtical Court, in the Life-time of the Perſon Simoniack or Simoniacally promoted or preſented; any Law or Statute to the contrary notwithſtanding.

Leaſe made *bona fide* by a Perſon Simoniack.

And be it alſo provided, enacted and declared by the Authority aforeſaid, That no Leaſe, or Leaſes, really and bona fide **made, or hereafter to be made, by any ſuch Perſon, as aforeſaid, Simoniack or Simoniacally promoted to any Deanery, Prebend, or Parſonage, or other Eccleſiaſtical Benefice or Dignity, for good and valuable Conſideration to any Tenant, or Perſon, not being Privy unto, or having Notice of ſuch Simony, ſhall be impeached or avoided, for or by Reaſon of ſuch Simony, but ſhall be good and effectual in Law, the ſaid Simony notwithſtanding.** Stat. 1 W. & M. c. 16.

Patron diſabled by Recuſancy.

As by Simony, ſo by Recuſancy of the Patron, the Right of Preſenting may go from him unto others: For it is enacted,

Stat. 3 *Jac.* 1. *c.* 5.

That every Perſon or Perſons, that is or ſhall be a Popiſh Recuſant convict, during the Time that he ſhall be or remain a Recuſant, ſhall from and after the End of this preſent Seſſion of Parliament, be utterly diſabled to preſent to any Benefice with Cure or without Cure, Prebend, or any other Eccleſiaſtical Living, or to collate or nominate to any Free-School, Hoſpital or Donative whatſoever, and from the beginning of this preſent Seſſion of Parliament, ſhall likewiſe

wiſe be diſabled to grant any Avoidance to any Benefice, Prebend, or other Eccleſiaſtical Living.

Patronage forfeited.

And that the Chancellor and Scholars of the Univerſity of Oxford, ſo often as any of them ſhall be void, ſhall have the Preſentation, Nomination, Collation and Donation of and to every ſuch Benefice, Prebend, or Eccleſiaſtical Living, School, Hoſpital, and Donative, ſet, lying, and being in the Counties of Oxford, Kent, Middleſex, Suſſex, Surrey, Hampſhire, Berkſhire, Buckinghamſhire, Glouceſterſhire, Worceſterſhire, Staffordſhire, Warwickſhire, Wiltſhire, Somerſetſhire, Devonſhire, Cornwal, Dorſetſhire, Herefordſhire, Northamptonſhire, Pembrockſhire, Caermarthenſhire, Brecnockſhire, Monmouthſhire, Cardigonſhire, Montgomeryſhire, the City of London, and in every City and Town being a County of it ſelf, lying and being within any of the Limits or Precincts of any of the Counties aforeſaid, or in or within any of them, as ſhall happen to be void during ſuch Time as the Patron thereof ſhall be and remain a Recuſant convict, as aforeſaid.

Preſentation by Chancellor, &c. of the Univerſity of *Oxford*.

And that the Chancellor and Scholars of the Univerſity of Cambridge, ſhall have the Preſentation, Nomination, Collation, and Donation of and to every ſuch Benefice, Prebend, or Eccleſiaſtical Living, School, Hoſpital, and Donative, ſet, lying, and being in the Counties of Hertfordſhire, Bedfordſhire, Cambridgeſhire, Huntingtonſhire, Suffolk, Norfolk, Lincolnſhire, Rutlandſhire, Leiceſterſhire, Darbyſhire, Nottinghamſhire, Shropſhire, Cheſhire, Lancaſhire, Yorkſhire, the County of Durham, Northumberland, Cumberland, Weſtmorland, Radnorſhire, Denbighſhire, Flintſhire, Carnarvonſhire, Angleſeyſhire, Merionethſhire, Glamorganſhire, and in every City and Town being a County of it ſelf, lying within any of the Limits or Precincts of any of the Counties laſt before-mentioned, or in or within any of them, as ſhall happen to be void during ſuch Time as the Patron thereof ſhall be and remain a Recuſant convict, as aforeſaid.

Of the Univerſity of *Cambridge*.

Provided, That neither of the ſaid Chancellors, nor Scholars of either of the ſaid Univerſities, ſhall preſent or nominate to any Benefice with Cure, Prebend, or other Eccleſiaſtical Living, any ſuch Perſon as ſhall then have any other Benefice with Cure of Souls: And if any ſuch Preſentation or Nomination ſhall be had or made of any ſuch Perſon ſo beneficed, the ſaid Preſentation or Nomination ſhall be utterly void; any Thing in this Act to the contrary notwithſtanding. Stat. 3 Jac. 1. cap. 5.

Proviſo.

By this Statute, a Popiſh Recuſant convict is diſabled to Preſent, *&c.* and therefore I conceive, if ſuch Perſon doth preſent, his Preſentation is void, and the Ordinary may refuſe his Clerk, and ſuffer the Turn to come to him by Lapſe, if that none other preſents who hath a better Right: For that the Preſentation is void, is admitted by *Jones*, in his Argument of *Knight* and *Dancer*'s Caſe, *Paſch.* 14 *Car.* 2. 1 *Keble* 282, 311. And by *Finch*, the Clauſe that diſables Recuſants to preſent, they being made Excommunicate before, is nugatory; yet if the Clerk be admitted, inſtituted, and inducted upon a Recuſant's Preſentation, it may be good to ſome Purpoſes; as againſt all Strangers that claim not under the righful Patron. But theſe Matters are not there reſolved, therefore *Quære*. And as to the Lapſe in this Caſe, it was in Queſtion, whether the Biſhop can have any Advantage by Lapſe, the Preſentations being veſted in the Univerſities by Act of Parliament?

If the Ordinary may refuſe and ſuffer a Lapſe.

As to the Lapſe.

Patronage forfeited.

And by the Opinion of *Hutton*, he ſhall not. But *Richardſon* Chief Juſtice, and *Yelverton*, were of a contrary Opinion, that by the Statute the Univerſities were only put in the Place of the Patron; but the Statute never intended to take away the Ordinary's Right, nor to give Liberty to the Univerſities to preſent when they pleaſed. *Mich.* 4 *Car. C. B.* Chancellor and Scholars of the Univerſity of *Oxford*, v. *Biſhop of Lincoln*, Sir *Kenelm Digby* and *Holmes*; *Littleton's Rep.* 192. but one *Duncomb*'s Caſe was mentioned, where it was held that the Univerſities ſhall not be bound by an Uſurpation.

Diſability to grant away an Avoidance.

Alſo this Statute doth diſable the Recuſant convicted from granting away the Avoidance of any Benefice; and it hath been held, That if a Perſon being a Popiſh Recuſant, doth, before he is convicted, grant the next Avoidance of his Church, yet being afterwards convicted, ſuch Grant of his is made void by the Statute, for the material Words of the Statute being ſingled by themſelves in this Manner will ſhew it: **Every Perſon that ſhall be a Popiſh Recuſant convict, during the Time that he ſhall be or remain a Recuſant, ſhall be diſabled from the beginning of this Parliament to grant any Avoidance.** By which it appears, that he is diſabled before his Conviction by the Retroſpect of the Act, he being afterwards convicted of Recuſancy. *Trin.* 11 *Jac. The Caſe of the Chancellor, Maſters, and Scholars of the Univerſity of Oxford*, 10 *Co.* 54.

Or his Advowſon for Years.

And the Statute, I ſuppoſe, doth alſo diſable a Recuſant in like Manner from granting his Advowſon for Years, eſpecially to a Friend in Truſt: For to this Opinion the Judges did ſeem to incline, tho' they would not anſwer directly to the Queſtion, when moved to them. *Mich.* 11 *Jac. C. B. Hughes, p.* 216.

Veſted in the Univerſities.

This Statute alſo gives the Avoidances that happen during the Time that the Patron thereof ſhall be and remain a Recuſant convict, to one or other of the Univerſities; and when, by Virtue thereof, the Preſentation, *hac vice*, is once veſted in the Univerſity, altho' that afterwards the Recuſant conformeth himſelf, or dieth, yet the Univerſity ſhall preſent. *Trin.* 11 *Jac. The Caſe of Chancellor, Maſters, and Scholars of the Univerſity of Oxon*, 10 *Co.* 54. *a. Cawley's Law againſt Recuſants* 230. And I conceive, that the next Avoidance is veſted in the Univerſity by the Conviction.

Miſnomer of the Name of the Univerſity.

Tho' the Statute doth give ſuch Avoidances to the Univerſities, by the Name of the Chancellor and Scholars, and they ſue for the ſame by the Name of the Chancellor, Maſters, and Scholars of *Oxford*, or *Cambridge*, which is the true Name of the Univerſity; yet they ſhall have the Benefit of this Act, notwithſtanding the Miſnomer in it: For in an Act of Parliament miſ-naming of a Corporation, when the expreſs Meaning appeareth, will not avoid the Act, no more than in a Will; for both are to be taken according to the Meaning of thoſe that are Parties to them: And theſe Clauſes that give the Benefit to the Univerſities are private Clauſes, whereof the Judges, without pleading of them, cannot take Notice; and therefore, the Judges ought to take them as they are pleaded. *Trin.* 11 *Jac. The Caſe of the Chancellor, Maſters, and Scholars of the Univerſity of Oxford*, 10 *Co.* 57. *b.*

Upon Seiſure of two Parts of a Manor.

But notwithſtanding this Statute, if a Popiſh Recuſant be ſeiſed of a Manor, to which an Advowſon is appendant at the Time of his Conviction, and for Non-payment of twenty Pounds by the Month, the King doth ſeiſe into his Hands two Parts of ſuch Manor, tho' there be no Mention made in the Inquiſition and Seiſure eſpecially of the Advowſon,

yet becauſe the Statute of 29 *Eliz.* gives two Parts of the Recuſant's Poſſeſſions to the King, two Parts of the Advowſon will follow the two Parts of the Manor, and the King, and not the Chancellor and Scholars of either Univerſity, will have Title to preſent to two Turns. *Mich.* 14 *Jac. Chancellor and Scholars of Cambridge* v. *Walgrave*, *Hobart* 127.

Patronage forfeited.

Or if a Recuſant be ſeiſed of an Advowſon in Groſs, and the King, by Virtue of the Statute of 3 *Jac. c.* 4. which gives Power to the King to ſeiſe two Parts of a Recuſant's Lands and Hereditaments, doth ſeiſe the Advowſon as a Part of his two Parts, the Advowſon is then in the King, and the Univerſity ſhall not preſent to the Avoidances that ſhall happen during the Recuſant's Recuſancy; becauſe the Univerſities have no other Intereſt than as a Biſhop to preſent by Lapſe, and not a real Eſtate: For that the Recuſant, notwithſtanding their Right, and his Diſability by the Statute to preſent, remains Patron as to other Purpoſes; as to confirm a Leaſe of the Incumbent, unleſs the King doth ſeiſe it, and then the King is Patron *pro Tempore*, and not the Recuſant, and ſo the Univerſity cannot have the Right of preſenting to the Advowſon, as to an Advowſon whereof a Recuſant is ſeiſed.

Advowſon in Groſs ſeiſed as Part.

So if a Recuſant be attainted of Treaſon, or *Præmunire*, or outlawed in a perſonal Action, he ceaſes to be Patron, and the Univerſity ſhall not preſent: And ſo, tho' a Recuſant be diſabled to grant away any Avoidance by the aforeſaid Statute 3 *Jac.* 5. yet he may, during his Recuſancy, grant away his Patronage in Fee to another, or in Tail, for Life, or for Years; and by ſuch Grant he ceaſes to be Patron in Poſſeſſion, during the Continuance of ſuch Eſtate by him granted; and the Univerſity loſes the Advantage of preſenting, tho' he continue Recuſant: And the Reaſon why the Grant of the Advowſon for Years is out of the Statute, and not within the Words *next Avoidance*, is becauſe the Advowſon is ſo in him that hath the Grant of it for Years, that he may accept of a Releaſe in Fee from the Patron in Fee; whereas, by the Grant of two or three Avoidances, the Patronage is not ſevered, neither may ſuch Grantee accept of ſuch Releaſe from the Patron; (but *Quære*) Whether theſe Grants ſhall defeat the Univerſity; for that by the Words of the Statute, the Recuſant is diſabled to grant any Avoidances; which may admit of a large Interpretation? However, it is admitted, that if ſuch Grants be made by Covin of the Recuſant, the Statute of the 3 *Jac. c.* 5. ſhall extend to give the Univerſity the Avoidance: Yea, and altho' that one doth grant an Avoidance before he is a Recuſant, and then turns Recuſant, unleſs the Recuſancy doth follow by Covin of the Grantor, on purpoſe to defeat his Grantee; as was the ſaid Caſe of *The Chancellor of Oxford*, *Co.* 10. And the Law is owned to be the ſame, in caſe the Fee of the Advowſon, before the Recuſancy, be granted by Covin; but then Covin in theſe Caſes ſhall not be intended, unleſs it be averred. Theſe Things were held, and delivered by *Jones* Juſtice, in his Argument, whereby he held, as the chief Point, That the King by his ſeizing of a Recuſant's Advowſon in Groſs, did defeat the Univerſity of the Avoidance: With whom 'tis ſaid, that *Hobart* and *Winch* did agree, as to that Queſtion; but *Hutton*, *contra*. *Hill.* 29 *Jac. Standen*, &c. v. *Univerſity of Oxford*, and *Witton*, *Jones* 17. But a Diſcontinuance of the Suit was cauſed by one of the Plaintiffs, and ſo no Judgment given.

Recuſant attainted of Treaſon, &c.

Grants made by Covin.

Averment.

If a Recuſant hath Right of Nomination to a Benefice, and another hath the Right of Preſentation, yet the Recuſant is diſabled by this Act

Recuſant diſabled to nominate.

Patronage forfeited.

Act to nominate: For altho' only the Word *Preſent* be uſed in the Statute, yet that ſhall extend as well to Nomination: For the Intent of the Act is to prevent Recuſants to appoint who ſhall be Incumbent, and the Caſe of Nomination is in equal Miſchief with that of Preſentation, and in the ſubſequent Clauſe, the Right of Nomination is given to the Univerſities, as well as Preſentation. *Cawley's Laws againſt Recuſants* 228, 229. In a *Quare Impedit* brought by either of the Univerſities, it muſt be alledged, That the Party was a Recuſant convict at the ſame Time when the Church became void; for without ſhewing that, they do not enable themſelves to preſent. *Cawley's Law againſt Recuſants* 230. Then ſuppoſe the Caſe to be, That *A.* is a Recuſant convict, and by Pardon that Conviction is pardoned, (as it hath been held it may) and then the Church becomes void: I conceive, the Univerſity ſhall not have the Preſentation, for that the Patron was no Recuſant convict at the Time the Preſentation became void, his former Conviction being taken away by the Pardon: For the Pardon hath not only pardoned the Conviction, but alſo reſtored the Party to his Ability, notwithſtanding that he do not conform; for the Word *Convict* is to be underſtood throughout the whole Statute, altho' that it be left out in the Middle of the Sentence in the ſaid Statute, which Enacts, That every Perſon who ſhall be Recuſant convict, during the Time that he ſhall remain a Recuſant (and ſays not convict) ſhall be diſabled to preſent to any Church, *&c. Trin.* 4 *W. & M. C. B. The Lord Petre* v. *The Univerſity of Cambridge* and *Woodroffe*, 3 *Levinz* 332. And indeed, no Perſon, ſtrictly ſpeaking, can properly be ſaid to be a Recuſant, before he be convicted of it; for 'tis the Conviction which in Law is the Proof and Evidence of his Recuſancy. It hath alſo been Enacted, That,

Allegation by the Univerſities.

Pardon.

Party reſtored.

1 *W. & M.* Seſſ. 1. *c.* 26. Popiſh Recuſants diſabled to preſent to Benefices, *&c.*

Whereas in and by a certain Clauſe mentioned in one Act of Parliament made in the third Year of the Reign of King James **the Firſt, intitled,** An Act to prevent and avoid Dangers which may grow by Popiſh Recuſants; **it is enacted, That every Perſon or Perſons, that is or ſhall be a Popiſh Recuſant Convict, during the Time that he ſhall be or remain a Recuſant, ſhall from and after the End of that preſent Seſſion of Parliament, be utterly diſabled to preſent to any Benefice with Cure or without Cure, Prebend, or any other Eccleſiaſtical Living, or to collate or nominate to any Free-School, Hoſpital, or Donative whatſoever, and from the beginning of the ſaid Parliament, ſhall likewiſe be diſabled to grant any Avoidance to any Benefice, Prebend, or other Eccleſiaſtical Living.**

Other Perſons refuſing to repeat and ſubſcribe the Declaration, *&c.*

Be it enacted by the King and Queen's moſt excellent Majeſties, by and with the Advice and Conſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by Authority of the ſame, That every Perſon who ſhall refuſe or neglect to make, repeat, and ſubſcribe the Declaration mentioned in one Act of this preſent Parliament, intitled, An Act for the better ſecuring the Government, by Diſarming Papiſts, and reputed Papiſts, **when the ſame ſhall be tendred to ſuch Perſon by any two or more Juſtices of the Peace, as in the ſaid Act is enacted, or who ſhall upon Notice given, as in the ſaid Act is directed, refuſe or forbear to appear before them, for the making, repeating, and ſubſcribing thereof, and ſhall thereupon have his Name, Surname, and uſual**

Place

Place of Abode certified and recorded at the General Quarter-Sessions, to be holden for the Shire, Riding, Division, or Liberty, for which such two Justices shall be Justices of the Peace, by the Clerk of the Peace, or Town-Clerk, as in the said Act is appointed; every such Person so recorded shall be, from and after the Time of such Record made, adjudged, taken and esteemed, disabled to make such Presentation, Collation, Nomination, Donation, or Grant of any Avoidance of any Benefice, Prebend, or Ecclesiastical Living, as fully and amply, as if such Person were a Popish Recusant convict by the Laws or Statutes of this Realm; any Law, Statute, or Usage to the contrary notwithstanding. And that the Chancellor and Scholars of the University of Oxford, and the Chancellor and Scholars of the University of Cambridge, by what Name or Names soever they or either of them are incorporated, shall respectively have the Presentation, Nomination, Collation, and Donation of and to every such Benefice, Prebend, or Ecclesiastical Living, School, Hospital and Donative, set, lying and being in the respective Counties, Cities, and other the Places and Limits in the said Act of the Third of King James mentioned, as in and by the said Act is directed and appointed, so often as any of them shall become void, according to the Limitations, Directions, and Provisions in that behalf limited, enacted and provided.

Patronage forfeited.

Disabled to make a Presentation as fully as Popish Recusants.

And the Chancellor, &c. of the Universities to have the Presentation.

And be it farther enacted by the Authority aforesaid, That where any Person or Persons are or shall be seised or possessed of any Advowson, Right of Presentation, Collation, or Nomination, to any such Ecclesiastical Living, Free-School, or Hospital, as aforesaid, in Trust for any Papist or Popish Recusant, who shall be convicted or disabled, according to the true Intent and Meaning of the said Statute, made in the Third Year of the Reign of the said King James the First, or by this present Act; every such Person and Persons so seised and possessed in Trust for any Papist or Popish Recusant convict or disabled, shall be and are hereby adjudged to be disabled to Present, Nominate, or Collate to any such Ecclesiastical Living, Free-School, or Hospital, or to grant any Avoidance thereof; and their and every of their Presentations, Nominations, Collations and Grants, shall be null and void to all Intents and Purposes whatsoever; and the Chancellors and Scholars of the said respective Universities, as aforesaid, upon every Avoidance, shall have the Presentations, Nominations and Collations, to such Ecclesiastical Livings, Free-Schools and Hospitals, in such manner as they should have the same, in case such Recusant convict, or disabled, were seised or possessed thereof.

The Trustees of Popish Recusants convict disabled to present, &c.

And in case any Trustee or Trustees, or Mortgagee or Grantee of any Avoidance, hereafter Present, Nominate, or Collate, or cause to be presented, nominated or collated, any Person to any such Ecclesiastical Living, Free-School or Hospital, whereof the Trust shall be for any Recusant convict or disabled, without giving Notice of the Avoidance in Writing to the Vice-Chancellor for the Time being of the University, to whom the Presentation, Nomination, or Collation shall belong, according to the true Intent of this Act, within Three Months after the Avoidance shall happen, such Trustee or Trustees, Mortgagees or Grantees, shall forfeit and pay the Sum of Five hundred Pounds to the said respective Chancellors and Scholars of either of the said Universities, to whom such Presentation, Nomination,

The Trustees, Mortgagees and Grantees to give Notice of any Avoidance, before they present, &c.

Forfeiture.

Patronage forfeited.

tion, or Collation shall belong, according to the true Intent of this present Act, to be recovered in any of their Majesties Courts of Record, by Action of Debt, Bill, Plaint, or Information, wherein no Essoin, Protection, or Wager of Law shall be allowed.

Chancellor, &c. not to present one having another Benefice.

Provided always, That the said Chancellors, and Scholars, of either of the said Universities, shall not Present or Nominate to any Benefice with Cure, Prebend, or other Ecclesiastical Living, any Person as shall then have any other Benefice with Cure of Souls; and if any such Presentation shall be had or made of any such Person so beneficed, the said Presentation shall be utterly void; any thing in this Act to the contrary notwithstanding.

Proviso.

Provided, That if any such Person so presented, or nominated to any Benefice with Cure, shall be absent from the same above the Space of Sixty Days in any one Year, that in such Case the said Benefice shall become void.

How the Person may be discharged of the Disability.

Provided nevertheless, That if any such Person shall present himself before the Justices of the Peace at the General Quarter-Sessions to be holden for the County, Riding, Division or Liberty where his Name was recorded, and shall there in open Court make, repeat and subscribe the said Declaration, and take the several Oaths contained in one Act of this present Parliament, intitled, An Act for the Abrogating of the Oaths of Supremacy and Allegiance, and appointing other Oaths, he shall from thenceforth be discharged of and from the said Disability, and be enabled to make such Presentation, Collation, Nomination and Donation, and Grant of any Avoidance to any Benefice, Prebend or Ecclesiastical Living, School or Hospital, as if this Act had not been made. Stat. 1 W. & Mar. Sess. 1. cap. 26.

Note; *Stat.* 3 *Jac.* 1. *c.* 5. extends to all Avoidances, as well before as after Conviction; and a Conviction upon *Stat.* 1 *W. & M.* for not attending to take the Oaths, *&c.* is a sufficient Conviction. *Comyns* 169, &c. 181, &c. *Fitzherbert* v. *Chancellor*, &c. *of Oxford & al'.*

Stat. 7, 8 *W.* 3. *c.* 27.

It hath also been enacted by 7, 8 *W.* 3. *c.* 27. to the Effect following, *viz.*

Refusing Oaths.

That from and after the First Day of May 1696. all and every Person and Persons, who shall refuse to take the Oaths mentioned and appointed to be taken, in an Act of Parliament made in the First Year of his Majesty King William and the late Queen of Blessed Memory, intitled, An Act for Abrogating of the Oaths of Supremacy and Allegiance, and appointing new Oaths, or either of them,

To forfeit, &c. as Popish Recusants convict.

when tendred to him or them by any Persons lawfully authorized to administer and tender the same, or shall refuse or neglect to appear, being lawfully summoned for that Purpose, shall, until he or they have duly taken the said Oaths, be liable to incur, forfeit, pay and suffer the Penalties, Forfeitures and Disabilities, which by the Law and Statutes now in Force are inflicted on Popish Recusants convict.

Upon Refusal, the Names to be recorded, &c.

And the Persons so tendring the said Oaths, shall upon every Refusal or Default of Appearance as aforesaid, record in Parchment the Christian and Surnames, and Places of Abode of the Person or Persons so refusing, or not appearing within the Time of Tender, and shall certify the said Record to the Justices of Assise at their next

Sessions in the same County, who shall forthwith estreat and certify the same into the Exchequer, to be there entred of Record, that the said Court of Exchequer may thereupon issue out Process against the Lands and Goods of the said Person and Persons, as against Popish Recusants convict. Patronage forfeited.

That if any Person shall, after the said First Day of May, maliciously by Writing, Printing, Preaching, Teaching, or advised Speaking, utter, publish or declare, That his then Majesty was not the Lawful and Righful King of these Realms; or that the late King James, or the pretended Prince of Wales hath any Right or Title to the Crown of these Realms, or any other Person, otherwise than according to an Act made 1 W. & M. intitled, An Act declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown; such Person, being thereof lawfully convicted, shall incur the Danger and Penalty of a Præmunire, mentioned in the Statute of Præmunire made 16 R. 2. Concerning malicious Writing. Preaching, Teaching, &c.

Also by the said Act 'tis provided, That Quakers, who shall make and subscribe the Declaration of Fidelity mentioned in an Act made 1 W. & M. cap. 18. and shall produce such Witnesses and Certificates as are by the said Act required, proving themselves to be Quakers, and shall also own King William to be Right and Lawful King of these Realms, shall be exempted from the Penalties and Forfeitures of this Act provided for such as shall refuse the Oaths aforesaid. *Quakers* Declaration of Fidelity. Certificates.

Provided always, That all or any of the Pains, Penalties or Disabilities, to be incurred by any Person as a Popish Recusant convict, for not taking the Oaths aforesaid, may be pardoned or discharged by the King under the Privy Seal, notwithstanding this Act. Pardon under the Privy Seal.

Stat. 12 *Ann. Sess.* 2. *ch.* 14. recites, that by the said Act 3 *Jac.* 1. & 1 *W. & M.* The Presentation, Nomination, Collation, and Donation of and to Benefices, Prebends, or Ecclesiastical Livings, Schools, Hospitals and Donatives belonging to Popish Recusants, and other Persons thereby disabled to Present, Collate or Nominate, are given to the two Universities; but they are so given only where such Persons are and stand convicted by such Ways and Means, as in the said recited Acts are mentioned and provided; which Acts do nevertheless prove ineffectual for such Purposes, by reason such Patrons are not convicted, or not in such Manner as the said Acts direct and appoint. Therefore for the making the said Laws more Effectual, and for the speedier and easier Vesting the Presentation to such Benefices in the two Universities, according to the Intention of the said Laws, it is Enacted, That every Papist or Person making Profession of the Popish Religion, and every Child not being a Protestant, under the Age of one and twenty Years of every such Papist or Person professing the Popish Religion, and every Mortgagee, Trustee or Person any ways intrusted, directly or indirectly, mediately or immediately, by or for any such Papist or Person making Profession of the Popish Religion, or such Child as aforesaid, whether such Trust be declared by Writing, or not, shall from and after the tenth Day of July, which shall be in the Year of our Lord One Thousand seven Hundred and Fourteen, be disabled, to Present, Collate or Nominate to any Benefice, Prebend or Ecclesiastical Living, School, Hospital or Donative, or to Grant any Avoidance of any Benefice, Prebend or Ecclesiastical Living, and that every such Presentation, Collation, Nomination and Grant, and every Admission, Institution and Induction to be made thereupon, shall be utterly

Patronage forfeited.

utterly void and of no Effect to all Intents, Constructions and Purposes whatsoever, and that in every such Case, the Chancellor and Scholars of the University of Oxford, and the Chancellor and Scholars of the University of Cambridge, by what Name or Names soever they or either of them are incorporated, shall respectively have the Presentation, Nomination, Collation and Donation of and to every such Benefice, Prebend or Ecclesiastical Living, School, Hospital and Donative, set, lying, and being in the respective Counties, Cities, and other Places and Limits in the said Act of the third Year of King James mentioned, as by the said Act is appointed in the Case of a Popish Recusant Convict.

And it is further Enacted, That from and after the said tenth Day of July, when, and as often as any Presentation to any Benefice or Ecclesiastical Living shall be brought to any Archbishop, Bishop, or other Ordinary, from any Person who shall be reputed to be, or whom such Archbishop, Bishop, or other Ordinary, shall have Cause to suspect to be a Papist, or Trustee of any Person making Profession of the Popish Religion, or suspected to be such; such Archbishop, &c. may, and he is hereby required, to Tender or Administer to every such Person, if present, the Declaration against Transubstantiation, set down and expressed in an Act of Parliament, made in the five and twentieth Year of the Reign of the late King Charles the Second, Intitled, An Act for preventing Dangers which may happen from Popish Recusants, to be by such Persons made, repeated and subscribed; and in case such Persons shall be absent, the said Archbishop, &c. shall by Notice in Writing, to be left at the Place of Habitation of such Person, appoint some convenient Time and Place, when and where such Person shall appear before such Archbishop, &c. or some Person to be authorized by such Archbishop, &c. by Commission under his or their Seal of Office; and upon such Appearance the said Archbishop, &c. or such Commissioners, shall tender or administer the said Declaration, to the Person making such Presentation; and in case such Person shall neglect or refuse to make, repeat and subscribe such Declaration, when the same shall be so tendred as aforesaid, or shall neglect or refuse to appear before such Archbishop, &c. or such Commissioners, upon such Notice as aforesaid, that then such Presentation shall be utterly void and of none effect; and in every such Case, such Archbishop, &c. shall within ten Days next after such Neglect or Refusal, send and give a Certificate under his or their Seal of Office of such Neglect or Refusal, to the Vice-Chancellor for the Time being of that University, to whom such Presentation would of right belong, if such Person so presenting had been a Popish Recusant Convict. And it shall be lawful, to and for the Chancellor and Scholars of such University, to present a Person qualified according to the said Acts, to such Benefice or Ecclesiastical Living; and the Presentation to such Benefice or Ecclesiastical Living for that Turn only, is hereby given unto and vested in them for that Purpose; any Matter, Clause, or Thing contained in either of the said former recited Acts to the contrary thereof notwithstanding.

And for the better Discovering of all secret Trusts and fraudulent Conveyances, made by Papists or Persons making Profession of the Popish Religion, of their Advowsons and Right of Presentation, Nomination and Donation, to any Benefices or Ecclesiastical Livings;

Livings; It is further Enacted, That when the Presentation of any Person presented to any Benefice or Ecclesiastical Living shall be brought to any Archbishop, &c. the said Archbishop, &c. before he gives Institution, is to examine the Person presented upon Oath, whether, to the best and utmost of his Knowledge and Belief, the Person or Persons who have made such Presentation, be the true and real Patron or Patrons of the said Benefice or Ecclesiastical Living, or made the said Presentation in his or her, or their own Right, or whether such Person or Persons be not mediately or immediately, directly or indirectly, Trustee or Trustees, or any way intrusted for some other, and what Person, or Persons by Name, who is or are Papists, or make Profession of the Popish Religion, or the Children of such, or for any other, and what Person or Persons, or what he knows, has heard or believes, touching or concerning the same; and if such Person so presented refuses to be so examined, or shall not answer directly thereto, then such Presentation shall be void. Patronage forfeited.

And it is further Enacted, That the Chancellor, &c. of the respective Universities, to whom the Presentation to such Benefices, &c. should belong, in case the rightful Patrons had been Popish Recusants Convict, and their Presentees or Clerks, for the better Discovery of such secret and fraudulent Trusts, created by or for such Papist and their Children, to exhibit their Bill in any Court of Equity against such Person or Persons presenting, and such Person or Persons as they have reason to believe to be the Cestuy que Trust of the Advowson of such Benefice, or any other Person who they have Cause to suspect may be able to make any other or further Discovery of such secret Trusts and Practices, to which Bill the Defendants therein named, being duly served with the Process of the Court in which the said Bill shall be exhibited, shall forthwith directly answer to the Facts charged and inquired in the said Bill, at the Discretion of the Court where such Bill shall be exhibited; and in case the Defendants, or any of them, shall refuse or neglect to answer the said Bill in such reasonable Time, as shall be for that Purpose allowed and appointed by Discretion of the said Court where said Cause shall be depending (the Distance of Place and Circumstances of the Defendant or Defendants considered); then and in such Case the said Bill shall be taken pro Confesso, and be allowed as Evidence against such Person so neglecting and refusing, and his Trustee or Trustees, and his and their Clerk; provided that every Person having fully answered such Bill in such Court of Equity, and not knowing any thing of any such Trust for a Papist or other Person disabled, as aforesaid, shall be intitled to his Costs, to be taxed according to the Course of the Court.

And it is Enacted, That the Court, where any Quare Impedit shall be hereafter depending, at the Instance of either of the said Chancellors, &c. or their Clerk, being Plaintiffs or Defendants in such Suit, by Motion in open Court, at their Discretion to make any Rule or Order, requiring Satisfaction upon the Oath of Patron and his Clerk, who in the said Suit shall contest the Right of the said University to present to such Benefice, &c. by Examination of them, or either of them in open Court, or by Commission under the Seal of such Court for Examination of them, &c. or by Affidavit, as the said Court shall find most proper, in Order to the Discovery

Patronage forfeited.

of any secret Trust, &c. relating to the said Presentation then in Question; and in case it appear to the Court, upon the Examination of such Patron and Clerk, or either of them, that the said Patron is but a Trustee for some other Person, &c. that then the said Patron and his Clerk shall discover who such Person or Persons are, and where he, she, or they, live or inhabit; and upon their Refusal to make such Discovery, or to give such Satisfaction as aforesaid, they shall be punished as Persons that are guilty of a Contempt of the said Court; and in case such Patron, or his Clerk, shall discover the Person for whom the said Patron is a Trustee; then and in such Case the said Court, upon Motion made in open Court, shall make a Rule or Order, that the Person or Persons, for whom the said Patron is a Trustee, shall in the said Court, or before Commissioners to be appointed for that Purpose, under the Seal of the said Court, make, repeat and subscribe the Declaration against Transubstantiation herein before mentioned, and likewise, on Pain of incurring a Contempt against the said Court, give such further Satisfaction upon Oath, touching or relating to the said Trust, as the said Court shall think fit; and such Person so required to make, repeat and subscribe the said Declaration, and refusing or neglecting so to do, shall be deemed a Popish Recusant Convict, in respect of such Presentation.

And it is further Enacted, That the Answer of such Patron and Patrons, and the Person for whom he or they are any way intrusted, and his and their Clerk, or any of them, and his and their, or any of their Examinations and Affidavits taken, as aforesaid, &c. or by any Archbishop, &c. or the Commissioners, as aforesaid, (which Examination shall therefore be reduced into Writing, and signed by the Party examined) shall be allowed as Evidence against such Patron so presenting, and his Clerk.

Provided always, That no such Bill, nor any Discovery to be made by any Answer thereunto, or to any such Examination, as aforesaid, shall be made use of to subject any Person making any such Discovery, or not answering such Bill, to any Penalty or Forfeiture, other than the Loss of the Presentation then in Question.

And it is further Enacted, That in case of any such Bill or Bills of Discovery, as aforesaid, exhibited in any Court of Equity by the Chancellor, &c. or their Presentee, no Lapse shall incur, nor Plenarty be a Bar against such Chancellor, &c. in respect of the Benefice or Ecclesiastical Living, touching which such Bill shall be so exhibited, till after three Months from the Time that the Answer to such Bill shall be put in, or the same be taken pro Confesso, or the Prosecution thereof deserted; provided that such Bill or Bills be exhibited before any Lapse incurred.

And whereas it hath been doubted, whether any Writ of Quare Impedit brought by the respective Universities for any Presentation, Nomination, Collation or Donation, pursuant to the said recited Acts, or either of them, may be brought by them, in or by the Name of Chancellor and Scholars, or ought to be by their true Name of Incorporation respectively; It is hereby declared, that the said respective Chancellors and Scholars of the said University are, by this Act, and by the said former Acts, intitled to sue any Writ of Quare Impedit, by the Name of Chancellor and Scholars of the University of Oxford, and Chancellor and Scholars of the University

versity of Cambridge respectively, or by their respective proper Names of Incorporation, at their Election.

Patronage forfeited.

And it is further Enacted, That in case of any Trust for any Papist, or Person professing the Popish Religion, confessed or discovered in and by any Answer to such Bill, as aforesaid, or such Examination, as aforesaid, it shall be lawful for the Court where such Discovery shall be made, to inforce the producing of the Deeds creating and relating to the said Trusts, by such Methods as they shall find proper.

Provided, That nothing herein before contained shall extend to Scotland.

By *Stat.* 1 *Geo.* 1. *Sess.* 2. *ch.* 13. it is (among other Things) Enacted, That it shall be lawful, to and for two or more Justices of Peace, or any other Person or Persons, who shall be by his Majesty for that Purpose specially appointed, by Order in the Privy Council, or by Commission under the Great Seal, to administer and tender the Oaths therein before appointed to be taken, to any Person or Persons whatsoever, whom they shall or may suspect to be dangerous or disaffected to his Majesty, or his Government: And if any Person or Persons, to whom the said Oaths shall be so tendred, shall neglect or refuse to take the same, such Justices, or any other Person or Persons specially to be appointed, as aforesaid, tendring the said Oaths, shall certify the Refusal thereof to the next Quarter-Sessions of the County, Riding, Liberty, City, Borough, Town Corporate or Place, in which such Refusal shall be made; and the said Refusal shall be recorded amongst the Rolls of that Sessions, and shall be from thence certified by the Clerk of the Peace of such County, &c. into his Majesty's Court of Chancery, or King's Bench, Court of Sessions, or Court of Justiciary in Scotland, there to be recorded amongst the Rolls of the said Courts, in a Roll or Rolls there to be provided and kept for that Purpose only; and that every Person, so neglecting or refusing to take the said Oaths, shall be, from the Time of his Neglect or Refusal, taken, esteemed, and adjudged a Popish Recusant Convict, and as such to forfeit and be proceeded against.

And to the Intent and Purpose, that no Person may avoid taking the several Oaths in this Act particularly mentioned, upon any Pretence whatsoever, It is further Enacted, That it shall be lawful unto and for two or more Justices of the Peace, or any other such Person, &c. by writing under the Hands and Seals, to summon any Person to appear before them at a certain Day and Time therein to be appointed, to take the said Oaths; which said Summons shall be served upon such Person, or left at his Dwelling-House, or usual Place of Abode, with one of the Family there; and if such Person, who shall be so summoned, neglects or refuses to appear according to such Summons, that then, upon due Proof to be made upon Oath of the serving the said Summons, which Oath such Justices, &c. may administer, such Justices, &c. are to certify the same to the next General Quarter-Sessions of the Peace to be holden for such County, &c. there to be entred upon the Rolls of the said Sessions; and if such Person who shall be so summoned, &c. shall neglect or refuse to appear and take the said Oaths at the said General Quarter-Sessions, the Names of the Persons so certified being publickly read at the first Meeting of the said Sessions,

Patronage forfeited.

Sessions; then such Person shall be adjudged a Popish Recusant Convict, and as such, to forfeit and be proceeded against, as if such Person had actually refused to take the said Oaths; and the same shall be from thence certified by the Clerk of the Peace of such County, &c. into the High Court of Chancery, or King's Bench, Court of Session, or Court of Justiciary in Scotland, there to be recorded amongst the Rolls of the said Courts, in a Roll or Rolls there to be provided and kept for that Purpose only.

Provided, That any Person or Persons, who shall become Popish Recusants Convict, by Virtue of any Thing in this Act contained, and shall at any Time thereafter take and subscribe the Oaths, and make and subscribe the Declaration, and subscribe the Assurance, in such Manner, and in such Place, as is appointed by this Act, shall be from such Time discharged from such Conviction.

By *Stat.* 11 *Geo.* 2. *chap.* 17. it is recited, That Persons professing, or educated in the Popish Religion, are by divers Acts of Parliament subjected to several Disabilities and Incapacities, which may affect Persons conforming from the Popish to the Protestant Religion: And whereas many Persons have already conformed to the Protestant Religion, and are willing to submit to his Majesty's Government, in as full and ample Manner as any other of his Majesty's Subjects, and others are likely so to do; and it is therefore Enacted, That all and every Person or Persons being reputed Owner or Owners, or in Possession or Receipt of the Rents and Profits of any Manors, Messuages, Lands, Tenements, or Hereditaments, or of any Interest therein, who having been or reputed to be a Papist or Papists, or educated in the Popish Religion, hath or have conformed to, or hereafter shall conform to and profess the Protestant Religion, and hath or have taken, or shall take the Oaths of Allegiance, Supremacy, and Abjuration, and also subscribed, or shall subscribe the Declarations expressed in an Act of Parliament made in the thirtieth Year of the Reign of the late King Charles the Second, intitled, An Act for the more effectual preserving the King's Person and Government, by disabling Papists from sitting in either House of Parliament, to be by him, her, or them repeated and subscribed in the Courts of Chancery, or King's Bench, or Quarter-Sessions of the County where such Person, &c. shall reside (all which shall be recorded in one of his Majesty's Courts of Record at Westminster, or such Quarter-Sessions as aforesaid) and all and every Person, &c. being Protestants, claiming under such Person, &c. conforming and performing the Requisites, as aforesaid, for their own Benefit, or for the Benefit of any other Protestant or Protestants, and not for the Benefit of any Papist or Papists, shall hold, possess, and enjoy all such Manors, &c. freed and discharged of and from the Disabilities and Incapacities in the said Acts or any of them contained, incurred or supposed to be incurred by such Person or Persons so reputed Owner or Owners, or in Possession or Receipt of the Rents and Profits, as aforesaid, or by any other Person or Persons, by, from, or through whom the Title to such Manors, &c. or any Interest therein, was or shall be derived or supposed to be derived, for such Estate, Right, Title, or Interest, as he, she, or they had or would have had, if no such Disability or Incapacity had been incurred; unless the Person, &c. intitled to take Advantage of such Disability, Incapacity, or Defect of Title, hath or have actually and bona fide recovered, or shall hereafter recover such Manors, &c. by Judg-

ment or Decree in some Action or Suit already commenced, or hereafter to be commenced, six Kalendar Months at least before the making of such Record, and to be prosecuted with due Diligence. Patronage forfeited.

Provided, That this Act shall not take away or prejudice the Right of any Person intitled to take Advantage of such Disability or Incapacity, who now is in the actual Possession of, or shall have, precedent to the making of such Record, been in quiet Possession of any such Manors, &c. by the Space of two Kalendar Months.

Provided, That if any such Person so conforming shall, after such Conformity, return to, or again profess the Popish Religion, every such Person shall for ever afterwards be disabled from having or injoying any Benefit, &c. of this Act, and shall from thenceforth be liable to the same Disabilities, &c. as if he had not taken the said Oaths, and subscribed the Declaration, as aforesaid.

Provided, That nothing in this Act shall prejudice the Right of any Person intitled to any Remainder or Reversion in any such Manors, &c. in Case such Person shall pursue his Right by some Action or Suit, to be commenced within the Space of twelve Kalendar Months next after the precedent Estate, on which such Remainder or Reversion depends and is expectant, shall be determined; or within twelve Kalendar Months from the twenty-ninth Day of September one Thousand seven Hundred and thirty-eight, if such precedent Estate be already determined by the Death of any Person, whose Death has been concealed from, or not known to the Person intitled to such Remainder or Reversion, by reason of their having been buried beyond the Seas, or in a private and clandestine Manner at Home, and shall prosecute such Action or Suit with due Diligence.

And whereas by an Act made in the twelfth of Queen Anne, for rendring more effectual an Act made in the third Year of James the First, intitled, An Act to prevent and avoid Dangers which may grow by Popish Recusants; and also one other Act made in the first of William and Mary, intitled, An Act to vest in the two Universities the Presentations of Benefices belonging to Papists, It was enacted, That every Papist, &c. and every Child, not being a Protestant, under the Age of one and twenty Years of every such Papist or Person professing the Popish Religion, and every Mortgagee, Trustee, or Person any ways intrusted directly or indirectly, mediately or immediately, by or for any such Papist or Person making Profession of the Popish Religion, or such Child as aforesaid, whether such Trust be declared by Writing or not, should be disabled and made incapable to present, &c. to any Benefice, &c. or to grant any Avoidance of any Benefice, &c. and that every such Presentation, &c. and every Admission, &c. to be made thereupon, should be utterly void, &c. and that in every such Case the Chancellor, &c. of Oxford, and the Chancellor, &c. of Cambridge should respectively have the Presentation, &c. of and to every such Benefice, &c. set, lying, and being in the respective Counties, &c. in the said Act of the third of James mentioned, as in the said Act is directed in the Case of a Popish Recusant Convict: And whereas for the better Discovery of all secret Trusts and fraudulent Conveyances made by Papists or Persons making Profession of the Popish Religion, of their Advowsons and Right of Presentation, &c. to any Benefice, &c. several Provisions were made by the said Act of the twelfth of Anne, which

Patronage forfeited.

have been fraudulently evaded by Persons obtaining from such Papists, without a full and valuable Consideration, Grants of such Advowsons and Right of Presentation, &c. upon Confidence only, that such Grantees will, at the Request of such Papists, present to such Benefices, &c. Clerks nominated by such Papists, who have been presented accordingly, contrary to the true Intent of the said Acts, and to the great Hurt of the Protestant Interest of this Kingdom; It is therefore Enacted, That every Grant, to be made from and after the sixth Day of May one Thousand seven Hundred and thirty-eight, of any Advowson or Right of Presentation, &c. of and to any Benefice, &c. and every Grant of any Avoidance thereof by any Papist or Person making Profession of the Popish Religion, or any Mortgagee, Trustee, or Person any ways intrusted directly or indirectly, mediately or immediately, by or for any such Papist or Person making Profession of the Popish Religion, whether such Trust be declared by Writing or not, shall be null and void, unless such Grant shall be made bona fide, and for a full and valuable Consideration to and for a Protestant Purchaser or Protestant Purchasers, and meerly and only for the Benefit of a Protestant or Protestants; and that every such Grantee, or Person claiming under any such Grant, shall be deemed to be a Trustee for a Papist or Person professing the Popish Religion, as aforesaid, within the true Intent and Meaning of the said Act; and that all such Grantees, or Persons claiming under such Grants, and their Presentees, shall be compelled to make such Discovery relating to such Grants and Presentations made thereupon, and by such Methods, as in and by the said Act of the twelfth of Anne are directed in the Case of Trustees of Papists, or Persons professing the Popish Religion; and that every Devise, to be made after the said sixth Day of May, by any Papist, &c. of any such Advowson, or Right of Presentation, &c. or any such Avoidance, with Intent to secure the Benefit thereof to the Heirs or Family of such Papist, &c. shall be null and void; and that all such Devisees, and Persons claiming under such Devisees, and their Presentees, shall in like Manner, and by such Methods, be compelled to discover whether, to the best of their Knowledge and Belief, such Devises were not made with the said Intent.

Note; The above *Stat.* of 12 *Ann. Sess.* 2. *ch.* 14. reciting that Convictions for the Purpose of gaining the Presentation to the Churches of Papists, are only by *Stat.* 3 *Jac.* 1. and *Stat.* 1 *W. & M.* it seems the Legislature considered the Conviction above mentioned in *Stat.* 7 & 8 *W.* 3. *ch.* 27. as none to this Purpose; and if so, possibly Convictions upon *Stat.* 1 *Geo.* 1. *Sess.* 2. *ch.* 13. may also be ineffectual to the same Purpose, yet we thought it proper to lay it before the Reader.

Disadvantage by being outlawed.

Also the rightful Patron may lose his Right to present, by suffering himself to be outlawed: For if an outlawed Person hath an Advowson that doth fall void during the Outlawry in Force, such Avoidance is forfeited to the King: And so it is if he be outlawed only in an Action of Trespass, or other Personal Action. 8 *R.* 2. *Quare Impedit* 200. And although the Person outlawed be but Tenant at Will of a Manor, to which an Advowson is appendant. 5 *H.* 5. 3. Or if a Person hath a Grant only of a next Avoidance, and be outlawed at such Time when the Church voids, the Right of Presenting doth belong to the King.

Book of Entries 485. and the King in ſuch Caſe will preſent, though the Outlawry be pardoned. 9 *H.* 6. 57. by *Paſton.* But then the King muſt preſent in his Turn, or loſe the Preſentment. *Mich.* 2 *Jac. King* v. *Biſhop of Wincheſter* and *Champion*, 2 *Cro.* 54. Right of Patronage forfeited.

But if an Uſurpation be made by the King upon a rightful Patron, who brings a *Quare Impedit*, and hath Judgment to recover, and then is outlawed, and the King's Clerk doth reſign, and takes a new Preſentation of the King, by reaſon of the Outlawry, and is again inſtituted and inducted, the Patron reverſeth the Outlawry, and brings a *Scire facias* to have Execution of the Judgment; it was adjudged, That he ſhall have Execution thereof, and remove the Incumbent; becauſe any Incumbent that comes in *pendente Placito*, ſhall be removed, eſpecially being made Party to the Writ, elſe the Incumbent in this Caſe would have Advantage of his own Practice, and any Incumbent being ſued might reſign and diſappoint the Plaintiff of his Suit. *Mich.* 27 & 28 *Eliz. Beverly* v. *Cornwal*, 3 *Cro.* 44. *Mich.* 30 & 31 *Eliz. Goulſborough* 103. *Trin.* 30 *Eliz.* 1 *Anderſon* 148. *Mich.* 30 & 31 *Eliz. Moor* 269. *Savil* 89. And in this Caſe it was ſaid by the Judges, That if a Perſon outlawed hath a Manor to which an Advowſon is appendant, and the King takes the Profits, and the Church voiding during the Outlawry, the King doth preſent his Clerk, though the Party doth reverſe the Outlawry for Error, yet he ſhall not in ſuch Caſe be reſtored to the Preſentment, becauſe it is but a Thing acceſſary to the Principal, *viz.* the Manor and the Profit only of the Advowſon. But otherwiſe it is, if the Church be void at the Time of the Outlawry, and the Preſentment thereby forfeited as a Chattel, principal and diſtinct; upon the Reverſal of the Outlawry for Error, the Party ſhall have Reſtitution of the Preſentment. *Mich.* 30 & 31 *Eliz. Beverly* v. *Cornwal*, *Moor* 270. becauſe there it is the Thing principally forfeited by the Outlawry. Outlawry reverſed. *Pendente Placito.*

Though the Law doth give Avoidances of Churches forfeited by Outlawry to the King, yet the King may grant away ſuch Forfeitures to a Subject: But if the King doth grant *omnia Bona & Catalla tenentium reſidentium, &c.* within ſuch a Liberty to a Subject, it is a Queſtion, Whether Avoidances of Churches that come to the King by Outlawries ſhall paſs from him by ſuch Words, unleſs they had been more ſpecial: Foraſmuch as ſuch Avoidances are ſpecial Chattels, and not uſually intended or thought of, when Men ſpeak generally of Goods and Chattels. And *Anderſon* held, that they ſhould not paſs; but it was adjourned. *Mich.* 31 & 32 *Eliz. Queen* v. *Archbiſhop of Canterbury. Fane* and *Hudſon*, 4 *Leonard* 107. Forfeitures granted away.

The Right of Preſenting may be alſo loſt from the Patron to the King, by his being attainted; but if the Leſſee of an Advowſon for another's Life be attaint, the King muſt take his Intereſt and Advantage during the Time, *viz.* during the Life of the *Ceſtuy que vie*, or at leaſt by an Avoidance which happened during the Life of *Ceſtuy que vie*, or if filled by Uſurpation, before it voids again, or otherwiſe he ſhall never have it, as is ſaid *Paſch.* 26 *Eliz. Beverly* v. *Archbiſhop of Canterbury*, *Owen* 2. The ſame Caſe 3 *Cro.* 44. Patron attainted.

Alſo the King may gain a Right of Preſenting to a Church upon the Account of an Appropriation made without his Licence: For if an Advowſon (whether held of the King or not) be appropriated without his Licence, although another be Founder, the King may by his Prerogative ſeiſe the Advowſon; and being ſeiſed by him (though the Inheritance be not forfeited) he ſhall have the Preſentments to the Avoidances, in the Name Appropriation without Licence.

Right of Patronage forfeited.

Name of Diſtreſs, until ſuch Time as Fine is made to him for making the Appropriation without his Licence. 21 *E.* 3. 5. by *Shard. Mich.* 18 & 19 *Eliz.* in *Grendon*'s Caſe v. *Biſhop of Lincoln*, *Plowden fol.* 499.

Purchaſe by an Alien born.

So if an Alien born doth purchaſe an Advowſon, and the Church doth become void, after Office found that he is an Alien, the King ſhall preſent. *Parſon's Law, chap.* 10. *fol.* 74. Or if a Villain doth purchaſe an Advowſon, the Lord ſhall preſent, becauſe the Lord upon ſuch Purchaſe by the Villain may claim the Inheritance of the Advowſon, and upon ſuch Claim the Intereſt thereof ſhall be veſted in him, and then the Lord in his own Right ſhall preſent to an Avoidance. *Parſon's Law, chap.* 10. *fol.* 75. And Note, That if the Lord doth preſent his Villain to a Church, this is no Enfranchiſement of him. *Mich.* 8 *Jac. C. B. Waller*'s Caſe, *Parſon's Law, chap.* 9. *fol.* 72.

Patron becomes a Bankrupt.

The Right of Preſenting may be alſo transferred from the Patron by becoming a Bankrupt; for if the Patron of a Church, who is a Trader within the Statutes made againſt Bankrupts, commits an Act of Bankruptcy, and a Commiſſion of Bankrupt is ſued out againſt him, the Commiſſioners may ſell the Advowſon; but if the Church be void at the Time of ſuch Sale made, the Vendee ſhall not preſent to the void Turn, but the Bankrupt himſelf, but the Sale of the Advowſon is good. *Law againſt Bankrupts, chap.* 10. *fol.* 146. For Sale made in ſuch Caſes by the Commiſſioners of the Bankrupt's Goods and Chattels, is in order for the Payment and Satisfaction of his Creditors their juſt Debts; but the void Turn of a Church is not a Matter valuable, which can go in Diſcharge or Satisfaction of ſuch Debts, though the Advowſon or next Preſentation, while the Church is full, may be accounted to be ſo, and conſequently may be granted or aſſigned by the Commiſſioners.

Forfeiture by Alienation.

Alſo the Right of Preſenting may be forfeited by Alienation; for if Leſſee for Life of a Manor, to which an Advowſon is appendant, alien the Manor, by which he commits a Forfeiture, and after the Church voids, the Leſſor may preſent, and that before his Entry into the Manor for the Forfeiture, becauſe his Entry is lawful in any Part. 19 *H.* 6. 33. 16 *E.* 3. *Quare Impedit* 146. *Contra* 39 *E.* 3. 21. So if he aliens one Acre of the Manor only with the Advowſon, by which the Advowſon is appendant to the Acre, the Leſſor may preſent, and that before Entry into the Acre. *Roll's Abr.* 2. *p.* 352. *Contra* 18 *E.* 3. 44.

Fine levied by Tenant for Life.

If Tenant for Life of an Advowſon in Groſs doth grant it in Fee, it is no Forfeiture; yet if he doth levy a Fine thereof, *&c.* this is a Forfeiture to him in Reverſion: But if after ſuch Fine levied, and before any Claim made by him in Reverſion, the Church doth void, altho' the Reverſioner doth then preſent; yet it is ſaid, that he ſhall not have the Preſentment: For notwithſtanding the Forfeiture, until he in Reverſion hath made his Election, to take Advantage thereof, the Eſtate of the Tenant for Life is not determined; and if he ſhould make his Claim after the Death of the Incumbent, yet the preſent Avoidance ſhall be a Chattel veſted in the Tenant for Life, which cannot be deveſted by the Preſentment of him in Reverſion. *Trin.* 13 *Car. B. R. Spring* and Sir *Julius Cæſar*'s Caſe, adjudged upon a Writ of Error. *Roll's Abr.* 2. *p.* 352. *Co. Lit.* 251. *Paſch.* 12 *Car. Spring* v. *Dame Cæſar*, *Jones* 391. Yet *Paſch.* 7 *Car. C. B.* in the Caſe of *Merton-College* v. *Wood* and *Ramſey*, *Lit. Rep.* 366. the Court ſeemed to be of another Opinion; where the Caſe was, That the Warden of *Merton*-College makes a Leaſe of a Manor unto which an Advowſon was appendant, which was not warranted by the Statute, and dies, the Church then becomes void, and the Succeſſor

preſents

preſents before any Entry made into the Manor; and it was urged, that he could not preſent, for that the Leaſe was not void, but void.ble by Entry of the Succeſſor; and he not entring before the Church voided, the void Turn was a Chattel veſted in the Leſſee, and the Succeſſor's Entry after ſhall not by any Relation deveſt it; but the Court (ſays the Book) ſeemed to be of a contrary Opinion. But if a Diſſeiſor of a Manor, to which an Advowſon is appendant, doth alien, the Diſſeiſee may preſent before his Entry into the Manor. 19 *H.* 6. 33. *b.* But *Quære:* For *Brook* thinks he cannot make Title without the Manor. *Br. Quare Impedit* 11. But if the Diſſeiſor of a Manor to which, *&c.* doth preſent, when the Church is void, if the Diſſeiſee doth re-enter into the Manor, he may preſent at the next Avoidance. 14 *H.* 6. 15, 16. So if the Diſſeiſee doth re-enter when the Church is void, he may preſent, and have a *Quare Impedit*; by *Townſend.* 2 *H.* 7. 2. *Littleton's Rep.* 367.

Patronage forfeited.

Entry.

Alienation by a Diſſeiſor.

Re-entry.

And here Note: If one that is ſeiſed of an Advowſon doth leaſe the ſame for Years, and the Leſſee doth accept of a Preſentation from the Leſſor, this is an Extinguiſhment of the Leaſe. So if a Man doth preſent to his own Church, as Proctor to another, by this he loſeth his Advowſon. 42 *Eliz. C. B. Rudd* v. *Topſey*, *Owen* 142. *Litt. Rep.* 282. And if a Biſhop doth preſent by Uſurpation unto an Advowſon, as in the Right of his Church, and his Clerk doth die Complete Incumbent; *Quære*, Whether the Advowſon be not in Mortmain, and forfeited to the King? See 47 *E.* 3. 11.

Leaſe extinguiſhed.

Mortmain.

CHAP. XII.

Of LAPSE.

IN the laſt Place, the Right of Preſenting may go from the true Patron to others, by his Lapſe or Neglect. And firſt, By not preſenting in ſuch Time, or taking ſuch Courſe in Law as to prevent the Right of Preſenting from going to another, by reaſon of ſuch Lapſe: For ſo it may do, if the Church or Benefice be of the Patronage of a common Perſon in moſt Caſes; that is, unleſs it be a Donative: For they remaining void, never go in Lapſe; but the Ordinary may compel the Patron to fill the ſame by Church Cenſures. *Paſch.* 3 *Jac. Fairchild* v. *Gair*, *Yelverton* 61. And tho' uſually a free Chapel is Donative, and ſo goes not in Lapſe; yet by the Foundation, or after Compoſition it may be Preſentative, and ſo be ſubject to Lapſe, and yet remain free from the Juriſdiction of the Ordinary in whoſe Dioceſe it is ſituate. *Rawſon* and *Burgue*'s Caſe, *Trin.* 23 *Car. B. R.* *Stile* 82, 83. But if a Church or Benefice be of the Patronage of the King, or he hath a Right of Preſenting thereto, he can never loſe his Turn to the Ordinary, by his Neglect of preferring his Clerk thereto: For altho' it hath been enacted, by the Statute of *Prærogativa Regis*, 17 *Ed.* 2. *cap.* 8.

Patron diſabled by Lapſe.

Donatives.

Stat. 17 *Ed.* 2. *c.* 8.

Of Lapſe, &c.

If the King's Church ſhall go in Lapſe. See 7 *Co.* 28. *Dyer* 36. *Hob.* 214.

That of Churches being vacant, the Advowſons whereof belong to the King, and other preſent to the ſame; whereupon Debate ariſeth between the King and other, if the King by the Award of the Court, doth recover his Preſentation, though it be after the Lapſe of Six Months from the Time of the Avoidance, no Time ſhall prejudice him, ſo that he preſent within the Space of Six Months.

It ſeems not.

From which it ſeems to be inferred, That if the King had not preſented, his Church, as well as a common Perſon's, ſhould go in Lapſe; Yet the Law is not taken ſo to be. *Mich.* 28 & 29 *Eliz. Beverley* v. *Biſhop of Canterbury* and *Cornwal*, 1 *Anderſon* 148. *Trin.* 4 *Jac. King* v. *Matthew*, *Brownlow* and *Gouldſborough* 1. *Yelverton* 90. *Doctor and Student*, *l.* 2. *c.* 36. 2 *Inſt.* 273. And the Reaſon may be, becauſe the Words are not particular enough: For tho' the Statute of *Weſtminſter* 2. ordains, That Plenarty by Six Months ſhall bar the Party that hath Right, yet it ſhall not bar the King, becauſe he is not expreſly named in the Statute. So no Statute of Limitation ſhall bar him: For his Prerogative, *Nullum tempus occurrit Regi*, ſaith *Jones*, ſhall not be taken away by a general Statute. *Hill.* 20 *Eliz. C. B. Standen*, &c. v. *The Univerſity of Oxon* and *Whitton*, *Jones* 21. And therefore not by theſe general Words, as I ſuppoſe: And ſo 'tis ſaid in *Magdalen*-College's Caſe. 11 *Co.* 74. *b.* and the ſame Caſe, *Roll's* 1 *Rep.* 151.

The Reaſon.

Plenarty by Six Months.

1 *Jac.* 2. concerning St. *James's Weſtminſter.*

So by Act of Parliament 1 *Jac.* 2. St. *James's Weſtminſter* was made a Pariſh, and divided from the Pariſh of St. *Martin*'s, and a Church erected; and it was provided by the ſame Statute, That Dr. *Tenniſon*, the then Vicar of St. *Martin*'s, ſhould be the firſt Rector of St. *James*'s Pariſh, and that the Patronage of the Advowſon ſhould belong to the Biſhop of *London* and the Lord *Jermin*, *alternis vicibus*; the firſt Rector, after Vacation by Dr. *Tenniſon*, to be preſented by the Biſhop of *London*, and the next by the Lord *Jermin* and his Heirs, and ſo *alternis vicibus*. Dr. *Tenniſon* was promoted to the Biſhoprick of *Lincoln*, by which the Church of St. *James* became void; and adjudged, that altho' it was by the Statute expreſly appointed, that the Biſhop of *London* ſhould preſent to the Avoidance; yet the Statute deſigned only to direct the Methods and Turns between the Patrons, and not to exclude the King of his Prerogative; and altho' this was a Church newly erected, yet the King having the Prerogative to preſent to all Churches where the Incumbent is promoted to be Biſhop, ſhall have it in this Church when 'tis erected; ſo that it was held, that the King ſhould preſent to the Avoidance by reaſon of his Prerogative, and not the Biſhop of *London*, notwithſtanding the ſaid Act of Parliament. *Mich.* 5 *W. & M. B. R. Rex & Regina* v. *Epiſc' London'* & Dr. *Birch*, 3 *Levinz* 382. See the ſame Caſe, *Caſes in Parliament* 164. 2 *Salk.* 540. 4 *Mod.* 190. 1 *Show.* 164. *Cumberba.* 301, &c. *vide ante Chap.* 9. And in caſe the King doth not preſent, all that the Ordinary can do, is to ſequeſter the Profits of the Church, and appoint a Clerk to ſerve the Cure. 18 *E.* 3. 21. 14 *H.* 7. 21. *Doctor and Student*, *l.* 2. *c.* 36.

Sequeſtration.

Notice of Avoidance.

But that we may the better know when the Title of Lapſe doth take Place, as to ſuch Benefices, the Preſentment to which may be loſt by Lapſe, we muſt firſt conſider, How and by what Means the Church in Queſtion doth become void. For in ſome Caſes the Ordinary muſt give Notice of the Avoidance, before the Patron is bound to preſent, or the

the Title of Lapſe can accrue to him upon the Neglect of Preſenting. In other Caſes, the Patron muſt take Notice of the Avoidance, and make Preſentment at his Peril within ſuch a Time as the Law alloweth him to provide for the Church. But in what Caſes Notice of an Avoidance is to be given by the Ordinary, before Lapſe can run, and when it runs from the very Time that the Church is void, hath been already declared in the foregoing Chapters; that is,

Of Lapſe, &c.

From the Time that a Church is void, where Notice is not neceſſary, and from the Time of Notice duly given of an Avoidance, in ſuch Caſes when it is neceſſary, and not from the Time of Notice given of the Refuſal of a Clerk preſented. 14 *H.* 7. 21. 15 & 16 *Eliz. Dyer* 327. *Mich.* 15 *Eliz.* 3 *Leonard* 46. *Paſch.* 3 *Eliz. B. R.* Every Patron, as well Lay-man as Clerk, hath by the Common Law ſix Months allowed him to provide for his vacant Church, within which no Ordinary can collate by reaſon of Lapſe, *Doctor and Student* 116. *b. Cuſtoms of Normandy, c.* 1. *Patronage* 870. which ſix Months allowed, are to be accounted ſuch Months as make an Half-year, conſiſting of 182 Days. *Paſch.* 5 *Jac. Cateſbby* v. *Baker and the Biſhop of Peterborough, Yelverton* 100. *Trin.* 5 *Jac. Biſhop of Peterborough* v. *Cateſby*, 2 *Cro.* 166. 6 *Co.* 61. and not according to twenty-eight Days in the Month, as ſome have thought, 22 *H.* 7. *Keilway* 88. *Trin.* 27 *Eliz. Albany and Biſhop of St. Aſaph*'s Caſe, 1 *Leonard* 31. (but the Law doth not regard the odd Days in the Year;) and the Day the Church becomes void, is not to be taken into the Account of ſix Months, but is to be excluded. *Cateſby*'s Caſe, 6 *Co.* 61. *Cornwallis* v. *Hood, Carter* 44. Within which ſix Months allowed, every Patron muſt preſent his Clerk; yea, though an Infant or Feme Covert, for Nonage or Coverture will not excuſe this Neglect, or prevent a Lapſe. 33 *E.* 3. *Quare Impedit* 46. *Mich.* 15 *Eliz. C. B.* 1 *Leon.* 32.

Notice from what Time.

Tho' the Patron hath ſix Months as aforeſaid, before Lapſe incurs, yet it concerns him not to delay preſenting till the ſix Months be almoſt expired: For if he doth preſent but one Week before the ſix Months be ended, the Ordinary may pretend that he hath not Time to examine the Clerk. Or if the Ordinary refuſe the Clerk for Inability, becauſe unlearned, *&c.* the Patron will not have Time to preſent anew within the ſix Months, but Lapſe may incur. And tho' the Patron neglecting to preſent, doth bring his *Quare Impedit* againſt the Biſhop within the ſix Months, if the Church remained open for the Time of Preſentment, had it been made, Lapſe ſhall not be prevented by ſuch Device, or the Ordinary barred from Collating: For 'tis moſt unreaſonable, that the Church by ſuch Tricks ſhould be kept void, or that the Patron ſhould make Advantage of an unjuſt Suit, and the Ordinary be puniſhed for doing nothing amiſs. *Mich.* 15 *Jac. Brickhead* v. *Archbiſhop of York, Hobart* 200.

Caution to the Patron not to delay his Preſentation.

In the Caſes in which Notice is to be given, the Patron neglecting from Year to Year to preſent, Lapſe doth not run to the Ordinary; yet if in ſuch caſe a Stranger doth preſent, and his Clerk is inſtituted and inducted, and not interrupted by the Patron until ſix Months (accounting from the Induction) be expired, the Patron is without Remedy for that Turn: For that tho' he had not Notice from the Ordinary of the Avoidance, (for which Reaſon the Ordinary can have no Advantage of Lapſe) yet the Induction of the Stranger's Clerk is a notorious Act, of which the Patron as well as the Country might have taken Notice. *Paſch.* 39 *Eliz.*

Stranger's Clerk inducted.

A notorious Act.

Of Lapſe, &c.

39 *Eliz. Servein* v. *Biſhop of Lincoln*, *Noy* 65. *Paſch.* 17 *Jac.* Sir *William Elvis* v. *Archbiſhop of York* and others, *Hobart* 318.

Wrongful Collation no Bar to the Patron.

But if a Biſhop doth collate his Clerk, either before he gives Notice of an Avoidance, where Notice is to be given, or at any Time within the ſix Months limited to the Patron to fill his Church, the Patron may at any Time after preſent his Clerk: For tho' wrongful Collation makes ſuch a Plenarty as ſhall bar the Lapſe to the Metropolitan and King, yet it is no Bar to the true Patron; and if the Biſhop doth admit the Patron's Clerk, the other is out *ipſo facto*; or if the Biſhop will not admit him, the Patron may as well then, as at any Time before, have his Remedy at Law againſt the Biſhop. *Hill.* 17 *Jac. Gawdy* v. *Biſhop of Canterbury* and others, *Hob.* 302. And therefore if the Ordinary doth collate within the Patron's ſix Months, and then the ſix Months paſs,

How the Ordinary muſt collate anew.

no Preſentation being made by the Patron, the Ordinary, if he will have the Benefit of a Lapſe, muſt collate of new; for the firſt Collation being by Wrong cannot by Time become rightful, and therefore doth not put the Patron to his *Quare Impedit*, for that it was but as a Proviſion for the Time, and there ought to be a new Act before it ſhall be a good Collation, by *Roll's* 2. *p.* 368. And yet it is ſaid, That if the King preſent

Ratione Lapſus, When none was.

Ratione Lapſus, when he hath no Title of Lapſe, that ſuch Preſentation is void, and that the Inſtitution thereupon is but as a Collation of the Biſhop's, and void to the Patron, but full as to all others; ſo that ſuch a Plenarty doth bar the Lapſe of the Metropolitan and King. *Paſch.* 17 *Jac. Gawdy* v. *Biſhop of Canterbury* and others, *Hobart* 302.

Where Inſtitution is but a Collation.

But if Inſtitution in ſuch Caſe be but as a Collation, I ſuppoſe it is a Collation by Wrong only, and therefore hath no greater Effect than ſuch a Collation hath that is made deſignedly by the Biſhop, which is only, as hath been ſaid, looked upon to be proviſional for a Time: And therefore, if after ſuch Inſtitution or Collation, neither the Patron, nor other Perſon, by Uſurpation, doth preſent to the Biſhop within the ſix Months, it might ſeem (according to the Caſe in *Roll's Abr.*) that the Biſhop may collate upon ſuch Collatee, as unto a Church lapſed to him, and that the other might be thereby outed of his Incumbency. (*Quære.*)

That in ſeveral Caſes the Lapſe may go to the Biſhop.

However, if the Patron or other Perſon doth preſent to the Ordinary before the ſix Months be expired, and the Preſentation is void in Law, the Ordinary is not bound to admit the Clerk therein nominated, as I conceive, but may ſuffer Lapſe to run to himſelf, (and the Preſentee is without Remedy) if within Time no other Preſentation is made. Or if the Patron or Uſurper do make a Preſentation that is good in Law, and in due Time, it may fall out that the Right of Preſenting may go to the Biſhop by Lapſe, ſuch Preſentation notwithſtanding: For in ſeveral Caſes the Ordinary may refuſe to admit and inſtitute the Clerk preſented, by Occaſion of which Lapſe may come to him; and all Things that are juſt Cauſes to deprive a Clerk, are juſt Cauſes to refuſe a Clerk when preſented. 5 *Co.* 58. *a. Parſ. Counſ.* 4, 5.

Lay-man preſented and deprived.

But if a Lay-man be preſented, and the Ordinary doth inſtitute him, and after the Patron's ſix Months be ended, the Ordinary doth deprive him, and his Admiſſion, Inſtitution and Induction are declared to be null, yet this ſhall not relate to give Title of Lapſe to the Ordinary. *Dyer*, 3 *Eliz.* 294. *Roll's Abr.* 2. *p.* 220.

Where Clerk of Biſhop being refuſed, there needs no Notice.

If the Clerk refuſed be the Preſentee of a Biſhop, or other Eccleſiaſtical Patron, the Ordinary is not bound to give Notice of the Refuſal. 18 *H.* 7. *Keilway* 49. *b.* 14 *H.* 7. 21. *a. Mich.* 15 *Eliz.* 3 *Leonard* 47.

Of Lapſe, &c.

47. Or if he ſhould do it, ſuch Patron can never revoke, nor vary his Preſentation by preſenting one afterwards that is better qualified, without the Ordinary's Conſent; the Law ſuppoſing him that is a Spiritual Perſon to be capable of chuſing an able Clerk. 31 *E.* 1. *Quare Impedit* 185. *Rolls* 2. *p.* 354. *Mich.* 1 *H.* 8. *Keil.* 154. *Mich.* 3 *Car. Stoke* v. *Stiles*, *Latch* 191, 253. And ſo Lapſe may come to him unavoidably, if the Clerk firſt preſented be juſtly refuſed. But if the Clerk preſented be the Preſentee of a Lay-Patron, and be refuſed by the Ordinary, the Ordinary in moſt Caſes is bound to give Notice to the Patron of ſuch Refuſal: For if in ſuch Caſe no Notice is given, no Lapſe can run, tho' no other Clerk be preſented, 38 *E.* 3. 2. Nor if Notice be given, unleſs upon Trial the Clerk was juſtly refuſed. But if a Clerk preſented be for good Cauſe refuſed, and Notice thereof be in due Time and Manner given to the Patron, and no other Clerk be preſented in Time, Lapſe doth run to the Ordinary. *Mich.* 15 *Eliz. C. B.* 3 *Leonard* 46.

Lapſe.

Aliter, if preſented by a Lay-Patron.

If the Clerk, whether of an Eccleſiaſtical or Lay-Patron, be not refuſed, but only the Biſhop doth delay the Examination to him, whereby ſix Months paſs, tho' no Writ be brought by Way of Prevention, yet Lapſe ſhall not incur; becauſe the Church remains void by the Biſhop's own Fault, and he is thereby a Diſturber: And generally, if the Biſhop be a Diſturber, the Church doth not go in Lapſe, altho' it remains void by the Space of ſix Months. *Trin.* 3 *Jac. B. R. Palmer* and *Smith*'s Caſe, *per Cur' Roll's Abr.* 2. *p.* 366. But in what Caſes the Biſhop may juſtly refuſe a Clerk, and in what he muſt give Notice, and how, is hereafter declared.

No Lapſe, if the Biſhop be a Diſturber.

If the Church doth become litigious, which is, when two ſeveral Patrons preſent their ſeveral Clerks to a void Church within the ſix Months. *Roll's* 2. *p.* 384. *Paſch.* 26 *Eliz. C. B. Gerrard*'s Caſe, 2 *Leonard* 168. The Biſhop therefore may ſuſpend admitting the one Clerk and the other; by *Hobart*, *Mich.* 15 *Jac. Brickhead*'s Caſe v. *Biſhop of York*, *Hobart* 201. and ſuffer Lapſe to incur without any Inquiry. 34 *H.* 6. 41. 35 *H.* 6. 18. For tho' to award the Writ of *Jure Patronatus* be the Remedy in this Caſe, to ſatisfy the Biſhop who hath the beſt Right, and to ſecure him, if he admit the Clerk, according to the Verdict found in the *Jure Patronatus*, from being a Diſturber, yet the Biſhop is not bound to award the ſame *ex Officio*, but only at the Prayer of the Party, *viz.* either Patron or Clerk. 8 *E.* 4. 24. 5 *H.* 7. 20. *b. per Keble.* 22 *H.* 6. 30. *per March.* 34 *H.* 6. 38. *Broke*, Title *Coſts* 2. *Paſch.* 26 *Eliz. Gerrard*'s Caſe, 2 *Leonard* 168. For if he were compelled to award his Writ *ex Officio*, 'tis ſaid, that Lapſe in ſuch Caſe could never come to him. 35 *H.* 6. 19. And yet by ſome it is ſaid, That the Biſhop ought to make this Inquiſition at his Peril. 34 *H.* 6. 11. by *Priſot*. But the former Opinion takes Place.

Lapſe by the Church being litigious.

Jure Patronatus.

If when the Church is litigious, the Ordinary is required to award a *Jure Patronatus*, and doth not award it accordingly, he is a Diſturber, and the Right of preſenting doth not Lapſe from the true Patron, if his Clerk be not admitted within the ſix Months. 34 *H.* 6. 40. *Br. Quare Impedit* 12.

Jure Patronatus required.

Or if a Clerk be preſented to the Ordinary, and he doth refuſe to admit him without Cauſe, and after ſuch Refuſal the Church doth become litigious, the Ordinary (foraſmuch as the Church had not remained void, but by his own Act) ſhall not have the Benefit of Lapſe, altho' the Church be not filled within the ſix Months. 22 *E.* 3. *Quare Impedit* 194.

Refuſal to admit without Cauſe.

Of Lapſe, &c.

Requeſt by the Clerk.

After the Commiſſioners, upon a *Jure Patronatus* awarded, have certified the Biſhop of the Right, as it is found before them, the Biſhop ſhall not take Advantage of the Lapſe; that is, if the Clerk of the Patron, for whom it is certified, doth afterwards make a new Requeſt to the Ordinary to be admitted, which may be done upon the firſt Preſentment, without any new Preſentation or Requeſt of the Patron; but without ſuch After-Requeſt, the Ordinary may have the void Turn, as by Lapſe; ſuch Inquiry and Certificate notwithſtanding. 34 *H.* 6. 12.

Certificate of Right.

And ſo he may, if the ſix Months end before Certificate be made in whom the Right is upon ſuch Inquiry, altho' the Inquiry was depending upon a *Jure Patronatus* awarded before they ended. *Mich.* 15 *Jac. Brickhead* v. *Archbiſhop of York*, *Hobart* 201. That is (I ſuppoſe) if the Biſhop after a *Jure Patronatus* required, did not unduly delay to award and execute the ſame: But if the Biſhop doth inquire by a *Jure Patronatus*, and thereby a Stranger is found to be the true Patron, if the Stranger preſent within the ſix Months, the Biſhop is bound to receive his Clerk; but if not, and the Diſturber doth preſent, the Biſhop is bound to receive the Diſturber's Clerk. *Br. Quare Impedit* 12. (*Quære.*)

Lapſe upon a *Quare Impedit* depending.

Alſo if when a Church is litigious, no *Jure Patronatus* is awarded, but only an Aſſiſe of *Darrein Preſentment*, or *Quare Impedit*, is brought by one Party, who doth recover againſt the other, if the Biſhop was not named in the Writ, and the ſix Months paſs pendant the ſame, Lapſe ſhall incur, for that there was no Default in the Biſhop. 1 *E.* 1. *Rot. Patentium*, *Memb.* 15. 6 *E.* 1. *Rot. Pat. Memb.* 25. 33 *E.* 3. *Quare Impedit* 194. *Mich.* 3 *Jac. Lancaſter* v. *Low*, 2 *Cro.* 92. And tho' the Patron in ſuch Caſe doth recover within the ſix Months, yet if the ſix Months paſs before the Writ to the Biſhop be taken forth, Lapſe ſhall incur. 17 *E.* 3. 75. *F. N. B.* 48. *b.* And if the Ordinary doth collate before the Receipt of the Writ, his Clerk ſhall not be removed. 11 *H.* 4. 80. And ſo it is, if after the Recovery, within the ſix Months, the Defendant doth bring a Writ of Error, and the ſix Months do paſs pendant the ſame, 17 *E.* 3. 75. unleſs the Plaintiff, before the ſix Months by ſuch Means paſs, doth bring *Quare Incumbravit* againſt the Biſhop; for thereby it is ſaid, that Lapſe ſhall be prevented, 17 *E.* 3. 75. but *Quære.* However, it is generally ſaid, that if a *Quare Impedit* in any Caſe be brought, and the Biſhop be named therein, Lapſe ſhall not paſs to the Ordinary *pendente Brevi*. *Mich.* 3 *Jac. Brickhead* v. *Archbiſhop of York*, *Hobart* 200. 1 *Inſt. f.* 344. *b.* Accordingly, if a Man brings a *Quare Impedit* againſt Patron, Ordinary and Incumbent, and the Ordinary pleads, that he claims nothing but as Ordinary, and after the Plaintiff recovers, and the Patron and Incumbent do bring a Writ of Error, depending which the Biſhop dies, and another is made Biſhop; and afterwards the Incumbent voiding the Church in Controverſy by taking a ſecond Benefice, the ſaid Church remains void ſix Months; and after this, the firſt Judgment is affirmed; no Lapſe incurs to the Ordinary, as was adjudged, this Matter being returned by the new Biſhop, upon the Writ to him directed. *Paſch.* 3 *Jac. B. R. James* v. *Bolton*, *Roll's Abr.* 2. *p.* 366.

Simile upon a Writ of Error.

Aliter, Ordinary being named.

Lapſe to the Metropolitan.

It is a Rule, That the Metropolitan ſhall never preſent, or collate by Lapſe after ſix Months, but when the immediate Ordinary might have collated by Lapſe within the before-going ſix Months, and had ſurceaſed his Time; and ſo it is, if the Time be devolved to the King;

Of Lapſe, &c.

How the Right of Lapſe doth go.

therefore if the Biſhop be named in the Writ, the Lapſe is ſtopped, not only againſt him, but the Metropolitan and the King. 1 *Inſt.* 344. *b.* The Right of preſenting by Lapſe doth go, generally ſpeaking, firſt to the next immediate Ordinary, and therefore firſt to the Biſhop of that Dioceſe in which the Church is ſituate. *Stat.* 25 *E.* 3. *c.* 7. *Doctor and Student*, *l.* 2. *c.* 36. That is, if the Church be not of the Patronage of ſuch Ordinary, for then it goes immediately to the Metropolitan at the End of ſix Months, for the Biſhop in ſuch Caſe as Ordinary, ſhall not have a ſecond ſix Months to ſupply his own Neglect as Patron, but it ſhall go to the Metropolitan, by the Council of *Lateran*, out of which, as is generally agreed, the Law of Lapſe with us was taken: Six Months is given to Eccleſiaſtical Patrons to preſent, and for want of Preſentation within that Time by a Biſhop, the Lapſe by that Council is given to the Chapter, and then to the Metropolitan: But this Canon extended only to Lapſe of ſuch Churches which were of the Biſhop's Patronage, and not to thoſe which came to Biſhops by Lapſe; for the Metropolitan, and not the Chapter, was in that Caſe immediately to ſupply the Biſhop's Neglect, as is obſerved by the Comments upon this Canon: But that Part of the Canon which let in the Chapter to ſupply the Biſhop's Neglect, was never received with us; the reſt was admitted to be the Rule and Law in that Caſe; ſo that the Metropolitan ſhall at the End of ſix Months ſupply the Biſhop's Neglect in preſenting to Benefices whereof he is Patron, ſeems to be all that was received here out of that Canon concerning Biſhops; but the Law of preſenting in all other Caſes within ſix Months with us in *England*, is referred to this *Lateran* Canon, *Bracton lib.* 4. *c.* 6. *Coke Inſt.* tho' Mr. *Selden* thinks, that by Authority alſo of a Decretal mentioned *Extra de Jure Patronat. c.* 12. *Cum te*, which mentions Lay-Patrons, as well as by the ſaid Canon, the Law here was firſt admitted. *Seld. of Tythes*, *c.* 12. *f.* 388, 389.

Council of *Lateran.*

Lapſe in Time of an Archbiſhop's Viſitation.

If an Archbiſhop doth viſit an inferior Dioceſe, and doth inhibit the Biſhop during the Viſitation (as the Uſe is,) and afterwards during the Viſitation and Inhibition, and before any Releaſe made by the Archbiſhop, ſome Church within the ſaid Dioceſe doth Lapſe, altho' that the Juriſdiction of the Ordinary be ſuſpended during the Viſitation, ſo that he cannot in any Caſe collate his Clerks himſelf, yet he ſhall have the Benefit of the Lapſe, and not the Archbiſhop, to whom, in this Caſe, the Biſhop muſt, as a common Perſon, preſent his Clerk, and the Archbiſhop, as his Ordinary, ought to inſtitute upon ſuch Preſentment, as was agreed by the Civilians. *Trin.* 13 *Car. B. R. Dodſon* v. *Lynn*, *Roll's* 2. *p.* 367.

From the Ordinary to the Metropolitan.

In caſe the Ordinary dieth, or be deprived or tranſlated before he takes the Benefit of a Lapſe incurred, it is ſaid, That the King ſhall have the Turn. *F. N. B.* 34. *g.* *Bracton l.* 5. *f.* 404, 510. See *Mich.* 10 *Jac.* in *Colt* and *Glover*'s Caſe v. *Biſhop of Coventry*, *Hobart* 154. But ſome doubt, whether the King or Metropolitan ſhall have it. *Paſch.* 7 *E.* 6. *Dyer* 87. *b.* And I do rather think, that the Right doth go with the Spiritualties to the Metropolitan, or other Warden of the Spiritualties; becauſe it is but a meer Truſt in the Law, and hath no Relation to the Temporalties which go to the King: And of this Opinion was *Noy* Attorney General. *Noy* 69. So *Roll's* 2. *p.* 367, and 345. From the immediate Ordinary, the Title of Lapſe, after half a Year, (that is, at the End of the whole Year, accounting from the Time that the Patron is bound at his Peril to take Notice of the Avoidance) goes to the Ordinary's immediate Superior; and therefore if it went firſt to the Biſhop of the Dioceſe

Of Lapſe, &c.

From the Metropolitan to the King.

Dioceſe, it goes from him to the Metropolitan of the Province. *Mich.* 28 & 29 *Eliz.* *Beverly* v. *The Biſhop of Canterbury* and *Cornwal*, 1 *Anderſon* 148. And if it Lapſe firſt to the Metropolitan, as he is the Biſhop of a Dioceſe, (as the Archbiſhop of the Province of *Canterbury* is Biſhop of the Dioceſe of *Canterbury*; and the Archbiſhop of the Province of *York*, is Biſhop of the Dioceſe of *York*) then in the next Place it doth Lapſe immediately to the King; and ſo a Benefice doth Lapſe immediately from the Metropolitan to the King, when the Metropolitan is the very Patron, and doth neglect for his ſix Months to collate.

And then the King may take his own Time to collate.

If the Metropolitan doth not within half a Year fill the Church, the Right of Preſenting to which comes to him by Lapſe, or other Church, to which he may collate, ſuch Right paſſeth from him to the King as Supreme Patron. *Mich.* 18 & 19 *Eliz.* in *Greendon*'s Caſe v. *Biſhop of Lincoln*, *Plowden* 498. *b.* And being once come to the King, the King may take his own Time to collate: And *Fitzherbert* ſaith, That the King in that Caſe doth preſent by Lapſe as Ordinary: But the Title of Lapſe doth never go to the Superior Ordinary, but where it comes firſt to the Inferior, (ſaving in the Caſe of the King's free Chapels, to which he preſents by Lapſe in Default of the Dean, in reſpect of his Supreme Eccleſiaſtical Juriſdiction. 27 *E.* 3. 8. *b.* *Co.* 5. *de Jure Eccleſiaſtico.*)

Lapſe ought to come firſt to the inferior Ordinary.

And therefore if Courſe be taken to ſtop Lapſe from going to the Biſhop in ſuch Caſes in which it would otherwiſe go, it ſhall never go to the Metropolitan or King. 11 *H.* 4. 80. *F. N. B.* 48. *Roſwel*'s Caſe, 6 *Co.* 52. *Jenk.* 281. *Mich.* 3 *Jac.* *Lancaſter* v. *Low*, 2 *Cro.* 93. And therefore if Notice (where requiſite) is not given to the Patron, ſo that for want thereof Lapſe doth not come to the Biſhop, the Church remaining void eighteen Months, it ſhall not go to the King, becauſe it never came to the immediate Ordinary, tho' it was only thro' his Fault or Neglect that it did not. 18 *Eliz.* *Dyer* 341. *Jenkins*, *Cent.* 7. *Caſe* 7.

Lapſe prevented by Inſtitution.

And for the ſame Reaſon it is, that tho' in other Caſes the Church is not full againſt the King but by Induction, yet if the Patron doth preſent, and his Clerk is admitted and inſtituted, and doth forbear to be inducted eighteen Months, the King ſhall not preſent upon him for Lapſe, the Inſtitution ſtopping the Lapſe from going to the inferior Ordinary. *Hob.* 154. *Colt* and *Glover*'s Caſe, and by *Roll's Ab.* 2. *p.* 367. and by *Popham* in *Robins* and *Prince*'s Caſe, *Hill.* 43 *Eliz.* *Gouldſborough* 164.

King may null an Inſtitution.

Where the Title of Lapſe is come to the King, if the King doth preſent, and his Preſentee is Inſtituted, yet the King may revoke his Preſentation, and ſo null the Inſtitution at any Time before his Clerk is inducted; or if his Clerk be inſtituted upon ſuch Title, and die before his Induction, the King may preſent another, his Turn not being ſerved by the Inſtitution only of his Clerk. *Trin.* 32 *Eliz.* *Wright* v. *The Biſhop of Norwich*, 1 *Leonard* 156.

Lapſe to the King's Predeceſſors.

The King hath not only the Right of preſenting to Churches which Lapſe to him during his own Reign, but alſo to ſuch which have lapſed to any of his Predeceſſors, and no Advantage taken by them thereof, contrary to the appearing Senſe of the Statute 25 *E.* 3. *c.* 1. For by the true Meaning of that Statute, King *Edward* III. and his Heirs were only excluded from Titles of Preſentation in others Right, fallen before the Time of that King, whereof any Church was then full. *Hill.* 9 *Car.* *King* v. *George Archbiſhop of Canterbury* and *Priſt*, 1 *Cro.* 355. and ſame Caſe, *Jones* 334. 11 *H.* 4. 8. *Vide* 11 *H.* 4. 4. 70. *contra.*

Benefit of Lapſe loſt to the Biſhop.

After a Church is lapſed to the Biſhop or Archbiſhop, it concerns them to take Advantage thereof with all ſpeed, leſt the Benefit be loſt; for after

a Church is lapſed to the immediate Ordinary, if the Patron doth preſent before he hath filled the Church, the Ordinary ought to receive his Clerk: For Lapſe to the Ordinary is only an Opportunity of executing a Truſt, *viz.* of ſeeing the Cure ſupplied, in caſe of the Patron's Neglect, which being performed by the Patron himſelf, the Ordinary can take no Advantage by it. 11 *H.* 4. 80. 18 *E.* 3. 21. *a.* 13 *E.* 4. 3. 43 *E.* 3. 11. *a. Trin.* 18 *H.* 7. *Keilway* 50. And by *Hobart* in *Colt* and *Glover*'s Caſe, *p.* 154. 28 & 29 *Eliz. Beverly* v. *Biſhop of Canterbury* and *Cornwall*, 1 *Anderſon* 148. *Doctor and Student*, *l.* 2. *c.* 36. If one hath the Nomination, and another the Preſentation, and the ſix Months being incurred, he that hath the Preſentation only preſenteth to the Biſhop, before the Biſhop hath taken Benefit of the Lapſe, without any Nomination made to him, in ſuch caſe the Biſhop is bound to admit the Clerk, as the Clerk of the very Patron: By *Doderidge* in his *Complete Parſon*, *Lect.* 12. *f.* 67.

Of Lapſe, &c.

Nomination in one, Preſentation in another.

Or tho' the Patron did not preſent within his ſix Months, but the Ordinary did collate before the Expiration thereof, the Patron is not thereby barred from preſenting, but may preſent after the ſix Months be expired, and his Clerk ought to be received. *Co.* 6. *Green*'s Caſe, 22. and *Boſwell*'s Caſe, 50. But if the Biſhop in ſuch Caſe, after the ſix Months, and before any Preſentation exhibited, hath made a new Collation, the Patron is barred. *Roll's* 2. *p.* 368. *Co. Lit.* 344.

And the laſt only preſenteth.

So tho' Lapſe be incurred to the inferior Ordinary, and the Archbiſhop doth collate within the inferior Ordinary's ſix Months, the Patron's Clerk, if he be preſented, ought to be received; becauſe the Collation of the Metropolitan is tortious, and doth not put the Patron to his *Quare Impedit*, but is null, and as no Collation to the Patron: By *Roll in his Abridgment* 2. *p.* 368. But this is doubted of, and objected, That the Wrong is here done to the Ordinary only, and not to the very Patron. 11 *H.* 4. 80. The like Law, if Lapſe be accrued to the Metropolitan; for then, if the Patron preſent to the inferior Ordinary, whilſt the Church remains void, he is bound to receive his Clerk, and the Metropolitan is barred. *Booton* v. *Biſhop of Rocheſter*, *Hutton* 24. *Doctor and Student*, *l.* 2. *c.* 36. But if either the Ordinary of the Dioceſe, or Metropolitan, hath collated his Clerk, whilſt the Turn was reſpectively theirs, altho' the Clerk be not inducted, the Patron's Clerk, if after that preſented, is not to be admitted. *Trin.* 10 *Eliz. Dyer* 277. Or if the inferior Ordinary, after the Time is gone by Lapſe to the Metropolitan, hath collated his Clerk to the Benefice that is in Lapſe, altho' this Collation be tortious to the Metropolitan, yet it ſeems, that it takes away the Preſentation of the Patron, ſo that he ſhall not preſent, and is only an Uſurpation upon the Metropolitan: By *Finch*, Judge at *Somerſet* Aſſizes. Sir *Francis Popham* v. *Biſhop of Bath* and *Wells*, *Roll's* 2. *p.* 350, 368. And thereby the Metropolitan is put out of Poſſeſſion, and driven to his *Quare Impedit*. *Co.* 6. *Green*'s Caſe, *b.* 29. and *Boſwell*'s Caſe 50. *Co. Lit.* 344.

Where the Collation of the Metropolitan is tortious.

Q.

Metropolitan barred.

Patron barred.

Patron not barred by a wrongful Collation.

It hath been a Queſtion, Whether the Biſhop ought to admit the Patron's Clerk, after the Title of Lapſe is paſſed from the Metropolitan to the King? *Trin.* 10 *Eliz. Dyer* 277. and by *Hobart*, the Patron's Preſentation takes Place, after the Church is lapſed to the King, if it be exhibited to the Ordinary before the King's: In *Colt* and *Glover*'s Caſe v. *Biſhop of Coventry*, *Hobart* 157. Becauſe the Patron's Right to preſent continueth, until the Title by Lapſe be executed, and the King's Title is not veſted in him in this Caſe abſolutely, as other Titles are, but conditionally, *viz.* If he doth preſent before the Patron: Becauſe the King hath it only as Supreme Ordinary. *Hutton* 24. But by others, the Turn by Lapſe is ſo veſted in the King, that if the Patron's, or other Perſon's

Q. If the Ordinary ſhall admit the Patron's Clerk after a Lapſe paſſed from the Metropolitan to the King.

Of Lapſe, &c.

Clerk be admitted to a Church, after 'tis come to the King by Lapſe, the King by *Quare Impedit* may recover the Preſentment, and remove ſuch Clerk. *Mich.* 28 & 29 *Eliz. Beverly* v. *Biſhop of Canterbury* and others. 1 *Anderſon* 148. *Trin.* 27 *Eliz. Baſkervill*'s Caſe, *Co.* 7. *p.* 28. 27 *E.* 3. 85. *Mich.* 29 & 30 *Eliz. C. B. Biſhop of Lincoln*'s Caſe, *Brownlow* and *Gouldſborough* 1, 63. *Hill.* 6 *Jac. Cumber* v. *Biſhop of Chicheſter*, cited in the Caſe of *The King* v. *The Archbiſhop of Canterbury* and *Priſt*, *Trin.* 4 *Car. C. B. Hetley* 125. And this latter Opinion is taken to be the Law. So if the King hath Title, by Lapſe, to preſent to a Prebend of his free Chapel, for that the Dean thereof hath not collated to it within ſix Months, tho' the Dean doth collate before the King preſents, yet the King ſhall remove his Clerk. 27 *E.* 3. 8. *b.*

Advantage of the King loſt, the Clerk dying Incumbent.

But tho', as hath been ſaid, the King may remove the Patron's, or a Stranger's Clerk, that comes in upon his Lapſe, yet if ſuch Clerk doth die Incumbent of the Church, before the King doth preſent, the King hath loſt the Advantage of the Lapſe, and ſhall not preſent afterwards, or remove the Patron's ſecond Preſentee. *Trin.* 27 *Eliz. Baſkervill*'s Caſe, 7 *Co.* 28. *Paſch.* 26 *Eliz. Beverly* v. *Archbiſhop of Canterbury*, *Owen* 2. ſame Caſe. 1 *Anderſon* 148. and 3 *Cro.* 44. *Mich.* 2 *Jac. King* v. *Biſhop of Winton*, 2 *Cro.* 53. *Mich.* 30 & 31 *Eliz. Beverly* v. *Cornwall*, *Moor* 269. *Hill.* 6 *Jac. Cumber* v. *Biſhop of Chiceſter* and *Green*, 2 *Cro.* 216. *Mich.* 29 & 30 *Eliz. Biſhop of Lincoln*, *Owen*, *The Caſe of the King* v. *The Archbiſhop of Canterbury* and *Priſt*, *Trin.* 4 *Car. C. B. Hetley* 125.

The Reaſon.

Becauſe the King is to have but one Turn, and that the next Turn, 1 *Bulſt.* 28. and if the Law ſhould be otherwiſe, the King by ſuffering divers Uſurpations upon his Lapſe, might even diſinherit the very Patron; and the Rule, *Nullum tempus occurrit Regi*, is not to take Place where the King is limited to a Time certain.

Simile upon Avoidance by Reſignation.

The like Law upon the ſame Reaſon is ſaid to be, if the Church, before the King doth preſent, be voided by any other Means, as by Reſignation, unleſs the Reſignation be by Fraud on purpoſe to bar the King. *Trin.* 6 *Jac. Cumber* v. *Biſhop of Chicheſter*, *Brownlow* and *Gouldſborough* 1, 161. the ſame Caſe, 2 *Cro.* 216. *Paſch.* 30 *Eliz. Gouldſborough*, *p.* 83, & 86.

Econtra.

Yet on the contrary it is ſaid, That if the Clerk of the Patron, or a Stranger, that is preſented to a Church in Lapſe to the King, doth after his Induction reſign, it is no Prejudice to the King's Turn. *Brownlow* and *Gouldſborough* 1. *p.* 64. *The Caſe of the King* v. *The Archbiſhop of Canterbury* and *Priſt*, *Trin.* 4 *Car. C. B. Hetley* 125.

Diſtinction.

And ſome diſtinguiſh in this Caſe betwixt an Avoidance by the Act of God, as Death, (in which Caſe it is paſt Queſtion, that the King's Turn is gone) and the Act and Fault of the Incumbent, as by Reſignation, Deprivation, or the like: And therefore it hath been adjudged, That if he that is preſented upon the King's Lapſe, doth refuſe to pay the Tenths due from him to the King, and the Refuſal is certified by the Biſhop, whereby the Church is void, the King may then preſent as to his Turn by Lapſe, or remove another's Preſentee that comes in upon ſuch Avoidance. *Mich.* 30 & 31 *Eliz. Queen* v. *Biſhop of Lincoln* and *Leigh*, 3 *Cro.* 119. and *Leonard* 4. *Caſe* 105. *Moor* 259. and ſame Caſe by *Owen* 89.

Q.

But *Quære*; for it ſeems moſt reaſonable, that the King ſhould loſe his Turn by Lapſe, if he preſent not during the Incumbency of the Clerk of him that uſurped upon his Lapſe, whether it become void by his Death, or other Means, unleſs there be Fraud in the Caſe; and ſo it was held to be *per Cur. Trin.* 31 *Eliz. C. B. The Queen* and *Biſhop of Norwich*, 4 *Leon. Caſe* 351.

Of Lapſe, &c.

Lapſe to the King, and Ordinary collates, &c.

However, if the Ordinary doth collate to a Benefice that is lapſed, as well from him as the Patron to the King, and his Collatee doth die ſeiſed of the Church, it ſeems, that the King may afterwards have his Turn, becauſe the Church was not thereby filled, either againſt the Patron, or the King: Not againſt the King, becauſe the Collation of the Ordinary doth gain no Poſſeſſion againſt him; and the King may preſent without being put to his *Quare Impedit*; but whether (as it ſeems to be) againſt the Patron, *Quære*, by *Roll's* 2. *p.* 368.

King may not preſent again after his Title once executed.

If in the Caſe of Lapſe, or other the like Caſe, when the King hath Right to preſent but to the preſent Avoidance, and the Church is filled againſt him by Inſtitution and Induction, ſo that the King is driven to his *Quare Impedit*, and after he hath recovered, he confirms the Incumbent's Eſtate, yet he may preſent after ſuch Incumbent's Death: For when the King hath recovered, he hath a Right to preſent uncontrollably by the Record, and may at his Pleaſure ſue forth Execution, and the King's Confirmation, or Grant, that the Incumbent ſhall not be moleſted during his Life, cannot be pleaded by the Patron, in Bar of the King's Right to preſent by Virtue of his Judgment. 9 *E.* 3. 20. and 18 *E.* 3. 21. *The Abbot of Thorney*'s Caſe there cited. *Paſch.* 19 *Car.* 2. *Henry Edes* v. *Walter* Biſhop of *Oxford*, *Vaughan* 26. But if the King hath preſented for Lapſe, and his Clerk is inſtituted and inducted, and then being ſued doth loſe his Incumbency by ill pleading, the King ſhall not preſent again, for that this Title was once executed. *Mich.* 32 *Eliz. Arundel* and *The Biſhop of Glouceſter*'s Caſe, 1 *Leonard* 194.

Touching Lapſe in general, we may here add thoſe Rules and Maxims of the Common and Canon Law collected in Biſhop *Gibſon's Codex*, *viz.* *Cod.* 808.

1. *Lapſe is a Devolution of Patronage* (*or rather the Right of Preſentation*) *from the Patron to the Biſhop, from the Biſhop to the Metropolitan, and from the Metropolitan to the King*, i. e. to the Biſhop as Ordinary, to the Metropolitan as Superior, and to the King as Patron Paramount. *Vide* 2 *Inſt.* 361. *Bract. lib.* 4. *Reg.* 42. *b.*

2. *The Term or Space in which Title by Lapſe accrues ſucceſſively to the fore-mentioned Superiors in ſix Months.* Vide 2 Inſt. 361. 6 Rep. 62. a. 2 Cro. 141. Yelv. 100, &c. 2 Roll. Abr. 363, 364. 4 Mod. 140. Kelw. 49.

3. *Lapſe ſhall incur, or not incur according as it doth, or doth not happen through Default of the Biſhop; and according as he is named, or not named in the* Quare Impedit. *See* 2 Roll. Abr. 365. 3 Cro. 93. Hob. 200.

4. *Altho' the Biſhop is both Patron and Ordinary, he ſhall not have a double Time to preſent in, but only ſix Months, before Title by Lapſe accrues to the Metropolitan.*

5. *No Title by Lapſe can accrue to the Metropolitan, or to the King, unleſs it hath firſt accrued to the immediate Ordinary.* *See* 2 Cro. 93. 2 Roll. Abr. 365, 366, 367.

6. *If Title by Lapſe is accrued to the Biſhop, and he dies, or is tranſlated or deprived before he takes the Benefit of it, the Devolution is to the Metropolitan*, (i. e. as he is Guardian of the Spiritualties, and as this is not an Intereſt, but a meer Spiritual Truſt.) See *Bract.* 404. *Sect.* 10. 2 *Roll. Abr.* 367. And note *Noy* 69.

7. *Lapſe accruing to the Biſhop in a Metropolitical Viſitation, he ſhall not loſe the Benefit of it.* Vide 2 Roll. Abr. 367.

8. *After*

Uſurpation, &c.

8. *After Lapſe to the Ordinary, or to the Metropolitan, if the Patron preſent to the Ordinary before the Church is filled by Inſtitution, he is bound to receive his Clerk.* Vide Lyndw. De Jur. Patr. c. 2. Injuria. Nat. Br. f. 83. Hob. 157. 2 Roll. Abr. 368. Moor 900. Hutt. 24.

9. *There is no Lapſe from the King.* For altho' the Words of the *Stat.* 17 *Ed.* 2. *c.* 8. do plainly imply a Lapſe, yet they are not allowed to be expreſs enough to deſtroy or limit that known Maxim, *Nullum Tempus occurrit Regi.* 'Tis true the *Reformatio Legum, f.* 29. *b.* ſeems intended to provide againſt this. But as the Law is, there is no Remedy againſt a Neglect in the Crown to fill ſuch vacant Churches in the Crown, but only the Ordinary's Sequeſtring the Profits of the Church, and Appointing a Clerk to ſerve the Cure.

CHAP. XIII.

Of Uſurpation, and the ſeveral Conſequences thereof; and of the Writ of Right of Advowſon.

Fee of an Advowſon may be gained by Uſurpation.

AS the Patron by his Neglect doth loſe the Right of Preſenting upon the Account of Lapſe, ſo upon the Account of Uſurpation; for thereby the Fee of an Advowſon may be gained, 9 *H.* 6. 30. *b.* 31. that is, not only the Avoidance upon which the Uſurpation is made, but the whole Eſtate of the Advowſon againſt all the World; by *Hobart. Paſch.* 17 *Jac.* in Sir *William Elvis*'s Caſe *v. Archbiſhop of York, Hobart* 322. *Hill.* 14 *Car. B. R. Harper* v. *Bailiffs and Burgeſſes of Derby, Jones* 427.

But the Reader is, in reading this Chapter, to remember the *Stat.* of 7 *Annæ*, which is before at the End of the eighth Chapter of this Book. This Statute repeals for the future much of the Doctrine delivered in the preſent Chapter.

No Poſſeſſion gained where there is no Preſentation.

That an Uſurpation may be ſaid to be truly ſuch, and to have the Effect of gaining the Poſſeſſion of an Advowſon, ſeveral Things muſt concur; as firſt, it muſt (generally ſpeaking) be initiated by a Preſentment made to the Church: Therefore, if a Perſon affirming himſelf to be Patron of a Church that is void, doth pray the Ordinary to admit him thereto, (for that he cannot preſent himſelf) and the Ordinary doth inſtitute him accordingly, this gains no Poſſeſſion, for that there is no Preſentation, and a Man cannot plead Plenarty of his own Preſentment. 14 *H.* 8. 3. *a.* So if a Biſhop doth collate without Title to a Church preſentable, and his Clerk is inducted, the rightful Patron is not thereby put out of Poſſeſſion, as by Uſurpation; for it appertaining to the Biſhop's Office to provide for the void Church, until ſuch Time as the Patron doth make Preſentment of his Clerk thereto, his Collation ſhall be intended only to be as a Proviſion for the Celebration of Divine Service during the Vacation: For if the Patron's Clerk, notwithſtanding ſuch Collation, be not received when preſented, and the Patron brings his *Quare Impedit*, Plenarty by Six Months, in ſuch Caſe,

Neither by Biſhop's Collation without Title.

Caſe, cannot be pleaded againſt the Patron. *Mich.* 3 *Jac.* in *Boſwell's* Caſe, 6 *Co.* 50. 14 *H.* 8. 3. *Trin.* 44 *Eliz. Green's* Caſe, 6 *Co.* 30. 1 *Inſt. f.* 344. *b. Smallwood* v. *The Biſhop of Coventry*, &c. and *Marſh, Savile*, Caſe 188. And as not one, ſo not two or three more Collations do gain any Poſſeſſion of an Advowſon to a Biſhop, though he ſhould not collate as Ordinary, but as Patron. *Paſch.* 33 *Eliz. Queen* and *Biſhop of York's* Caſe, 1 *Leon.* 226. and ſame Caſe, 3 *Cro.* 240. And if the Inheritance of an Advowſon be in a Biſhop, in Right of his Biſhoprick, but the ſame is leaſed out for Years, or Life, a Collation by the Biſhop ſhall no more prejudice the Leſſee, than any other Stranger who hath the Inheritance in himſelf. *Paſch.* 32 *Eliz. Sale* v. *Biſhop of Coventry and Marſh*, 1 *Anderſon* 141. and *Savile*, Caſe 188.

Uſurpation, &c.

Nor by two or three more Collations.

Biſhop's Leſſee.

Tho' generally, as hath been ſaid, an Uſurpation muſt be initiated by a Preſentment, and not by a Collation, yet if a Biſhop doth collate upon him that hath Right to collate to a Church, his Collation doth make an Uſurpation and Plenarty by Six Months, and doth put him, in whom the Right of collating was, to his Writ of Right to recover his Advowſon. 17 *E.* 3. 64. *b.* Dean of *Lincoln's* Caſe. *Mich.* 3 *Jac.* in *Boſwell's* Caſe, 6 *Co.* 50. *Trin.* 44 *Eliz. Green's* Caſe, 6 *Co.* 29. 1 *Inſt.* 344. *b.*

Collation puts the Patron to his Writ.

Note: To complete an Uſurpation, the Uſurper muſt be in peaceable Poſſeſſion for Six Months. See 1 *Inſt.* 344.

And as an Uſurpation muſt be initiated by a Preſentation, ſo ſuch Preſentation ought to be valid, and not void in Law: Therefore if a Maſter of a College be preſented by Maſter and Fellows, or a Dean by the Dean and Chapter, the Preſentation being void, though the Maſter, or Dean, be admitted, makes no Uſurpation to the diſpoſſeſſing of a rightful Patron. 14 *H.* 8. 3. So if a Church being void, a Stranger doth preſent his Clerk upon a Simoniacal Contract, and the Clerk is admitted, inſtituted, and inducted thereupon, and Six Months paſs, yet this is not any Uſurpation upon the rightful Patron, altho' that the Clerk was ignorant of the Contract, for that ſuch Preſentation and Induction are void in Law, and the Clerk is as never preſented. *Stat.* 31 *Eliz. c.* 6. And in this Caſe the rightful Patron, and not the King, ſhall preſent. *Co. Litt.* 120. *a.*

The Preſentation muſt be valid.

So not where the Preſentations are void.

And if a Man and his Wife do join in a Preſentment to a Church, to which they have no Right, this Preſentation doth gain nothing to the Wife; for the Wife is at the Will of her Huſband, and ſo it is but as the Act of the Huſband; but otherwiſe it is, when the Wife hath Right. *Paſch.* 15 *Car. C. B. Neſton* v. *Hampton, March*, Caſe 146. And for this Reaſon, tho' the King may preſent by Uſurpation, yet he ſhall be no Uſurper by preſenting, if in his Letters of Preſentation he doth preſent by ſome Title which he hath not, ſuch Preſentation being void; but if he preſent generally, mentioning no Title at all in his Preſentation, and his Clerk be received, and dies, he hath gained a Title by Uſurpation. *Hill.* 17 & 18 *Car.* 2. Sir *John Tufton* v. Sir *Richard Temple*, *Vaughan p.* 14.

By Huſband and Wife.

King gains a Title by Uſurpation.

That an Uſurpation may have the Effect of gaining the Poſſeſſion of the Advowſon to a Stranger, 'tis not neceſſary that the Stranger doth preſent in his proper Perſon: As 'tis ſaid, that if the King doth preſent in the Right of his Ward, who hath not any Right to an Advowſon, this doth veſt the Inheritance in the Ward by Uſurpation, becauſe the King expreſly preſented in his Right. 42 *E.* 3. 4. *b.* 43 *E.* 3. 14. *b.* 22 *E.* 4. 9. *b.* *Quære:* For this ſeems contrary to the Books before cited, *viz.* that where the King mentions a Title which he hath not, his Preſentation is void, and ſhall not be any Uſurpation. But however, ſo it is in the Caſe of a common Guardian. *Roll's* 2. *p.* 370. *Contra* 17 *E.* 3. 60. 7 *H.* 4. 26. *b.* And alſo in the Caſe of a Proctor, with reſpect to the Perſon for whom

Where the Preſentation is in the Right of another.

By Proctor.

Uſurpation, &c. Attorney.

whom he is Proctor; yea, and tho' he was not his Proctor, if he did preſent as ſuch, or if he preſented as Proctor, or as Attorney to another, to a Church whereof himſelf was ſeiſed, it ſhall be an Uſurpation upon himſelf, for ſuch Perſon in whoſe Name and Right he preſented. 17 *E.* 3. 60, 61. 1 *Inſt.* 52. *a.*

By a Stranger to a Donative.

If a Stranger doth preſent to a Donative being void, and his Clerk thereupon is admitted, inſtituted, and inducted, yet this makes no Uſurpation upon the very Patron, becauſe the Preſentation, and ſo all that followeth thereupon, is meerly void; a Donative not being preſentable, unleſs it be firſt made ſo by the very Patron's Preſentation made thereunto to the Ordinary. *Co. Litt.* 344. *a.*

Muſt be to a Church which is void.

For the initiating of an Uſurpation, 'tis not enough that a Preſentment be made to a Church, and ſuch Preſentment as is not void, but it muſt be made to a Church that is void; therefore, if a Preſentation be made to a Church appropriate, (which is always full of him to whom the Appropriation is made) or to any other Church full of an Incumbent, and Inſtitution and Induction be had upon ſuch Preſentment, yet (all being void) no Uſurpation, or Diſpoſſeſſion is made thereby. *Mich.* 18 *&* 19 *Eliz. Grendon* v. *Biſhop of Lincoln, Plowden* 500.

What Avoidance to the Patron.

But though the Church muſt be void when the Preſentation is made for the aforeſaid Purpoſe, yet it is not neceſſary that it be ſo void to the Patron, that he muſt either preſent or ſuffer a Lapſe; but only ſo, that if the Patron pleaſe, he may preſent: For if an Ordinary doth deprive an Incumbent of a Church, for Crime, or other Cauſe, and doth not (as he ought to do) give Notice to the Patron of the Avoidance; yet if a Stranger doth preſent his Clerk, who is inſtituted, and inducted, and Six Months paſs, the Stranger thereby hath uſurped upon the Patron, and gained a Poſſeſſion of his Church: For though the Ordinary in the Caſe of a Deprivation, and in like Caſes, may not have the Benefit of a Lapſe without Notice, yet in regard that the Church is void and open to the Preſentment of the Patron, although no Notice be given thereof, the true Patron againſt Strangers is bound to take Notice of the Avoidance at his Peril. *Trin.* 44 *Eliz. Green* and *Baker*'s Caſe, *Roll*'s 2. *p.* 369. *Paſch.* 17 *Jac.* in Sir *Will. Elvis*'s Caſe *v. Archbiſhop of York, Hobart* 318.

Uſurpation by a Stranger.

Without Notice.

Incumbent reſigns, and Stranger preſents.

So if an Incumbent of a Church doth reſign his Benefice, and a Stranger preſents his Clerk thereto, who is inſtituted, and inducted, and continues Incumbent, without Interruption, by Six Months; tho' no Notice was given to the true Patron of the Reſignation, yet this Preſentment and Incumbency makes a complete Uſurpation, ſo that the Clerk cannot be removed; and the Reaſon is, becauſe the Induction is notorious to the Country, and therefore the Patron ought to take Notice of it at his Peril, and to uſe his Remedy in Time, if he will not loſe his Preſentment and Poſſeſſion. *Paſch.* 33 *Eliz. Serven* v. *Biſhop of Lincoln, Noy* 65. and by *Hobart* in Sir *William Elvis*'s Caſe *v. Biſhop of York, Tayler* and *Biſhop, Hobart* 318. And yet 'tis ſaid, That if a Clerk being inſtituted and inducted, doth reſign into the Hands of the Ordinary by Covin betwixt him, the Ordinary and the Stranger, on Purpoſe that the Stranger may preſent *A. B.* to the Intent to defeat the very Patron of his Preſentment, and the Stranger doth preſent the ſaid *A. B.* accordingly, and Six Months paſs, this ſhall not be any Uſurpation, for that the Ordinary did not give Notice of the Reſignation. *Trin.* 40 *Eliz. Lacon* v. *Biſhop of Lincoln, Roll*'s 2. *p.* 369. But I ſuppoſe this Caſe is to be underſtood as it is delivered, *viz.* ſpecially upon the Point of Fraud and Contrivance, and not ſo as to contradict the former Caſes.

Reſignation by Covin.

If

Uſurpation, &c.

If one hath a Benefice under the Value of Eight Pounds *per Annum*, and doth (without Diſpenſation) take another Benefice incompatible, in which Caſe the firſt is void only by Canon Law, and ſo is only ſaid to be void as to the Patron, and for his Advantage, not Diſadvantage; and a Stranger, before the true Patron hath Notice of the Avoidance from the Ordinary, or the Ordinary hath pronounced the Church void, doth get his Clerk inſtituted and inducted thereinto, this is no Plenarty againſt the true Patron: By *Hutton. Hill.* 9 *Car. King* v. *Prieſt*, *Jones* 336. (but *Quær.*) For that 'tis there alſo ſaid, that a Church is more void by the Conſtitution of *Lateran*, than by particular Deprivation or Reſignation, for that it is a general Sentence of Deprivation. 2 *E.* 3. 2. And therefore I think ſuch Inſtitution and Induction doth make a Plenarty. But *Quære*, Whether the Patron be put out of Poſſeſſion before Induction? for that 1 *H.* 5. 1. is *Contra*, as vouched in *Hare* and *Buckley*'s Caſe, *Plowden* 529.

Where one takes another Benefice incompatible.

If a Church be void in the Time of War, and a Stranger doth preſent his Clerk thereto, who is admitted, inſtituted and inducted, and in Poſſeſſion by Six Months, yet all is void: And though the Stranger doth only preſent in Time of War, and his Clerk is admitted upon that Preſentment in Time of Peace, yet the Law giveth Regard to the Original Act; that is to ſay, to the Preſentment; and all that followeth thereupon, although it were in Time of Peace, ſhall be avoided, as being conſtrued to be in Time of War, and ſhall not put the rightful Patron out of Poſſeſſion. 6 *E.* 3. 41. And upon this Reaſon was *Shelley*'s Caſe adjudged in *B. R.* ſaith *Coke*. *Trin.* 43 *Eliz. Bingham*'s Caſe, 2 *Co. p.* 93. and *Co.* 6. *Green*'s Caſe, 30. 1 *Inſt.* 249. *b.* And note, That the Time of War doth not only give this Privilege to them that be in War, but to all others within the Kingdom. 1 *Inſt.* 249. *b.*

Church void in Time of War, and Stranger preſents.

To the Gaining of the Poſſeſſion of an Advowſon, it is not only neceſſary that a Preſentation be made, and that it be made when the Church is void, and in Time of Peace, but Admiſſion and Inſtitution muſt be had thereupon; for before Inſtitution, and after Preſentation, the true Patron may grant the Advowſon, the Uſurpation not being completed till Inſtitution, (as is held by *Hobart*) and to the Gaining the Advowſon not without Induction, and the Clerk continues in Six Months. *Mich.* 30 *Jac.* 6 *Co.* 49. *b. Boſwell*'s Caſe. *Hill.* 14 *Car. B. R. Harper* v. *The Bailiffs of Derby*, *Jones* 427. *Paſch.* 15 *Car.* 2. *B. R. Brown* v. *Spence*, 1 *Siderfin* 163. 1 *Keble* 590. But if he doth die within the Six Months, (though the Patron cannot preſent before his Death, until he hath recovered) yet after his Death he may either preſent, or bring his *Quare Impedit*, becauſe the Plenarty did not bar his Action by reaſon of the Statute of *Weſtminſter* 2. *c.* 5. the Six Months not being incurred. Lord *Stanhope*'s Caſe, *Hobart* 241.

When there muſt be Admiſſion and Inſtitution.

When Induction, &c.

That an Uſurpation therefore may have the Effects of enabling the Uſurper to plead Plenarty againſt the true Patron upon his *Quare Impedit* brought, and to drive the Patron to his Writ of Right, 'tis not enough that the Uſurper duly preſent, and his Preſentee be admitted, inſtituted and inducted, but alſo that the Church be full by the Space of Six Months, before any Writ brought to recover the Preſentation. *Paſch.* 17 *Jac.* in Sir *William Elvis*'s Caſe *v.* Archbiſhop of *York* and others, *Hobart* 322. *Mich.* 13. *Jac. per Cur'*, *Godbolt* 263. For if within ſuch Time the Patron doth bring his *Quare Impedit*, or Writ of Darrein Preſentment, as the Caſe may be, Plenarty cannot be pleaded againſt him to bar him, but that he may remove the Uſurper's Clerk, and recover his Preſentment, and

Plenarty by the Space of Six Months.

Poſſeſſion

Uſurpation, &c. Writ of Right.

Poſſeſſion of the Advowſon, without being driven to his Writ of Right, 1 *Inſt.* 344. *b.* and that by the Statute of *Weſtminſter* 2. *c.* 5. For before this Statute at the Common Law, after Inſtitution had into a Church of a common Perſon, at the Preſentation of a Stranger that had no Right to preſent, the Incumbent was not removeable, but only the Advowſon recoverable by a Writ of Right of Advowſon, as appears by the ſaid Statute: By which it is enacted,

Stat. Weſt. 2. i. e. 13 *Ed.* 1. *c.* 5. *ſect.* 2. See 2 *Inſt.* 360. 1 *Inſt.* 344. *b.* 5 *Co.* 102. 6 *Co.* 61. *Cro. Jac.* 166. *Dyer* 29. *Bro. Plenarty* 1, 2, 7, 11, 12, 14, *&c.* *Fitz. Quare Impedit.*

That from henceforth one Form of Pleading ſhall be obſerved among Juſtices in Writs of Darrein Preſentment and Quare Impedit **in this Reſpect, if the Defendant alledgeth Plenarty of the Church of his own Preſentation, the Plea ſhall not fail by reaſon of the Plenarty, ſo that the Writ be purchaſed within the Six Months.** Vide Sect. 1. Poſt.

Incumbent, *&c.*

But if a Church is aliened in Mortmain, and the Perſon to whom it is aliened doth preſent, or he is uſurped upon, yet the Lord may at any Time within the Year bring his *Quare Impedit*, and the Uſurpation and Plenarty by Six Months ſhall not bar him. 47 *E.* 3. 11. For in this Caſe he cannot have a Writ of Right of Advowſon, for that he cannot alledge Seiſin in himſelf, nor in his Anceſtor. 21 *E.* 3. 27.

Upon Recovery in *Quare Impedit.*

Alſo by Recovery in a *Quare Impedit*, and Execution had, the Poſſeſſion of an Advowſon may be gained, for thereby every other Perſon is put out of Poſſeſſion. 9 *H.* 6. 57. *a.* And though a *Quare Impedit* be brought, and a Recovery thereupon had againſt an Incumbent alone, without the Patron, if thereupon by Writ to the Biſhop the Incumbent is removed, and the Clerk of him that recovered inſtituted, the Patron is thereby put out of Poſſeſſion. *Roll's Abr.* 2. *p.* 369. *Dubitat'.* 9 *H.* 6. 32.

By Leſſee for Years.

But if Leſſee for Years, or a Guardian, bring a *Quare Impedit*, although that the Defendant hath a Writ to the Biſhop againſt the Termor or Guardian, and his Preſentee is accepted, yet the Tenant of the Freehold is not put out of Poſſeſſion thereby. 50 *E.* 3. 14. *b.* And ſo if the

By a Stranger.

Preſentee of a Stranger being admitted, inſtituted and inducted into the Church of a rightful Patron, and another Stranger doth bring a *Quare Impedit* againſt the firſt, and recovers, this Recovery is no Prejudice to the true Patron who was a Stranger to it. *Hill.* 18 *H.* 7. *Keilway*, *p.* 49. 1 *Mod. Rep.* 255.

What Privity neceſſary to gain the Fee of an Advowſon.

That an Uſurpation may be ſuch as may gain the Fee of an Advowſon, there muſt not be ſuch Privity betwixt the Uſurper and the Perſon upon whom the Uſurpation is made, as doth fruſtrate an Uſurpation as to its Effects; and therefore, firſt, there muſt not be a Privity in Blood, for when an Advowſon deſcendeth unto Parceners, though one preſent twice, and uſurpeth upon her Coheir, yet ſhe that was negligent ſhall not be clearly barred, but another Time ſhall have her Turn to preſent when it falleth. *Stat. Weſt.* 2. *c.* 5. *viz.* 13 *E.* 1. 2 *Inſt.* 363. And accor-

Coparceners.

dingly 'tis ſaid, that one Coparcener by preſenting alone without the other, cannot uſurp upon the other to the diſpoſſeſſing her. 17 *E.* 3. 37. *b.* 9 *Eliz. Dyer* 259. *b.* 20 *Dubitat'*. 15 *E.* 3. *Aſſiſe Darrein Preſentment* 11. Yea, and if a *Quare Impedit* be brought by two Coparceners, and the one is ſummoned and ſevered, and the other doth recover and preſent, this is in the Right of them both. 38 *E.* 3. 35, 36. So if an Advowſon be aſſigned in *Chancery* to two Daughters Coparceners, and the eldeſt doth after preſent to the next Avoidance, (I ſuppoſe contrary to the Aſſignment) this ſhall be in her Right as the elder, and not by Uſurpation;

tion; for that the firſt Preſentment of common Right doth belong to her, but this ſhall void the Aſſignment in Chancery. 17 *E.* 3. 30, 38. *adjudged.* Uſurpation, &c.

And yet it is ſaid, That if two Coparceners make Partition in Chancery, or Compoſition by Fine, to preſent by Turns, the one may uſurp upon the Turn of the other, 30 *E.* 3. 15. yet ſuch Uſurpation doth not put the Party out of Poſſeſſion upon whom it is made as to the next Turn, but ſuch Party may preſent thereto; and this is not only by the Aid of the Statute of *Weſt.* 2. *c.* 5. but at Common Law. 33 *Ed.* 3. *Quare Impedit* 196. 25 *Eliz. Dounam*'s Caſe, 4 *Leonard* 86. So though ſuch Compoſition be made betwixt three Coparceners, and the eldeſt doth uſurp upon the Turn of the ſecond and youngeſt, and after doth uſurp again in the Turn of the ſecond, yet the youngeſt may preſent in her next Turn. 13 *E.* 3. *Quare Impedit* 58. For an Uſurpation in this Caſe is but for the Turn uſurped upon, and doth not put the Perſon uſurped upon to her Writ of Right. *F. N. B.* 34 *Jac.* 22 *E.* 4. 9. However, if of three Coparceners the eldeſt after Partition doth uſurp the Turn of the ſecond only, this is not any Uſurpation upon the Turn of the youngeſt. *Keilway* 1. 2 *Inſt.* 365. *Roll's Abr.* 2. 372, 373. 2 *H.* 7. 4, 5. 22 *E.* 4. 9. Upon a Partition made in Chancery.

And if of three Coparceners the eldeſt doth preſent in her Turn without Partition, and afterwards a Stranger doth uſurp in the Turn of the ſecond, yet this is not any Uſurpation as to the third or firſt Coparcener, but only as to the ſecond; and the Law is the ſame, although Partition had been made to preſent by Turn. *Mich.* 12 *H.* 7. *Keilway* 1. 17 *E.* 3. 22. Yet by a late Report 'tis ſaid, That the Court inclined to an Opinion, that where Parceners had made Partition to preſent by Turns, and an Uſurpation is in the Turn of one of them, that it ſhould put all out of Poſſeſſion. *Paſch.* 35 *Car.* 2. *Anonymus*, 2 *Ventris* 39. Three Coparceners. If the Uſurpation upon one, may put three out of Poſſeſſion.

If two Coparceners be of an Advowſon, and they ſeverally grant their Parts to two ſeveral Men, the Advantage that was between the Parties doth hold Place between the Grantees, and ſo the firſt Preſentment ſhall go to the Grantee of the eldeſt. 1 *Inſt.* 166, 186, and ſo of the others, and an Uſurpation of one ſhall not put the other out of Poſſeſſion. 22 *E.* 4. 9. *Quære.* But Peradventure it ſhall be otherwiſe, if they were meer Tenants in common, and did not derive their Eſtates from Coparceners. And yet the Book is, 22 *E.* 9. *a.* that between Strangers in Blood, or where two make Compoſition to preſent by Turns, if one uſurps upon the Turn of the other, this ſhall not put him out of Poſſeſſion. *Anderſon* doubted; but he agreed, That Tenant by Courteſy ſhall have the ſame Advantage that his Wife ſhould have had. *Paſch.* 25 *Eliz. Harris* and *Hays* v. *Nichols*, 3 *Cro.* 18. 1 *Inſt.* 167. *b.* 186. *b.* Two Coparceners. Strangers, &c.

That an Uſurpation may be ſuch as may gain the Fee of an Advowſon, as there muſt not be a Privity in Blood betwixt the Uſurper and the Perſon upon whom the Uſurpation is made, ſo neither muſt there be a Privity in Eſtate betwixt them: For if a Leſſor of an Advowſon doth uſurp upon his Leſſee for Years, this doth only bar the Leſſee of that Preſentment, and doth not out him of his next Turn, and put him to his Writ of Right, and this by reaſon of the Privity betwixt them. And upon the ſame Reaſon, if a Man hath three Avoidances granted to him by one Deed, and the Grantor doth uſurp upon the firſt Avoidance, yet the Grantee at another Avoidance may preſent, or have his *Quare Impedit*; for that the Uſurpation made by the Preſentation, &c. of the Grantor, did not put the Grantee out of Poſſeſſion of all the Avoidances, adjudged As no Privity in Blood, ſo no Privity in Eſtate. Leſſor and Leſſee. Grantor and Grantee.

Uſurpation, &c.

Paſch. 12 *Car. Legg* v. Sir *Anthony Ager*, *Roll's Abr.* 2. *p.* 371. *Co. Litt.* 249. and the Caſe of Sir *William Elvis* v. *The Archbiſhop of York*, *Tailer* and *Biſhop*, *Paſch.* 17 *Jac. Hobart* 322. and *Jones p.* 4. being to the contrary are denied for Law.

Tenant in Common, &c.

So if one Tenant in Common of an Advowſon doth preſent alone, this doth not put the other out of Poſſeſſion; for at the next Avoidance they may join in a Preſentment. *Paſch.* 7 *Jac. Kite* v. *Biſhop of Briſtol*, *Roll's* 2. *p.* 372. *Mich.* 24 & 25 *Eliz. Harris* v. *Nichols*, 1 *Anderſon* 63. Or if two joint Tenants ſeiſed of an Advowſon, and the one doth preſent without the other, this is no Uſurpation upon his Companion; but he may alledge this Preſentment in a *Quare Impedit*, as a Title for himſelf to the next Avoidance. 27 *H.* 8. 11. *b.* And this is by reaſon of the Privity that is betwixt them. 1 *Inſt.* 186. *b.* 249. *a. contra.* 27 *H.* 8. by the King's Attorney, and 11 *H.* 4. 54. *Br. Quare Impedit* 52. 3. Or if there be two Jointenants, and the one doth preſent the other, this doth not gain any Poſſeſſion, for that it is not ſtrictly and properly a Preſentation, but rather a Prayer to be admitted. 14 *H.* 8. 2. *b.*

Where no ſuch Privity.

But where there is no ſuch Privity either in Blood or Eſtate, the Law is contrary; therefore in the Caſe of a Leaſe made of the Advowſon, *&c.* if any other Perſon, beſides he that is ſeiſed of the immediate Reverſion in Fee, doth uſurp upon the Leſſee, he thereby gains the Poſſeſſion of the whole Advowſon. *Rudd* v. *Biſhop of Lincoln*, *Hutton* 66. and by *Hobart*, *Paſch.* 17 *Jac.* in Sir *William Elvis*'s Caſe v. *Archbiſhop of York*, &c. *Hobart* 322.

After Recovery in a Writ of Right.

So if *A.* doth recover an Advowſon in a Writ of Right, and hath Judgment final, and the Incumbent dying, *B.* by Uſurpation doth preſent to the Church, whoſe Clerk is admitted and inſtituted, and then *B.* dieth, *A.* is put out of Poſſeſſion, and the Heir of *B.* is not ſo bound by the Judgment, either in Blood or Eſtate, but that he ſhall preſent. 1 *Inſt.* 238. *a.*

Or Fine levied.

So if *B.* doth levy a Fine to *A.* of an Advowſon, to him and his Heirs, and after the Church becomes void, *B.* preſents by Uſurpation, whoſe Clerk is admitted and inſtituted, this ſhall put *A.* the Conuſee out of Poſſeſſion. And the Reaſon of theſe two Caſes is; For that at the Common Law, every Preſentation to a Church did put the rightful Patron out of Poſſeſſion, and did put him to his Writ of Right, whether the Preſentation were by Title or without; and therefore, albeit the Uſurpation were in both the ſaid Caſes before Execution, yet it put the rightful Patron out of Poſſeſſion. 1 *Inſt.* 238. *a.*

Two Avoidances granted, and Stranger uſurps upon the firſt.

And if a Grant be made of two next Avoidances, and a Stranger doth uſurp upon the firſt of them, this ſhall be an Uſurpation upon the ſecond Avoidance. *Mich.* 16 *Jac.* Sir *William Elvis* and *Taylor*'s Caſe, *per Cur. Roll's* 2. *p.* 373. *Hob.* 323. And if Tenant in Tail of a Manor, to which an Advowſon is appendant, doth grant the next Avoidance, and dying, the Iſſue in Tail doth enter into the Manor, and thereby doth make void the Grant; if ſuch Grantee doth after preſent by Colour of ſuch Grant, that will be an Uſurpation. *Noy* 143.

By Grantee of Tenant in Tail.

Dean and Chapter.

So if a Dean doth preſent alone, without the Chapter, to an Advowſon whereof the Chapter is ſeiſed by themſelves, he thereby uſurps to the Diſpoſſeſſing of the Chapter. 17 *E.* 3. 64. *b.* 14 *H.* 8. 2, 3. But *Quære*, Whether at this Day a Chapter can be diſpoſſeſſed? For their Rights are guarded by *Stat.* 13 *Eliz. ch.* 10.

Upon the Uniting of two Churches.

If two Churches be united by the Aſſent of the Patrons, who thereupon agree for ever to preſent by Turns, and after one of them doth preſent in the Turn of the other, this is an Uſurpation. And the like

Law is, if one ſeiſed in Fee of a Manor to which an Advowſon is appendant, doth make Compoſition with another by Fine, that he ſhall preſent every other Turn, and then the one doth preſent in the Turn of the other. *Dyer* 259. 20. And the Reaſon of theſe laſt Caſes is, that the Perſons, betwixt whom the Uſurpations are made, are neither privy in Blood as Coparceners, nor in Eſtate as Jointenants, Tenants in Common, *&c.* Uſurpation, &c.

If an Uſurpation doth gain the Fee of an Advowſon, it muſt not be made upon ſuch Perſons whoſe Advowſons are ſpecially guarded by Law againſt all Prejudice by Uſurpations. And ſuch are firſt, the Advowſons whereof the King is ſeiſed: For although the King may uſurp upon others, and gain an Advowſon thereby, 42 *E.* 3. 4. *b.* 43 *E.* 3. 15. 35 *H.* 6. 62. 18 *Eliz. Dyer* 351. 22. *Paſch.* 15 *Car.* 2. *Brown* v. *Spence*, 1 *Siderfin* 193. 1 *Keble* 590. and although in ancient Time, and ſince by ſome the Law hath been taken to be, that the King by a double Uſurpation may be put out of Poſſeſſion, and for the Recovery of the Right ſhall be forced to his Writ, as a common Perſon ſhall be, *Fitz.* Tit. *Quare Impedit. Trin.* 18 *E.* 3. 47. 151. by *Shard. Paſch.* 18 *Eliz. Dyer f.* 351. *Mich.* 13 *Jac. Hughes* 263. 43 *E.* 3. 14. *Stanford Prerog. c.* 8. 38 *E.* 3. 3. *Mich.* 2 *Jac. King* v. *Biſhop of Winton* and *Champion*, 2 *Cro.* 54. and that a Grant of ſuch an Advowſon made by the King, after two Uſurpations ſhall be void, *Paſch.* 23 *Eliz. C. B. Hughes. Mich.* 23 *Eliz.* 4 *Leon.* Caſe 227. yet at this Day the Law ſeems to be ſettled, That neither two, nor twenty Uſurpations do put the King out of the Poſſeſſion of his Advowſon, ſo that he ſhall be forced to his Writ of Right, and that a Grant made after ſuch Uſurpations of the Advowſon ſhall be good. *Trin.* 4 *Jac. King* v. *Matthew*, *Brownlow* and *Gouldſborough* 1. 166. *Paſch.* 2 *Jac. King* v. *Biſhop of Wincheſter*, *Noy* 18. *Paſch.* 28 *Eliz. Yardly* v. *Peſcan*, *Owen* 43. *Moor* 338. *Paſch.* 14 *Jac.* by *Hobart* in Lord *Stanhop*'s Caſe v. *Biſhop of Lincoln*, *Hobart* 242. *Mich.* 14 *Eliz.* 3 *Leonard* 17, 61. *Mich.* 18 *Eliz.* 4 *Leonard*, Caſe 339. *Paſch.* 33 *Eliz. Queen* v. *Archbiſhop of York*, 1 *Leonard* 226. *Mich.* 38 & 39 *Eliz. Queen* v. *Huſſey*, 3 *Cro.* 519. and *Moor* 421. *Trin.* 44 *Eliz. Green*'s Caſe, 6 *Co.* 30. 1 *Inſt. f.* 344. *b.* And this Privilege extendeth not only to Advowſons of which the King is ſeiſed in Right of his Crown, but to ſuch alſo of which he is ſeiſed in Right of his Duchy. *Paſch.* 33 *Eliz. Queen* v. *Biſhop of York*, 1 *Leon.* 226. *Mich.* 38 & 39 *Eliz. Queen* v. *Huſſey*, 3 *Cro.* 519. *Regiſter* 31. *Contra.* Advowſons guarded againſt Uſurpations. The King's Advowſons in Right of his Crown. In the Right of his Duchy.

So if the King hath Right to preſent to a Church, for that the lawful Patron is outlawed, and a Stranger doth uſurp, and Six Months do paſs; yet the King may have his *Quare Impedit* for the Avoidance, and ſhall remove the Uſurper's Clerk, and thereby the Advowſon is recontinued to the rightful Patron, who otherwiſe had been out of Poſſeſſion, and driven to his Writ of Right. 1 *Inſt.* 363. *b.* If the Patron is outlawed.

And by *Hobart*, Uſurpers upon the King's Advowſons are but Intruders, and Treſpaſſers to him; and if the King will, he may charge them by Actions of Account as Bailiffs, and yet may have his Writ of Right of Advowſon. But if the King's Patentee of an Advowſon doth preſent twice to one Advowſon, and his Clerk be inſtituted, and inducted, although the Patent is void in Law, ſo that the Advowſon doth not paſs thereby; yet the Patentee hath ſo gained the Advowſon by Uſurpation againſt all Strangers, that if he be diſturbed at the next Avoidance, he may maintain an Aſſiſe of *Darrein Preſentment* againſt the Stranger that hath no Title to it. 18 *Eliz. Dyer* 351. When Uſurpers are but Intruders, *&c.* King's Patentee.

However,

Uſurpation, &c.

When a common Perſon uſurps upon the King, &c.

However, it is agreed, that if a common Perſon doth uſurp upon the King, and his Clerk is not only admitted, and inſtituted, but alſo inducted; the King is ſo far diſpoſſeſſed of his Preſentment, that he cannot preſent until the Incumbent is removed; which he may do at any Time, while the Incumbent lives, by *Quare Impedit*, but not without Suit; or he may preſent after his Death, as if no Uſurpation had been. 6 *Co. Green's* Caſe, 30. *Paſch.* 18 *Jac.* by *Hobart*, in Lord *Stanhop's* Caſe v. *Biſhop of Lincoln* and others, *Hobart* 241, 242. *Mich.* 3 *Jac. Boſwel's* Caſe, 6 *Co.* 49. *b.* 2 *Inſt.* 358. But (as *Popham* ſaid) a Confirmation being made by the King to ſuch Preſentee, is good to eſtabliſh his Poſſeſſion, againſt a Recovery in a *Quare Impedit* by the King afterwards; that is, the Clerk as aforeſaid being inducted, otherwiſe not, 11 *H.* 4. 9. and yet this Confirmation operates not to the Amending of the Eſtate of the Uſurper; nor to prejudice the King's Right to preſent at the next Avoidance; but where any Clerk is lawfully poſſeſſed of a Benefice to which the King hath Right, and may remove him by Action, the Clerk obtaining the King's Confirmation, doth ſo ſtrengthen his Title which before was voidable, as to make the Benefice ſure to him for his Life againſt the King, as ſeems to be agreed by very many Books. 9 *E.* 3. 20. 18 *E.* 3. 21. 45 *E.* 3. 19. 11 *H.* 4. 9. 76. *Fitz. Nat. Br.* 34. *Lit. f. Vaughan* 26. 2 *Brownlow* and *Gouldſborough* 166. In the Caſe, *Dyer* 292, mentioned before, the Confirmation was adjudged void; but that was by Reaſon it was obtained upon a falſe Suggeſtion, and the King deceived in granting it, as appears by the Recital of it; but if the King doth make to the Uſurper a Releaſe, it is ſaid to be void. *Jenkins, Cent.* 7. *c.* 96. *Trin.* 4 *Jac. King* v. *Matthew, Brownlow* and *Gouldſborough* 166.

And King confirms the Preſentee.

The King's Confirmation ſtrengthens the Title againſt the King.

Biſhops Advowſons guarded as to their Succeſſors.

Alſo Advowſons, whereof Biſhops are ſeiſed in Right of their Churches, are guarded by Law againſt all Prejudice by Uſurpations, as to their Succeſſors: For if a Biſhop doth ſuffer an Uſurpation, and dies, the Succeſſor may have a *Quare Impedit*, or preſent to the next Turn, by the Aid of the Statute of the firſt of *Elizabeth*, which reſtrains Alienations and Grants by Biſhops. *Dalton* v. *The Biſhop of Ely*, 2 *Cro.* 673. *Trin.* 17 *Car.* 2. C. B. *Cornwallis* v. *Hood, Carter* 33. And if an Uſurpation be made to a Church in the Time of Vacation, this ſhall not prejudice the Succeſſor to put him out of Poſſeſſion, but that at the next Avoidance he may preſent. 1 *Inſt.* 263. *b.* And by *Hobart* and *Jones*, though a Biſhop be but a Purchaſer of an Advowſon in Right of his Biſhoptick, and then doth ſuffer an Uſurpation, not having preſented; yet his Succeſſors ſhall not be bound thereby, but may have a *Quare Impedit*, and lay Poſſeſſion in the Grantor, but not a Writ of Right, for want of Seiſin. 21 *Jac. Dalton* v. *Pamphlin* and *Biſhop of Ely, Leyes, p.* 80. ſame Caſe. 3 *Cro.* 673. and *Jones, p.* 46. Or if the Predeceſſor do ſuffer a Recovery to be had againſt him without Title, in a *Quare Impedit*, by his Default, or Aſſent; or if he ſuffers Fine and Nonclaim, or Diſſeiſin and Deſcent, the Succeſſor is aided by this Statute, 1 *Eliz.* Yet although the Succeſſor by this Statute of the firſt of *Elizabeth* may preſent, or if he be diſturbed, may have a *Quare Impedit*; yet he ſhall be out of the Poſſeſſion of the Advowſon by the Uſurpation, until he hath re-continued it by Preſentment, or Recovery in a *Quare Impedit*; ſo that before ſuch Preſentment, or Recovery, a Grant thereof made by him ſhall be void. *Mich.* 22 *Jac. C. B. Dalton* v. *Biſhop of Ely, Jones* 46. However, ſuch Uſurpations ſhall bind thoſe Biſhops who ſuffer them, and they ſhall thereby be driven to their Writ of Right, or elſe they ſhall loſe their Preſentment

† Before the 13. *El.* c. 5. ſ. 1. the ſucceſſor was prejudiced.

Biſhop a Purchaſer.

Poſſeſſion re-continued.

Biſhops driven to their Writ of Right.

ſentment for their Times to ſuch Advowſons, in *Dalton*'s Caſe v. *Pamphlin* in *Leyes* 80. and 2 *Cro. Rep.* 673. *Mich.* 22 *Jac. Dalton* v. *The Biſhop of Ely*, *Jones* 46. And I take the Law to be the ſame, as to all other Eccleſiaſtical Perſons ſeiſed of Advowſons in the Right of their Churches, by the Stat. of 13 *Eliz. c.* 10. Uſurpation, &c.

Reſpect being had to theſe Rules, it may be truly ſaid, that the Fee of an Advowſon may be gained by Uſurpation, of which there are divers Effects: For firſt, The Poſſeſſion of the Advowſon by Uſurpation is ſo in the Uſurper that he that was, before the Uſurpation, ſeiſed of the Advowſon, hath thereby only a bare Right remaining in him; and therefore he upon whom the Uſurpation is made, before he hath by ſome proper Means regained the Poſſeſſion of the Advowſon, if he doth make a Grant thereof, or of the Thing to which it was appendant, the Advowſon doth not paſs thereby. 16 *E.* 3. *Quare Impedit* 67. and in *F. N. B.* and by *Hobart*, *Paſch.* 14 *Jac.* in Lord *Stanhop*'s Caſe v. *Biſhop of Lincoln*, *Hobart* 241. and the ſame Book, 321, 322. The Effects of Advowſons gained by Uſurpation.

And this holds true in the Caſe of all common Perſons, even of thoſe that are relieved by the Statute of *Weſt.* 2. *c.* 5. made the 13 *E.* 1. and therefore if one doth uſurp upon a Leſſee for Years, (he in the Reverſion is a Perſon relieved by the ſaid Statute) yet ſuch Uſurpation doth gain the Fee, and doth put him that hath the Inheritance out of Poſſeſſion; and ſo it is in all other Perſons Caſes, that are within the ſaid Statute of *Weſtminſter*. *Rudd*'s Caſe v. *Biſhop of Lincoln*, *Hutton* 66. For tho' the Statute doth give them a Poſſeſſory Action for the Recovery of their Preſentment upon an Avoidance after an Uſurpation completed, if the Uſurper doth diſturb them, or to remove his Incumbent, if they ſue within ſix Months, (who by the Common Law were as others driven to their Writ of Right, by which they could recover only their Inheritances, and not their Preſentments) yet that Statute doth not make Uſurpations upon the Advowſons of Perſons privileged thereby, to loſe the Effect of gaining the Poſſeſſion of the Advowſon to the Uſurper, nor doth it enable them to grant ſuch Advowſons, whilſt they do remain diſpoſſeſſed thereof. *Mich.* 3 *Jac. Boſwell*'s Caſe, 6 *Co.* 49. *Paſch.* 14 *Jac.* Lord *Stanhop* v. *Biſhop of Lincoln*, *Hobart* 241. And therefore, if a Manor with an Advowſon appendant doth deſcend to any of the Perſons privileged by the ſaid Statute, as to an Infant, and during the Infancy, the Church becoming void, a Stranger doth uſurp, and then the Infant being of full Age doth infeoff a third Perſon of the Manor; if upon the next Avoidance the Feoffee doth preſent, the Uſurper, or his Aſſigns, may bring their *Quare Impedit*, and ſhall recover; becauſe the Infant (as before ſaid) by Uſurpation was put out of Poſſeſſion, and remained ſo at his full Age when he made the Feoffment, and the Advowſon did not paſs. 16 *E.* 3. *Quare Impedit* 67. *Adam*'s Caſe cited by *Coke* in *Boſwell*'s Caſe, 6 *Co.* 50. and Lord *Stanhop* v. *Biſhop of Lincoln*, *Hob.* 241. It puts him that hath the Inheritance out of Poſſeſſion. Advowſons of Perſons privileged. Stranger uſurps upon an Infant.

After an Uſurpation, the Perſon uſurped upon (as hath been ſaid) having only a bare Right remaining in him, cannot therefore grant the Advowſon of which he is diſpoſſeſſed, nor the Right remaining in him after the Uſurpation; the Reaſon is, for that the Uſurpation being only voidable by Action, the Transferring of the Right would be the Transferring of the Action, which cannot be done by any common Perſon. 16 *E.* 3. *Quare Impedit* 67. *Adam*'s Caſe cited by *Coke* in *Boſwell*'s Caſe, *Mich.* 3 *Jac.* 6 *Co.* 50. But if ſuch Right doth by Act of Parliament, or other Means, come to the King, the King by Prerogative may grant the ſame; but then the Grant thereof muſt be by expreſs and determinate Hinders the uſurped upon, to make Grants, &c. Prerogative of the King to grant.

Uſurpation, &c.

Words, for it will not paſs by the Word *Advowſon*, for that it is no Advowſon *de Facto*; nor by the Word *Hereditament*, being a Word ambiguous, which ſhall never be taken againſt the King in a ſtrange Senſe, nor by the general Word of *Rights*, without a ſpecial Mention, or Recital of the particular Right, which is meant to be granted, as was reſolved in *Cromer*'s Caſe, 18 *Eliz.* cited in *Doughty*'s Caſe, 3 *Co. f.* 11. *Paſch.* 14 *Jac.* Lord *Stanhop*'s Caſe v. *Biſhop of Lincoln* and others, *Hobart* 243, 244.

When the Uſurper's Clerk ought to be received.

If an Uſurpation be complete, and the Poſſeſſion of the Advowſon be not regained before the Church becomes void, and then the Church doth become void and litigious between the Uſurper and him that hath the Right, the Ordinary ought to receive the Uſurper's Clerk, and not the Clerk of him that hath the Right only; unleſs he that hath the Right be a Perſon relieved by the Statute of *Weſtminſter* 2. *chap.* 5. but the Ordinary in ſuch Caſes may award a *Jure Patronatus*, and ſo be directed by the Verdict. But if he will chuſe either of the Clerks preſented, he muſt at his Peril receive him that hath Right by the Statute: By *Hobart*, in Lord *Stanhop*'s Caſe v. *Biſhop of Lincoln* and others, *Hob.* 242.

Poſſeſſion regained.

Tho' by Uſurpation the rightful Patron may be deveſted of the Poſſeſſion of his Advowſon as aforeſaid, yet thereby (for the moſt part) it is not abſolutely loſt without Remedy, for by divers Ways it may be regained by him in whom the Right remains, according as his Caſe ſhall be, (that is, unleſs his Caſe be ſuch as that he hath but a remedileſs Right;) as firſt, by Re-entry: For if a Diſſeiſor of a Manor to which an Advowſon is appendant, doth preſent to the Advowſon, and his Clerk is inducted, and after the Diſſeiſſee doth re-enter into the Manor at the next Avoidance, he may preſent, for his Re-entry defeats the Uſurpation. 3 *H.* 4. 8. 14 *H.* 6. 16. *a.*

By the Re-entry of the Diſſeiſee.

Where neither by Re-entry, nor Repeal of Stat'.

And if he re-enter within the ſix Months, his Preſentee ſhall be received, and the other outed, 14 *H.* 6. 24. *a.* but of an Advowſon in Groſs no Re-entry can be in ſuch Caſe. 3 *H.* 4. 8. 1 *H.* 6. 16. And ſo it is, if a Man being ſeiſed of ſix Acres of Land to which an Advowſon is appendant, doth die ſeiſed, and they deſcend to another who is attainted of Treaſon by Act of Parliament, by which the King doth become ſeiſed of the ſaid ſix Acres, and then the Church voiding, a Stranger doth uſurp upon the King, and after the Act of Parliament being repealed, he to whom the ſix Acres did deſcend is reſtored, and then the Church voids again, the ſaid Uſurpation doth continue not defeated by Repeal and Entry; ſo that neither he that entred, nor his Feoffee, can maintain a *Quare Impedit* againſt him who uſurped before, if he doth diſturb either of them. 28 *H.* 8. *Dyer* 24. *b.* and *Roll's* 2. *p.* 375. For altho' that the wrongful Preſentation was when the Advowſon was in the Crown by the Act of the Attainder, and conſequently was no Uſurpation upon the Crown; yet that Act of Attainder being after repealed, is as if it never had been, 4 *H.* 7. 11. and ſo the Advowſon by Relation always continued in the Perſon attainted and his Heir, and then the wrongful Preſentation muſt have the Effect of an Uſurpation, and put him out of Poſſeſſion, ſo that neither he nor his Feoffee could have a *Quare Impedit*.

The Reaſon.

Regained by Inſtitution, &c.

Alſo the Poſſeſſion of an Advowſon may be regained only by Preſentation, with Inſtitution and Induction had thereupon at another Avoidance; or if Inſtitution or Induction cannot be obtained upon a Preſentation made to the Ordinary in ſome Caſes, the Poſſeſſion of the Advowſon may

By Recovery, &c.

be had by Recovery in a poſſeſſory Action brought after the Refuſal of the Clerk

Clerk of him that hath the Right: For by the Statute of *Weſtm.* 2. *c.* 5. it is enacted as followeth: Uſurpation, &c.

Whereas of Advowſons of Churches there be but three Original Writs, that is to ſay, one Writ of Right, and two of Poſſeſſion, which be Darrein Preſentment and Quare Impedit: And hitherto it hath been uſed in the Realm, that when any having no Right to preſent, had preſented to any Church, whoſe Clerk was admitted; he that was very Patron could not recover his Advowſon, but only by a Writ of Right, which ſhould be tried by Battail or by great Aſſiſe, whereby Heirs within Age, by Fraud, or elſe by Negligence of their Wardens and Heirs, both of great and mean Eſtate, by Negligence or Fraud of Tenants by the Courteſy, Women Tenants in Dower, or otherwiſe, for Term of Life, or for Years, or in Fee-Tail, were many Times diſherited of their Advowſons, or at leaſt (which was the better for them) were driven to their Writ of Right, (in which Caſe hitherto they were utterly diſinherited: It is provided, that ſuch Preſentments ſhall not be ſo prejudicial to the right Heirs, or to them unto whom ſuch Advowſons ought to revert after the Death of any Perſons: For as often as any having no Right doth preſent during the Time that ſuch Heirs are in Ward, or during the Eſtates of Tenants in Dower, by the Courteſy, or otherwiſe for Term of Life, or of Years, or in Tail, at the next Avoidance, when the Heir is come to full Age, or when after the Death of the Tenants before named, the Advowſon ſhall revert unto the Heir being of full Age, he ſhall have ſuch Action by Writ of Advowſon Poſſeſſory, as the laſt Anceſtor of ſuch Heir ſhould have had at the laſt Avoidance happening in his Time, being of full Age before his Death, or before the Demiſe was made for Term of Life, or in Fee-tail, as before is ſaid. The ſame ſhall be obſerved in Preſentments made unto Churches, being of the Inheritance of Wives, what Time they ſhall be under the Power of their Husbands, which muſt be aided by this Eſtatute by the Remedy aforeſaid. Alſo Religious Men, as Biſhops, Arch-Deacons, Parſons of Churches, and other Spiritual Men, ſhall be aided by this Eſtatute, in caſe any having no Right to preſent, do preſent unto the Churches belonging to Prelacies, Spiritual Dignities, Parſonages, or to Houſes of Religion, what Time ſuch Houſes, Prelacies, Spiritual Dignities or Parſonages be vacant.

By 13 *Ed.* 1. *c.* 5. *ſect.* 1. Reciting three Original Writs; One of Right, and two of Poſſeſſion.
2 *Inſt.* 353. 11 *Co.* 31, 72. *Kelw.* 1. *Fitz. Quare Impedit* 43, 67, 87, 92, 96, 99, 105, 127, 142, 167. *Hob.* 240. 3 *Bulſt.* 40. *F. N. B.* 31 *F.*
Perſons prejudiced.
Remedy.
For Heirs.
By Action by a Writ of Advowſon poſſeſſory.
For Religious Men.

Sect. 2. Neither ſhall this Act be ſo largely underſtood, that ſuch Perſons, for whoſe Remedy this Statute was ordained, ſhall have the Recovery aforeſaid, ſurmiſing that Guardians of Heirs, Tenants in Tail, by the Courteſy, Tenants in Dower for Term of Life, or for Years, or Husbands, which faintly have defended Pleas moved by them, or againſt them: Becauſe the Judgments given in the King's Courts ſhall not be annulled by this Statute, the Judgment ſhall ſtand in Force, until it be reverſed in the Court of the King as erroneous, if Error be found; or by Aſſiſe of Darrein Preſentment, or by Inqueſt by a Writ of Quare Impedit, if it be paſſed, or be annulled by Attaint or Certification, which ſhall be freely granted. See now the Stat. 7 Annæ, c. 18. antea ch. 8.

Reverſal of Judgment for Error. *Vide Stat.* 4 *H.* 4. *c.* 3. 39 *E.* 3. 15. *Cro. Inſt.* 166. *Cro. El.* 207. 6 *Co.* 61. 5 *Co.* 102. 1 *Inſt.* 344.

By which Statute it appears, that at the Common Law before the ſame was made, when any having no Right to preſent, had preſented to

When Recovery was by Writ of Right only.

Uſurpation, &c.

to a void Church, and got his Clerk admitted, the very Patron (being a common Perſon) was diſpoſſeſſed thereby of his Advowſon, and could not recover the ſame by any other Means, but by a Writ of Right of Advowſon; nor could he recover his Preſentment by that Writ, nor by *Quare Impedit* or *Darrein Preſentment*; for by the Common Law the Writs of *Quare Impedit* and *Darrein Preſentment* did lie in the Caſe of a common Perſon only, before the Church was filled, againſt any one that did diſturb the Patron, ſo that he could not prefer his Clerk. And it is ſaid, That anciently there were only two Writs whereby to recover an Advowſon, (*viz.*) a Writ of Right, and an Aſſiſe of *Darrein Preſentment*; for that a *Quare Impedit* was afterwards ordained where an Aſſiſe would not lie. *Mich.* 10 *E.* 2. 301. Wherefore by the aforeſaid Statute it was provided generally for all, that if the Defendant alledgeth Plenarty of the Church of his own Preſentment, the Plea ſhall not fail by reaſon of the Plenarty, ſo that the Writ be purchaſed within the ſix Months, tho' he cannot recover his Preſentment within the ſix Months.

Perſons provided for, to have a Writ poſſeſſory.

Alſo by the aforeſaid Statute it is ſpecially provided for ſome certain Perſons, that tho' Uſurpations have been by others ſuffered to be made in former Time, to the diſpoſſeſſing them of their Advowſons; yet ſuch Uſurpations ſhall not be ſo prejudicial to them, as that they ſhall be driven to their Writs of Right to recover the Poſſeſſion thereof; but that they may have ſuch Action poſſeſſory (if diſturbed at the next Avoidance after the Right deſcends to them) for the Recovery of the Poſſeſſion of their Advowſons and Preſentations, as the Perſons that ſuffered the Uſurpations might have had when diſturbed, *viz.* an Action of *Quare Impedit* or *Darrein Preſentment*, or as *Hobart* infers in Lord *Stanhop*'s Caſe v. *Biſhop of Lincoln*, *Hob.* 238. may preſent at the firſt Avoidance that happeneth in their Time, and ſo regain the Poſſeſſion without Action; becauſe the Tenor of the *Quare Impedit*, which by this Statute is given for their Remedy, is, *Quod permittat ipſum præſentare, &c. Rudd* v. *Biſhop of Lincoln*, *Hutton* 66. and by *Richardſon* in *Dixy*'s Caſe v. *The Bailiff, &c.* of *Derby*, *Hetley* 159.

Or Preſentment.

To regain without Action.

As Heirs, where their Anceſtors had Right.

Now the Perſons that are thus ſpecially provided for by the ſaid Statute, are firſt Heirs; that is, ſuch who have an Advowſon by Deſcent, being Heir to ſome of his Anceſtors, *&c.* For the Words of the Statute are not, Whoever uſurps upon an Advowſon of Inheritance of an Infant; for that an Eſtate purchaſed, whilſt in the Hand of the Purchaſer, that may deſcend, and be inherited from him, is properly called an Inheritance, as well as that which he inherited from another by Deſcent. *Litt. f.* 3. So that Heirs are to be underſtood here only in reſpect of ſuch Advowſons to which their Anceſtors had Right; by *Hobart* in the Lord *Stanhop*'s Caſe v. *Biſhop of Lincoln*, *Hob.* 238, &c. and by *Jones* in *Dalton*'s Caſe v. *Biſhop of Ely*, *Jones* 48. *Fitz. Nat. Br.* 34. Therefore if an Heir within Age, hath an Advowſon by Purchaſe, he is not remedied in caſe of Uſurpation ſuffered, by this Statute, 1 *E.* 2. *Fitz. Quare Impedit* 43. 35 *H.* 6. 60. 3 *Jac. Boſwell*'s Caſe, 6 *Co.* 50. *b.* and by *Jones* in *Dalton*'s Caſe, *Jones* 45. and 2 *Inſt.* 358. And yet if one ſeiſed of an Advowſon doth make a Leaſe thereof for Years, and the Reverſion deſcending to the Heir is by him granted to another, and then the Leſſee doth ſuffer an Uſurpation; after the End of the Leaſe, the Grantee of the Reverſion, when the Church voids, may have his *Quare Impedit*, becauſe he is *in Loco Hæredis*, who was relievable, if he had kept the Reverſion; by *Hobart* in Lord *Stanhop*'s Caſe v. *Biſhop of Lincoln*, &c. *Hob.* 240.

Not Heirs by Purchaſe.

By a Grantee *in Loco Hæredis.*

If a Man doth purchaſe an Advowſon, and before any Preſentation made by him, doth make a Leaſe thereof unto another Perſon, who doth ſuffer an Uſurpation; the Grantee dies, his Heir may have a *Quare Impedit* at the next Avoidance after the Leaſe ſhall be expired, and may lay the laſt Preſentation in his Father's Grantor, according to the Words of the ſaid Statute, §. 1. which are, **That he ſhall have ſuch Action poſſeſſory as the laſt Anceſtor of ſuch Heir ſhould have had:** For by the Statute, Uſurpations upon the Leſſee are to be counted as none to this Purpoſe. But if the Heir (having an Advowſon by Deſcent) being of full Age, doth make a Leaſe thereof to another, who ſuffers an Uſurpation, the Heir at the next Avoidance after the Leaſe is ended ſhall not have his *Quare Impedit*, becauſe he being the Maker of the Leaſe, is Party to the Negligence and Wrong: And the Word *Heirs* throughout this Statute doth import, That he ſhould be in as Heir of the Reverſion, wronged by the Guardian and other Tenants, which he could not help: And the laſt Clauſe is more plain, which gives ſuch Action as the Anceſtor ſhould have had before Demiſe; ſo the Demiſe muſt not be made by him that is to be relieved, but by his Anceſtors. Lord *Stanhop*'s Caſe, *Hobart* 240, 241. *Fitz. N. B.* 31. *g.* Yet in the 33 *H.* 6. 12. and 10, in the Caſe of *Humphry de Bohun*, the Reverſioner himſelf had Aid; and in 34 *H.* 6. 27. *b.* the Prior of *Cornwal* granted two Avoidances, and the Grantee having preſented once, died, and then the Heir of the Grantee, by Uſurpation upon the Executor, preſenting to the ſecond Avoidance, when the Church voided again, the Prior that made the Leaſe was aided. But Note, that againſt *Hobart* the other Judges are ſaid to hold (tho' not all alike) that Reverſioners, as well of full Age as within Age, and as well of their own Leaſe, as of the Leaſe of their Anceſtors or Predeceſſors, whoſe Heirs they were, were within the Remedy of the Law, and that the Law preſerved the Poſſeſſion for the Reverſioner, tho' not for the Leſſees, and ſo made a kind of baſe Fee by Wrong, during the Leaſe in the Uſurper, which was *Hutton*'s Opinion. Things (ſaith *Hobart*) hard, and not warranted in his Judgment. Lord *Stanhop*'s Caſe v. *Biſhop of Lincoln* and others, *Hobart* 244. But as to this Difference, *Jones* in *Dalton*'s Caſe v. *The Biſhop of Ely*, *Mich.* 22 *Jac.* *Jones* 48. delivers his Opinion thus: If one being a Purchaſer doth Leaſe for Years, he in Reverſion ſhall not be aided; but if the Leſſor hath his Title by Deſcent, in ſuch Caſe he ſhall be aided. So in the Caſe of the Prior, if he had been Purchaſer and Leſſor for Life, he had not been aided; but having the Advowſon by Succeſſion, he was within the Remedy: But *Quære*. *Vide Cornwallis* v. *Hood*, *Trin.* 17 *Car.* 2. *C. B.* *Carter Rep.* 43.

By this Statute, not only Heirs that are in Ward, but alſo ſuch as are not in Ward, are relieved, altho' the Uſurpation be upon the Heir himſelf, the Advowſon being in his own Hands, and by Deſcent; by *Hobart* and *Jones* in *Dalton*'s Caſe, *&c.* *Jones p.* 45. See *Carter Rep.* 43. 2 *Inſt.* 359. But then they hold againſt the other Judges, as before, that Heirs within Age only are remedied, the Uſurpation being made upon their Advowſons. Alſo *Hobart* holds, That if an Infant Heir doth ſuffer an Uſurpation, and another Avoidance doth fall in his Nonage, he may, by reaſon of this Statute, either preſent, or have his *Quare Impedit* for that ſecond Avoidance, tho' the Words of the Statute *ſect.* 1. be, **When the Heir is come to full Age:** For that Clauſe was put in to anſwer a particular Caſe of an Heir in Ward, put in the Preamble, where the Guardian had ſuffered the Uſurpation; in which Caſe the Statute ſaw, that the Ward could have no Title till his full Age: But if a Guardian

Uſurpation, &c.

By Heir of Grantee after a Leaſe expired.

What Heirs the Statute doth import.

What Reverſioners may be aided.

Purchaſer and Leſſor.

Q.

What Heirs.

Infant Heir.

Clauſe to prevent Guardians.

Uſurpation, &c.

Heir's Age.

Heir *in Ventre ſa Mere.*

doth ſuffer an Uſurpation, and then will ſurrender to his Ward, the Ward ſhall not be relieved at another Turn during his Nonage, becauſe he ſhall be counted in by the Guardian to this Purpoſe: But if a Guardian in Socage, or his Ward, after fourteen Years of Age, ſuffer an Uſurpation, he ſhall be within the Relief at any other Turn before twenty-one; and therefore he doth deny the Opinion of *Thorp*, 16 *E.* 3. *Fitz. Quare Impedit* 67. Upon this, that it was the Meaning of this Law to ſuccour the Weakneſs of an Heir within Age, when he maketh a Fault, but not to inforce him to ſuffer a Wrong. So he declares his Opinion to be, That if an Uſurpation be made upon one *in Ventre ſa Mere*, at the next Avoidance after his Birth he ſhall be relieved, contrary to the Iſſue taken. 11 *E.* 3. *Fitz. Quare Impedit* 158. For ſuppoſe (ſaith he) the Heir then in *Eſſe* being a Daughter was relievable, in reſpect of her Nonage, were it reaſonable that the Son after born (to whom the Wrong is now done) ſhould loſe that Relief? Beſides this, the ſpecial Purview of this Statute for Prelates to be relieved againſt Uſurpations in the Vacation of their Prelacies, is altogether of the ſame Nature and Reaſon. Lord *Stanhop*'s Caſe, *Hobart* 240.

Heir dying without Heir, &c.

But it is ſaid, That if one doth uſurp upon an Infant that is an Heir, and the Infant doth come to full Age within ſix Months, and doth not remove the Incumbent by Suit, he is out of the Statute: By *Danby* and *Priſot*, 35 *H.* 6. 62. and by *Hobart* in Lord *Stanhop*'s Caſe, 241. Or if an Heir, relievable by a *Quare Impedit* upon this Statute, doth die without Heir, the Lord by Eſcheat (ſaith *Hobart*) ſhall not preſent, nor have a *Quare Impedit*. Lord *Stanhop*'s Caſe, 243.

Feme Coverts provided for.

The ſecond Sort of Perſons ſpecially provided for as aforeſaid by this Statute, are Feme Coverts, and yet only ſuch Feme Coverts as are Heirs; becauſe they have only the ſame Remedy given them, which Heirs have by Reference thereto; and therefore a Feme Covert being a Purchaſer, is without the Remedy of this Statute. 1 *E.* 3. *Fitz. Quare Impedit* 43. and by *Hobart* in Lord *Stanhop*'s Caſe, *Hob.* 239. 35 *H.* 6. 60. and *F. N. B.* and by *Jones* in *Dalton*'s Caſe, *Jones* 45. *Boſwell*'s Caſe, 6 *Co.* 50.

Succeſſors of Spiritual Men, how provided for.

The third Sort of Perſons expreſly provided for to the aforeſaid Purpoſes by this Statute, are Succeſſors of Spiritual Men, in reſpect of their Advowſons uſurped upon in Time of Vacancy; but if the Advowſon of a Spiritual Perſon be uſurped upon, when it is in the Poſſeſſion of a Spiritual Perſon, the Succeſſor hath not the Remedy of this Statute at the next Avoidance; for he that ſuffers an Uſurpation in ſuch Caſe, is driven to his Writ of Right, and then the Succeſſion cannot change it to a *Quare Impedit*. 7 *E.* 3. *Fitz. Quare Impedit* 21. *F. N. B.* 38. and by *Hobart* in Lord *Stanhop*'s Caſe, 240. and by *Jones* in *Dalton*'s Caſe v. *The Biſhop of Ely*, *Jones* 50. But Succeſſors of Biſhops are now remedied by the Statute 1 *Eliz.* See 3 *Cro.* 673. *Dalton* v. *Biſhop of Ely*, *Jo.* 36. *Ley* 80. If an Eccleſiaſtical Perſon be ſeiſed of an Advowſon in the Right of his Church, that came to him by Succeſſion, and not by Purchaſe, and doth Leaſe it for Life, or for Years, and his Leſſee doth ſuffer an Uſurpation, the ſame Perſon that made the Leaſe, and alſo his Succeſſor, ſhall be remedied by this Statute of *Weſtminſter* 2. after the Expiration of the Term, 34 *H.* 6. 27. 8 *H.* 6. 33. and this by the Equity of the Statute, by *Jones* in *Dalton*'s Caſe v. *The Biſhop of Ely*, *Jones* 48.

Succeſſors of Biſhops, how remedied.

Q.

But *Quære*, for the Statute ſeems only to relieve Spiritual Perſons, when their Advowſons are uſurped upon in Time of Vacation. *Vide F. N. B.* 34. *m.* *Cornwallis* v. *Hood*, *Carter* 43. Beſides the Succeſſors relievable,

What Succeſſors.

are

are Succeſſors of ſingle Corporations, ſuch as Biſhop, Dean, Rector, *&c.* *Brook* Preſentment 46. *Boſwell*'s Caſe, 6 *Co.* 50. *a.* 34 *H.* 6. 27. but not the Succeſſors of compounded Corporations, as Chapters, *&c.* becauſe the Body doth continue that committed the Laches; by *Hobart* in Lord *Stanhop*'s Caſe, *Hob.* 240.

Uſurpation, &c.

Beſides the Perſons provided for by the Words of the aforeſaid Statute, (ſome other Perſons) are thought alſo to be relieved by the Equity thereof: And of theſe are firſt Tenants in Tail; for if ſuch ſuffer an Uſurpation, after their Death the Iſſue in Tail may have the Remedy given by this Statute at the next Avoidance that happens. 43 *E.* 3. 20, 24, 25. *Vide* 46 *Aſſiſe*, *p.* 4. 8 *E.* 2. *Quare Impedit* 167. 34 *H.* 6. 20, 27. *Mich.* 3 *Jac.* *Boſwell*'s Caſe, 6 *Co.* 50. 2 *Inſt.* 359. and by *Hobart* in Lord *Stanhop*'s Caſe, 241. By which Tenants in Tail, *Jones* doth underſtand, Tenants in Tail in Poſſeſſion: For, ſaith he, Tenants in Tail in Reverſion are within the Words of the Statute, *Dalton*'s Caſe and *Jones*, *p.* 49. Alſo a Grantee of a next Avoidance is within the Equity of this Law, tho' he be not a Leſſee for Years. 24 *H.* 6. 17. *a.* and by *Hobart* in Lord *Stanhop*'s Caſe, 240. which ſee there; and by *Jones* in *Dalton*'s Caſe, *&c.* *Jones* 48. 2 *Inſt.* 359. And note, That it hath been a Doubt, Whether the King be bound by this Statute; ſo that when he uſurps upon any relievable thereby, the Party grieved be not left to his Remedy at Common Law. 35 *H.* 6. 62. *Br. Quare Impedit* 18. But in *Magdalen*-College Caſe, in 11 *Co.* 72. *b.* it was adjudged, That this being a Statute to remedy an Injury and Wrong, the King was bound thereby: So alſo is my Lord *Coke*'s Opinion in his Comment upon this Statute. 2 *Inſt.* 359.

Other Perſons, as Tenants in Tail.

Grantee of a next Avoidance. See alſo in *Stat.* 7 *Anræ*, *c.* 18. *ant. c.* 8. Whereby Coparceners, Jointenants and Tenants in Common are provided for.

Not only the Perſons provided for by the aforeſaid Statute of *Weſtminſter*, may regain the Poſſeſſion of their Advowſons by Preſentation and Inſtitution at another Avoidance, but alſo all other Perſons that have been diſpoſſeſſed thereof: For as by Preſentation and Inſtitution in a void Church ſuffered by the rightful Patron, the rightful Patron (as hath been ſhewed) may loſe the Poſſeſſion of his Advowſon to an Uſurper; ſo by the ſame Means the Uſurper may loſe the Poſſeſſion of the Advowſon which he had gained by Uſurpation again unto the rightful Patron; otherwiſe an Uſurper would be better ſecured by Law in the Poſſeſſion of an Advowſon gained only by Uſurpation than ever the rightful Patron was before the Uſurpation made unto him. 17 *E.* 3. 37. *b.* 1 *Inſt.* 194. *a.* 276. *a.* *Cornwallis* v. *Hood*, *Carter Rep.* 44. 3 *Bulſt.* 38. But tho' all other Perſons, as well as thoſe privileged by the Statute of *Weſtminſter*, may by Preſentation and Inſtitution regain the Poſſeſſion of their Advowſons loſt by Uſurpation, yet with ſeveral Differences: For firſt, Perſons that are within the Statute of *Weſtminſter*, have a Right to preſent, and by having their Clerk inſtituted, they are no Uſurpers; but all other common Perſons have not Right to preſent after the Uſurpation is made upon them, unleſs they bring their Writs before a ſix Months Plenarty, and thereby recover it; and therefore preſenting, and getting their Clerks inſtituted, tho' it be to an Advowſon to which they have a Right remaining in them, they are thereby but Uſurpers. 17 *E.* 3. 37. *b.*

Generally Perſons may regain Poſſeſſion by Inſtitution and Induction at the next Avoidance.

Yet with ſeveral Differences as to Perſons privileged and common Perſons.

A ſecond Difference is, That if the Ordinary will not admit the Clerk of a Perſon within the aforeſaid Statute, ſuch Perſon, tho' he hath only a Right, and not the Poſſeſſion of his Advowſon, may bring his poſſeſſory Action, *viz.* either *Quare Impedit*, or *Darrein Preſentment*, and recover both his Preſentation, and Poſſeſſion of his Advowſon thereby. But if any other Patron, not within the Benefit of the Statute (ſave the King,) doth

2. If the Ordinary will not admit a Clerk.

Uſurpation, &c.

doth preſent to his Advowſon when diſpoſſeſſed thereof, and the Ordinary will not receive his Clerk (as he ought not, being bound to receive the Clerk of the Uſurper by the Direction of Law) he is without any Remedy.

3. If the Ordinary doth admit the Clerk.

A third Difference is, That if the Ordinary doth Inſtitute the Preſentee of a Perſon within the Relief of the ſaid Statute, he doth that which he ought to do, and no more than what the Law, if an Action be brought in Time, would force him to do, and the Uſurper is thereby diſpoſſeſſed, not only of the Preſentation, but of the whole Fee of the Advowſon, and this without any Remedy; for he can neither maintain a *Quare Impedit*, or bring a *Writ of Right*: But if the Ordinary doth admit, *&c.* the Preſentee of any common Perſon diſpoſſeſſed, and not remedied by the ſaid Statute, though there may be a Right remaining in him, yet ſuch Admittance is a Wrong in Law to the Uſurper, the Right of preſenting being in him to all Avoidances that happen during the Time the Uſurpation doth continue in Force, and not avoided. And though at the the Common Law, before the ſaid Statute of *Weſtminſter*, the rightful Patron being out of Poſſeſſion, by getting his Clerk inſtituted had by Uſurpation regained the Poſſeſſion of his Advowſon from the Uſurper without Remedy, yet at this Day, by reaſon of the ſaid Statute, neither the Poſſeſſion of the Advowſon, nor the Preſentation to the Avoidance, are by ſuch Inſtitution abſolutely gained from the Uſurper, until after ſix Months, that Plenarty may be pleaded, if the Uſurper happen to bring his Action: For it is notorious, that after an Uſurpation ſuffered, and Plenarty of the Uſurper's Clerk by ſix Months, if the Church becomes void again, before that he that hath the Right doth by ſome legal Act regain the Poſſeſſion, the Uſurper hath Right to preſent to ſuch Avoidance; and, before the Statute of *Weſtminſter*, if diſturbed, might have had his Poſſeſſory Action for the Recovery of the ſame, if he brought ſuch Action before there was a Plenarty by Inſtitution: And now, by the ſaid Statute of *Weſtminſter*, it is ſaid generally, That a Plea ſhall not fail by reaſon of ſuch Plenarty pleaded by a Defendant, if the Writ be purchaſed within the Six Months: And this Caſe of the Uſurper is not by Word, or Reaſon, excepted out of the ſaid Statute: And accordingly it was adjudged (*per Curiam*) in a Writ of Error, that if one doth uſurp upon a Purchaſer of an Advowſon in Fee, and the Clerk of the Uſurper is in by Six Months, and after the Church voiding, the Purchaſer's Preſentee is inſtituted, and inducted; if the Uſurper doth bring a *Quare Impedit* within the Six Months, againſt the Purchaſer, and his Clerk, this is no Remitter to the Purchaſer. 14 *Car. Harper* v. *Wierſdals*, *Roll's Abr.* 2. *p.* 374. and by *Doderidge* and *Coke contra Haughton* in *Harris* and *Auſtin*'s Caſe, 1 *Roll's Rep.* 210. 3 *Bulſtrode* 38.

When the Uſurpation to be avoided.

And Poſſeſſion to be regained by ſome legal Act.

Plenarty pleaded.

Uſurpation upon a Purchaſer.

Uſurpation avoided by another Perſon.

As the Poſſeſſion of an Advowſon gained by Uſurpation may be defeated by the Inſtitution of him that hath the Right, in ſuch Sort as is declared; ſo may the Uſurpation be alſo voided by the Inſtitution of the Preſentee of another Perſon than he upon whom the Uſurpation was made: For if a Feme doth ſuffer an Uſurpation upon her Advowſon, and afterwards doth take an Huſband, who preſents to the next Avoidance in the Right of his Wife, (his Clerk being inducted) this doth veſt the Poſſeſſion in the Wife. 14 *H.* 6. 24. *a.* So if three Coparceners be of an Advowſon, and the eldeſt doth preſent in her Turn without Partition, and after a Stranger doth uſurp upon the Turn of the ſecond, and then the third doth preſent in her Turn; this doth remit the ſecond, ſo that ſhe may preſent again when it comes to her Turn, as if no Uſurpation had been; for their Right is Joint, and the Uſurpation being avoided by

Remitter amongſt Coparceners.

one, it is avoided for all. *Mich.* 12 *H.* 7. *Keilway* 1. And the ſame Law is, although there were a Partition, becauſe the Partition doth not ſever the Inheritance, but is only as to the Poſſeſſion; and therefore they ſhall join in *Writ of Right*. 2 *Roll's Abr. p.* 374. *contra. Mich.* 12 *H.* 7. *Keilway p.* 1. But if an Advowſon doth deſcend to two Coparceners, and after an Uſurpation is made upon one of them, who doth die without Iſſue, by which her Right doth deſcend to the other Coparcener, this ſhall defeat the Uſurpation without Preſentation, for that ſuch Coparcener cannot have an Action for Parcel of the Advowſon, being ſeiſed of the Remnant. 17 *E.* 3. 22. *Quære.*

Uſurpation, &c.

Tho' there was a Partition.

The means that a common Perſon (not being privileged by the Statute of *Weſtminſter*) hath for the regaining of his Advowſon, after Uſurpation with Plenarty, is to bring his *Writ of Right of Advowſon* for the Recovery of the ſame, which he had beſt do before the Church doth void again, leſt he loſe the next Avoidance that ſhall happen after the Uſurpation, for want of Poſſeſſion.

Writ of Right by a common Perſon.

If the Patron of an Advowſon doth create a Vicarage out of the ſame lawfully, and after a Stranger doth uſurp upon him in the Parſonage, and afterwards in the Vicarage, and then the Patron doth recover the Advowſon in a *Writ of Right*; yet this Recovery ſhall not defeat the Uſurpation in the Vicarage, for that the Vicarage is not appendant to the Advowſon of the Parſonage, as is implied by the Caſe hereafter next mentioned, becauſe it is put to prove it. 17 *E.* 3. 51. *b.* But it is to be admitted here, that the Patron of the Parſonage is Patron alſo of the Vicarage.

Vicarage created out of an Advowſon.

If there be two Coparceners of an Advowſon, and they do agree to preſent by Turn, each of them in Truth hath but a Moiety of the Church; and though if either of them be diſturbed, ſhe ſhall have (as is before ſaid) a *Quare Impedit præſentare Idoneam Perſonam ad Eccleſiam*; for that there is but one Church, and one Incumbent; yet in a *Writ of Right of Advowſon* brought by one of them, the Writ ſhall be *De Medietate Advocationis*; for in Truth ſhe hath but a Right to a Moiety: But if there be two ſeveral Patrons and two ſeveral Incumbents in one Church, the one of one Moiety thereof, and the other of the other Moiety, and one Part, as well of the Church, as of the Town, be allotted to the one, and the other Part thereof to the other, each of them ſhall have a *Writ of Right of Advowſon, De Advocatione Medietatis.* 1 *Inſt.* 18. *a. Fitz. N. B.* 31. *b.* In the Regiſter, there is a *Writ of Right, De Advocatione Medietatis Eccleſiæ*, but there is no Writ *De Medietate Advocationis*; and for this Reaſon, *Mich.* 14 *E.* 2. 411. it was objected, That no Writ of Right could be brought *De Medietate Advocationis*; but it was over-ruled.

Of a *Quare Impedit* by one Coparcener, and of a Writ of Right.

Two Patrons and two Incumbents in one Church.

Nota, of a Writ in the Regiſter.

But though this *Writ of Right* be the common Remedy, yet it doth not lie in all Caſes for all Perſons that are out of the Statute of *Weſtminſter*, for every one that may recover by this Writ, ought to count of ſome Seiſin, either in himſelf, or in his Anceſtor; for it is not enough to count of Seiſin in any other. 21 *E.* 4. 1. 1 *H.* 4. 2. 21 *E.* 3. 27. *b. Fitz. Nat. Br.* 30. But ſee now the *Stat.* 7 *Annæ antea.* If the Incumbent of the Church hath received the Profits thereof, as the groſs Tithes, thereby the Patron is ſufficiently ſeiſed to maintain this Writ. 21 *E.* 4. 1. *b. Fitz. N. B.* 30. But then, ſuch Incumbent muſt be complete; that is, not only admitted, and inſtituted, but alſo inducted; for that before his Induction he hath no Eſtate in the Glebe, nor can he receive any Tithes as Incumbent; and therefore the Patron,

Count upon a Writ of Right.

What Seiſin.

Uſurpation, &c.

before his Clerk be inducted, cannot in his Writ (as he ought) alledge Eſplees in himſelf, by the Perception of the groſs Tithes, *&c.* by his ſaid Clerk. 38 *E.* 3. 9. *Hare* v. *Brikley*, *Plowden* 528. 26 *H.* 8. 3. *a.*

In what Time.

And ſuch Seiſin ought to be within the Memory of Man, otherwiſe it is not ſufficient to maintain this Writ. 21 *E.* 4. 1. 2. *b.* But if a *Writ of Right* be brought by the King, the King may alledge, that he, or his Progenitor, was ſeiſed, without ſhewing any Time; becauſe *Nullum tempus occurrit Regi.* 1 *Inſt.* 294. *b.* But the King need not of Neceſſity bring this Writ, in that he cannot be diſpoſſeſſed by Uſurpation, as hath been ſhewed. But if the Patron be duly ſeiſed by preſenting once, though divers Uſurpations be after ſuffered, yet ſuch Seiſin is not thereby defeated; but that he may recover by this Writ. 43 *E.* 3. 15. *a.*

Where *Quare Impedit* neglected, Writ of Right cannot be had.

From the aforeſaid Particulars it appears, that if a Purchaſer doth ſuffer an Uſurpation before any Preſentment made by him, and the Six Months to paſs without bringing his *Quare Impedit*, the Uſurper hath gained the Patronage in Fee, and the Purchaſer is without Remedy, and can never have this *Writ of Right*, becauſe he cannot count of any Seiſin. 10 *Co.* 134. *b.* 43 *E.* 3. 15. *a.* 1 *H.* 4. 2. *b.* 43 *Aſſ.* 21. *per Thorp.* 32 *E.* 3. *Preſentation* 6. 22 *E.* 4. 9. 1 *Inſt.* 349. *b.* And ſo if a Purchaſer in Tail doth ſuffer an Uſurpation before he doth preſent, he hath not ſuch an abſolute Inheritance as to maintain this *Writ of Right*, 43 *E.* 3. 15. *Mich.* 22 *Jac.* *Dalton* v. *Biſhop of Ely*, *Jones* 49. nor can the Iſſues in Tail, or Leſſee for Life, have it upon the ſame Reaſon. *Rudd* v. *Biſhop of Lincoln*, *Hutton* 66. and by *Hobart* in Lord *Stanhop*'s Caſe, *Hob.* 322. *Fitz. Nat. Br.* 31. *b.* And ſo in the Caſe of a Lord that

Mortmain.

claims to have an Advowſon aliened in Mortmain by his Tenant, for that he cannot count of any Seiſin in himſelf, or his Anceſtors, but only in his Tenant, which is not ſufficient to maintain this Writ. 21 *E.* 3. 27. *b.*

Perſons enabled by Stat'.

As no Perſon without the aforeſaid Seiſin can maintain this Writ for the Recovery of an Advowſon from an Uſurper, ſo neither can he have any other Writ, whereby he may recover the ſame, or any Preſentment thereto, (that is, unleſs he be a Perſon that is enabled to bring his Writ of *Quare Impedit*, or *Darrein Preſentment* by the Statute of *Weſtminſter* 2. (if diſturbed in preſenting), and by Conſequence cannot recover the Poſſeſſion of his Advowſon,) but muſt give up his Advowſon as loſt

Others Remedileſs.

for ever, without Remedy. *Trin.* 13 *Jac.* *Harris* v. *Auſtin*, 3 *Bulſt.* 38. and in 1 *Roll's Rep.* 210. But this ſeems now remedied by the ſaid Statute 7 *Annæ.*

Alſo a Purchaſer, *&c.* as to other Advowſons.

And this doth hold true of a Purchaſer, although he be an Heir within Age, or a Feme Covert, relieved by the Statute of *Weſtminſter*, as to other Advowſons, by Deſcent; and alſo of a Purchaſer in Tail, and of a Leſſee, although the Iſſue of the Purchaſer in Tail, and he in Reverſion after the Leaſe expired, may have their Poſſeſſory Action for the ſame Advowſon. *Roll's Abr.* 2. *p.* 383. *Rudd* v. *Biſhop of Lincoln*, *Hutton* 66. and by *Hobart* in Lord *Stanhop*'s Caſe, *Hob.* 322. And ſo if he that is ſeiſed of an Advowſon in Fee, doth leaſe the ſame for Years, and the Leſſee (the Church being void) doth accept of a Preſentation from the Leſſor, and thereupon is admitted and inducted, although the Leſſor's

Where Leſſee accepts a Preſentation from the Leſſor.

Preſenting (the Leſſee conſenting thereto, by accepting of a Preſentation from the Leſſor) is not properly an Uſurpation; yet it hath as great an Effect as an Uſurpation made upon the Leſſee, and Plenarty had thereupon: For the Leſſee's Acceptance of the Leſſor's Preſentation, is a Surrender of his Leaſe. 42 *Eliz.* *Rot.* 105. in Sir *Arthur Capel*'s Caſe, cited in *Hutton* 105. But by *Owen*, who reports this Caſe, the Queſtion

was, Whether the Leſſee's Accepting of a Preſentation from the Leſſor, was a Surrender, or an Extinguiſhment of the Leaſe; and there 'tis ſaid, That all the Juſtices held, that it could not be a Surrender, but an Extinguiſhment: And alſo 'tis ſaid, That if a Man doth preſent to his own Church, as Proctor to another, by this he loſeth his Advowſon. 42 *Eliz.* *Rudd* v. *Topſey*, *Rot.* 135. *Owen* 142. ſee *F. N. B.* 35.

Uſurpation, &c.

Nota.

But if a Purchaſer hath preſented, and after, upon another Avoidance, a Stranger doth uſurp upon him, and Six Months paſs, he may have his Writ of Right of Advowſon before the Church doth void again: But if he doth not bring his Writ of Right, *&c.* before the Church doth void, he cannot, if the Uſurper preſent again, have a *Quare Impedit* for that Avoidance, but only his Writ of Right: And foraſmuch as he may have an Action for the Advowſon, if he uſurp upon the Uſurper, and his Clerk be in by Six Months, he ſhall be remitted. *Trin.* 13 *Jac. B. R.* *Harris* v. *Auſtin*, *Roll's* 1 *Rep.* 211. 7 *E.* 3. 2. *a.* 17 *E.* 3. 37. by *Perning.*

Where a Purchaſer hath preſented, *&c.*

If he uſurp upon the Uſurper.

Although when a Patron hath ſuffered an Uſurper's Clerk to remain in Poſſeſſion Six Months, without bringing his *Quare Impedit*, or *Darrein Preſentment*, he cannot, generally ſpeaking, bring either of thoſe Writs, but is driven to his Writ of Right, and is barred of all Remedy, if he cannot ſhew a Poſſeſſion in himſelf, or Anceſtor, ſufficient to maintain that Writ; yet, if after the Plenarty by Six Months, he doth in Fact bring his *Quare Impedit* againſt the Uſurper and his Incumbent, and they do not plead Plenarty by Six Months, but a *Non ſum informatus*, *&c.* upon which the Patron doth recover his Preſentment, he ſhall be alſo remitted to the Poſſeſſion of his Advowſon. *Mich.* 12 *Jac. Auſtin* v. *Harris*, 3 *Bulſtrode* 38. and *Trin.* 13 *Jac. Roll's* 1 *Rep.* 210. the ſame Caſe. And ſo the Law is, although the Patron was but Purchaſer of the Advowſon, and had never preſented before the Uſurpation. *Trin.* 13 *Jac. Harris* v. *Auſtin*, 3 *Bulſtrode* 38. So if the King doth preſent to an Advowſon of which another is ſeiſed, and after the Six Months, the Patron doth bring his *Quare Impedit* againſt the Incumbent of the King, and the Incumbent not taking the Advantage of the Plenarty, the Patron doth recover upon a *Non ſum informatus* pleaded, by this the Advowſon is reveſted. *Paſch.* 12 *Jac. Auſtin* v. *The Biſhop of London*, *Brownlow* and *Gouldſborough* 1. 165. But if the Patron be a Purchaſer of an Advowſon, and the King doth uſurp upon him, before any Preſentation is made by him, and the Six Months paſs before any *Quare Impedit* is brought againſt the Incumbent, though the Patron ſhould afterwards recover in a *Quare Impedit* brought after the Six Months were paſt againſt the Incumbent, upon a *Non ſum informatus* pleaded, without taking Advantage of the Plenarty, yet he ſhall not be remitted, becauſe by reaſon of the Uſurpation compleated by the Six Months Plenarty, the Purchaſer hath but a remedileſs Right without any Action to recover it, and the King is not Party to the Action. *Mich.* 12. and *Trin.* 13 *Jac. Auſtin* v. *Harris*, *Roll's Abr. p.* 374, and 375. See the Caſe in 3 *Bulſt.* 38. *Harris* v. *Auſtin*, *Trin.* 13 *Jac.* the ſame Caſe, *Roll's* 1 *Rep.* 210.

Where Plenarty is not pleaded againſt the Patron, but he recovers.

Poſſeſſion remitted.

Advowſon reveſted upon Recovery.

Aliter where he ſhall not be remitted.

But if the King doth ſuffer the Clerk of the Purchaſer (who hath recovered as aforeſaid, and removed the King's Clerk by a Writ to the Biſhop) to remain Incumbent until the Church doth void again, and then the King doth preſent; and upon a Writ brought by the Purchaſer, the former Recovery is alledged, although it be not ſhewed, that the Writ, upon which the Recovery was had, was brought within the Six Months after the Uſurpation; yet whether the Writ was brought within the ſaid Six Months

Aliter where upon a former Recovery alledged the Advowſon is reveſted.

Usurpation, &c. Intendment.

Months or not, a Recovery being had, and a Preſentment made thereupon, the Advowſon is gone from the King, and reveſted in him that hath recovered; becauſe it ſhall be intended, that the Writ was brought within the Six Months; by *Coke*, *Doderidge* and *Haughton:* For in ſuch Caſe, *Omnia præſumuntur ſolemniter eſſe acta. Trin.* 13 *Jac. Harris* v. *Auſtin*, 3 *Bulſtrode* 38. and in *Roll's* 1 *Rep.* 210. And therefore, he that doth alledge, that the Writ was not brought within the Six Months, ought to ſhew it, ſaid *Coke*, in the Caſe before cited.

To what Perſon a Clerk ought to apply himſelf.

Though the Clerk, by the foregoing Diſcourſe, may judge of the Title to an Advowſon, and ſo know who is the rightful Patron thereof; yet this is alſo to be noted, that not always he in whom the Title to the Advowſon, or to the void Turn is, but ſome other Perſon in his Right, is to preſent, or prefer a Clerk to his voided Benefice; and to ſuch Perſon it is, to whom the Clerk, that hath it in Deſign to make himſelf Incumbent of the vacant Benefice, ought to apply himſelf: For the Lord Chancellor of *England*, or the Lord Keeper of the Great Seal for the Time being, may, by Virtue of their Office, preſent to any Benefice that is of the Gift of the King, the Value of which is under Twenty Pounds in the Books of the King's Firſt-Fruits and Tenths. *Lord Chancellor*'s Caſe, *Hobart* 214. But it ſeems, that in ancient Time, the Lord Chancellor, *&c.* had the Privilege of preſenting but to thoſe Livings only of the King's Gift, that were under the yearly Value of Twenty Marks in the King's Books. 38 *E.* 2. 3. and 8, 9. *Br. Quare Impedit* 65. *Fitz. Nat. Br.* 35. *k.* Yet to ſuch undervalued Benefices, as the Lord Chancellor preſents to, the King, if he pleaſe, may immediately give the Preſentment. So if a Feme Covert hath Title to preſent to a Church, ſhe cannot preſent by her ſelf alone, but with her Huſband, and the Preſentment muſt be by the Huſband and Wife, in both their Names, and not by the Huſband in his Right, and in the Right of his Wife. 28 *H.* 6. 8. *a. Quare Impedit* 85. But the Queen is a Feme Sole, as it were exempt from the Perſon of the King, and hath a Capacity to grant, or to preſent to any void Church without the King, when the Title thereto is in her. 18 *E.* 3. 2. *a.* 3 *H.* 7. 14. *b.*

Chancellor, or Lord Keeper.

Husband and Wife.

The Queen.

Guardian in Socage.

Guardian in Socage, or by Nurture, cannot preſent to a Church in the Right or Name of the Heir, becauſe he cannot account for it. 29 *E.* 3. 5. 8 *E.* 2. *Preſentment* 10. 7 *E.* 3. 39. 27 *E.* 3. 79. 1 *Inſt.* 17. *b.* 88. *a.* But by *Daniel*, if the Heir be within the Age of Diſcretion, there the Guardian ſhall preſent. *Mich.* 3 *Jac. Shopland* v. *Ridley*, 2 *Cro.* 99. And *Berry* ſaith, he hath ſeen the Guardian preſent in the Name of the Heir, and ſo by *Green*; but Mr. *Hughes*, in his *Parſons Law*, makes a *Quære* of it, and ſuppoſeth it muſt be intended of Guardian by Knight-Service, and not of a Guardian in Socage. *Hughes Parſons Law*, *c.* 10. *f.* 76. And it is ſaid and agreed, that a Preſentment made by the Guardian, in the Name of the Heir, is a good Title for the Heir in a *Quare Impedit* brought by him. 42 *E.* 3. *Quare Impedit* 130. Alſo Guardian in Socage of a Manor, to which an Advowſon is appendant, if he be diſturbed, ſhall have a *Quare Impedit* in his own Name, although that he may not make an Account thereof. *Temp. E.* 1. *Hobart* 132. adjudged: Yet 'tis ſaid by my Lord *Coke*, That the Heir ſhall preſent, of what Age ſoever he be, and not the Guardian; 3 *Inſt.* 156. and of this Opinion was the late Lord *King*, in a Cauſe in the High Court of Chancery 1732. when he preſided there, and ſaid that if the Infant were but a Year old or younger, they ought to put a Pen in his Hand, and guide it to ſign the Preſentation.

If one before the Statute of 27 *H.* 8. *c.* 10. of Uſes, had infeoffed another in Fee, to the Uſe of the Feoffor and his Heirs, of a Manor to which an Advowſon was appendant, the Church becoming void, the Feoffor could not preſent to the Church in his own Name, and the Statute of *Richard* III. did not aid him; for this Preſentment is not like to a Leaſe for Term of Years, made by the Feoffor to a Stranger, or Feoffment of the Land, or ſuch like, or a Grant of a Rent out of the Land, or a Grant of the Advowſon of the Church to another, for this Preſentment is but as a Chattel, and a Thing in Action, veſted in theſe Perſons, which be Feoffors of the Manor; by *Rede* and *Grevil* Juſtices; but *Rede* ſaid, That the Feoffor might preſent in the Name of the Feoffees. *Paſch.* 2 *H.* 8. *Kel.* 160. See the *Stat.* 27 *H.* 8. *Of Uſes*: For by that Statute the *Ceſtuyque Uſe*, and not the Feoffee, is to preſent. Ordination, &c. Feoffor and Feoffee.

If the Parſon of a Church be Patron of the Vicarage thereof, yet if the Vicarage doth become void during the Vacancy of the Parſonage, the Patron of the Parſonage ought to preſent, 19 *E.* 2. *Quare Impedit* 178. and (as I conceive) if the Parſonage be filled before the Vicarage, yet the Right of Preſenting to the Vicarage doth remain in the Patron of the Parſonage, (*Quære.*) But it is ſaid, That Perſons outlawed, and excommunicated, may preſent to their Churches, and their Preſentations ſhall ſtand good, until ſuch Time as they be voided: And generally, all Perſons that have Ability to grant, or to purchaſe, have Ability alſo to preſent to their vacant Churches, according to their reſpective Rights. *Parſons Law*, *c.* 10. But *Quære*, Whether the Biſhop may not refuſe the Preſentees of Perſons outlawed, and excommunicated, and ſo ſuffer their Churches to lapſe to himſelf? Vicarage void during Vacancy of the Parſonage. General Suppoſition.

As to Preſentations in Caſe of Mortgages, ſee *ch.* 22.

CHAP. XIV.

Of Ordination: The taking of what Orders neceſſary to make one capable of a Benefice. Deacons, what Preferments they are capable of.

HAVING ſhewed by what means a Church doth become void, and how a Perſon may judge of the Patron's Title to the Advowſon thereof, as Things neceſſary to be known, in order to the taking a Title to a Church Preferment; I come to a Third Thing alſo neceſſary to be known and obſerved in order thereunto, *viz.* That the Perſon that would take an Eccleſiaſtical Benefice, muſt, to make himſelf capable thereof, be Epiſcopally ordained, and that as well Prieſt as Deacon: For although, in former Time, a Lay-man might have taken a Title to a Deanery, Prebendary, or other Benefice without Cure, *Mich.* 29 & 30 *Eliz. Bland* v. *Maddox*, 3 *Cro.* 79. *Paſch.* 3 *Jac. Fairchild* v. *Gain.* 1 *Brownlow* and *Gouldſborough* 201. and a Deacon might have taken a Title to a Benefice As well Prieſt as Deacon muſt be Epiſcopally ordained.

Ordination, &c.

Layman and Deacon not capable of being admitted, without Prieſts Orders.

with Cure, and enjoyed the ſame for the Space of one Year after his Induction, without Prieſt's Orders given according to the Manner and Form in and by the Book of Common Prayer preſcribed, or formerly by Epiſcopal Ordination, 13 *Eliz. c.* 12. Yet at this Day, neither Layman, nor Deacon, is capable of being admitted into any Parſonage, Vicarage, Benefice, or other Eccleſiaſtical Promotion or Dignity whatſoever, but muſt obtain the Orders of a Prieſt to qualify him for the ſame. *Stat.* 14 *Car.* 2. *c.* 4. Neither is a Perſon that is *mere Laicus*, or only a Deacon, capable of a Donative: For although that he that hath a Donative may come into the ſame by Lay-Donation, and not by Admiſſion and Inſtitution, yet his Function is Spiritual, *Co. Litt.* 344. *a.* in the Caſe of *St. Burien* in *Cornwall*, ſaid to be reſolved, *Roll's Abr.* 2. *p.* 341. So that he that is no more than a Deacon, can only uſe his Orders either as a Chaplain to ſome Family, or as a Curate to ſome Prieſt, or as a Lecturer without Title: For the Prebendaries of ſome Prebends in Cathedral and Collegiate Churches, are to read Lectures there, by the Appointment of the Founders thereof, and may from thence be called Lecturers; but theſe Places are of the Number of Eccleſiaſtical Promotions, to which the Incumbents are admitted by Collation or Inſtitution, of which a Deacon, *&c.* as aforeſaid, is not therefore capable; yet the King's Profeſſor of the Law within the Univerſity of *Oxford*, may have and hold the Prebend of *Shipton* within the Cathedral Church of *Sarum*, united and annexed unto the Place of the ſame King's Profeſſor for the Time being, altho' that the ſaid Profeſſor be but a Lay-man. *Stat.* 14 *Car.* 2. *c.* 4.

How a meer Deacon may uſe his Orders. Prebendaries.

How thoſe capable of Church Promotions, muſt be tried and examined, *&c.* See Bp. *Gibſon's Code* 166, 167.

As no Man is capable of a Church Promotion, but he who is ordained both Deacon and Prieſt; ſo no Man is to be accounted, or taken to be a lawful Biſhop, Prieſt or Deacon in the Church of *England*, or ſuffered to execute any of the ſaid Functions, except he be called, tried, examined and admitted thereunto, according to the Form preſcribed, and ſet forth in and with the Book of Common Prayer, and confirmed by Act of Parliament in the Fourteenth Year of King *Charles* the Second, *Stat.* 14 *Car.* 2. *c.* 4. Or hath had formerly Epiſcopal Conſecration or Ordination. *See the Preface before the Form of Ordaining.*

And by the Eighth Canon made by the Convocation for the Province of *Canterbury* in the Year 1603. *Whoſoever ſhall hereafter affirm or teach, that the Form and Manner of making and conſecrating Biſhops, Prieſts or Deacons, containeth any Thing in it that is repugnant to the Word of God, or that they who are made Biſhops, Prieſts or Deacons in that Form, are not lawfully made, nor ought to be accounted, either by themſelves, or by others, to be truly either Biſhops, Prieſts or Deacons, until they have ſome other Calling to thoſe Divine Offices, let them be excommunicated* ipſo facto, *not to be reſtored until he repent, and publickly revoke ſuch his wicked Errors.*

Age for Deacons and Prieſts.

Formerly the Rule was, and ſo ſay the Statutes 3 & 5 *E.* 6. That none ſhould be admitted a Deacon, unleſs he was One and Twenty Years of Age at the leaſt: *See the Preface to the old Form of Ordaining.* But now by *Stat.* 13, 14 *Car.* 2. no Man may be admitted to that Order, until he be Three and Twenty Years of Age, unleſs he hath a Faculty: *See the Preface to the new Form of Ordaining:* And every one that is to be admitted a Prieſt, muſt be full Four and Twenty Years old. *Stat.* 13 *Eliz. c.* 12. *Vide* Gibſon's *Code* 168.

In the Caſe of *Roberts* verſ. *Pain, Paſ.* 1 *Jac.* 2. *B. R.* which ſee in 3 *Mod.* 67. one being preſented to the Pariſh of *Chriſt-Church* in *Briſtol* was libelled againſt, becauſe he was not Twenty-Three Years of Age

when made a Deacon, nor Twenty-Four when made a Prieſt; and a Prohibition was prayed upon this Suggeſtion; That if the Matter was true, a *Temporal Loſs*, viz. *Deprivation* would follow; but it was denied, becauſe ſo it is alſo in the Caſe of Drunkenneſs and other Vices, which are uſually puniſhed in the Eccleſiaſtical Courts, though a Temporal Loſs may enſue. Oaths on Ordination.

Regularly, Deacons and Prieſts are to be ordered only upon the Four *Sundays* immediately following the Four *Ember-Weeks*; *Canon* 31. *Four Solemn Times appointed for the making of Miniſters:* But at this Day, upon urgent Occaſion, Orders both of a Deacon and Prieſt may be given on any other *Sunday* or Holy-day, by every Dioceſan, but not to be admitted to the Order of Prieſthood, until he hath been a Deacon for the Space of a whole Year; yet if for reaſonable Cauſes it ſhall otherwiſe ſeem good to his Biſhop, he may be admitted to the Order of a Prieſt in a ſhorter Time. *Rubr. Canon* 32. *None to be made Deacon and Miniſter both in one Day.* No Biſhop ought to admit any Perſon to the Order of a Deacon, unleſs ſuch whom he ſhall know, either by himſelf, or ſufficient Teſtimony, to be of virtuous Converſation, and without Crime: Nor ought he to make any Deacon a Prieſt, unleſs he firſt bring to the Biſhop, from Men known to the Biſhop, to be of ſound Religion, a Teſtimonial, both of his honeſt Life, and of his profeſſing the Doctrine expreſſed in the Articles of Religion agreed upon by a National Synod, in the Year 1562. Stat. 13 Eliz. c. 12. *and hath been found faithful and diligent in executing the Office of a Deacon.* Rubr. Canon 34. '*The Quality of ſuch as are to 'be made Miniſters.*' Canon 35. '*The Examination of ſuch as are to 'be made Miniſters*'. No Man ought to be ordained, unleſs he be learned in the *Latin* Tongue, and ſufficiently inſtructed in the Holy Scripture; and being to be made a Prieſt, unleſs he be able to anſwer, and render to the Ordinary an Account of his Faith in *Latin*, according to the Articles of Religion aforeſaid, or have a ſpecial Gift and Ability to be a Preacher. *Stat.* 13 *El. c.* 12. Nor ought any to be admitted, either to the Order of Deacon or Prieſt, unleſs he ſhall firſt ſubſcribe to the ſaid Articles. *Stat.* 13 *El. c.* 12. Canon 36. '*Subſcrip-* '*tion required of ſuch as are to be made Miniſters*'. Canon 38. '*Re-* '*volters after Subſcription, cenſured*': And take the Oath of the King's Supremacy. *Stat.* 5 *Eliz. c.* 1. *Rubr.* The Form of which Oath, till altered, was in theſe Words:

Deacons and Prieſts, at what Time to receive Orders.

Teſtimonial of Deacons, &c.

Miniſters.

Learned in the *Latin* Tongue, &c.

Articles to be ſubſcribed.

I A. B. *do utterly teſtify, and declare in my Conſcience, That the Queen's Highneſs is the only Supreme Governor of this Realm, and of all other her Highneſs's Dominions and Countries, as well in all Spiritual or Eccleſiaſtical Things or Cauſes, as Temporal; and that no Foreign Prince, Perſon, Prelate, State or Potentate, hath or ought to have any Juriſdiction, Power, Superiority, Pre-eminence or Authority Eccleſiaſtical or Spiritual within this Realm: And therefore I do utterly renounce and forſake all Foreign Juriſdictions, Powers, Superiorities and Authorities; and do Promiſe, that from henceforth I ſhall bear Faith and true Allegiance to the Queen's Highneſs, her Heirs and lawful Succeſſors, and to my Power ſhall aſſiſt and defend all Juriſdictions, Privileges, Pre-eminencies and Authorities granted, or belonging to the Queen's Highneſs, her Heirs and Succeſſors, or united and annexed to the Imperial Crown of this Realm. So help me God, and by the Contents of this Book.*

The Oath of Supremacy.

Alſo,

Oaths on Ordination.

Also the Oath of Obedience is commonly administred by Bishops to Persons by them ordained; the Form of which Oath was, till altered, as followeth:

Oath of Obedience.

I A. B. *do truly and sincerely acknowledge, profess, testify and declare in my Conscience before God and the Word, That our Sovereign Lord King* James *is lawful and rightful King of this Realm, and of all other his Majesty's Dominions and Countries; and that the Pope, neither of himself, nor by any Authority of the Church or See of* Rome, *or by any other Means with any other, hath any Power or Authority to depose the King, or to dispose any of his Majesty's Kingdoms or Dominions; or to authorize any Foreign Prince to invade or annoy him, or his Countries, or to discharge any of his Subjects of their Allegiance and Obedience to his Majesty; or to give Licence or Leave to any of them to bear Arms, raise Tumult, or to offer any Violence or Hurt to his Majesty's Royal Person, State or Government, or to any of his Majesty's Subjects within his Majesty's Dominions.*

Also I do swear from my Heart, That notwithstanding any Declaration or Sentence of Excommunication or Deprivation made or granted, or to be made or granted by the Pope, or his Successors, or by any Authority derived, or pretended to be derived from him or his See, against the said King, his Heirs or Successors, or any Absolution of the said Subjects from their Obedience: I will bear Faith and true Allegiance to his Majesty, his Heirs and Successors, and him and them will defend to the uttermost of my Power, against all Conspiracies and Contempt whatsoever, which shall be made against his or their Persons, their Crown and Dignity, by Reason or Colour of any such Sentence or Declaration, or otherwise, and will do my best Endeavour to disclose, and make known unto his Majesty, his Heirs and Successors, all Treasons and traiterous Conspiracies, which I shall know or hear of, to be against him, or any of them.

And I do further swear, That I do from my Heart abhor, detest and abjure, as impious and heretical, this damnable Doctrine and Position, That Princes which be excommunicated, or deprived by the Pope, may be deposed, or murthered by their Subjects, or any other whatsoever.

And I do believe, and in my Conscience am resolved, That neither the Pope, nor any Person whatsoever hath Power to absolve me of this Oath, or any Part thereof, which I acknowledge by good and full Authority to be lawfully ministred unto me, and do renounce all Pardons and Dispensations to the contrary: And all these Things I do plainly and sincerely acknowledge and swear, according to these express Words by me spoken, and according to the plain and common Sense and Understanding of the same Words, without any Equivocation, or mental Evasion, or secret Reservation whatsoever; And I do make this Recognition and Acknowledgment heartily, willingly and truly upon the true Faith of a Christian. So help me God. Stat. 3 Jac. 1. cap. 4.

New Oaths appointed by 1 *W. & M. c.* 8.

But these two Oaths are now both repealed and abrogated by the Statute of 1 *W. & M. sess.* 1. *cap.* 8. and new Oaths are thereby appointed. *And all Persons who were obliged to take the said abrogated Oaths, are now to take the new Oaths appointed by this Statute, in such Manner, at such Times, before such Persons, in such Courts or Places, as they should or ought to have taken the said abrogated Oaths, or either of them, in case they had not been abrogated; And every Person who shall neglect or refuse to take the same, shall incur and be liable to the same Penalties,*

nalties, Forfeitures, Diſabilities, as by any Statute was appointed, for or upon Neglect or Refuſal to take the former abrogated Oaths. Oaths on Ordination.

And the Oaths required now to be taken by this Statute, are in theſe Words following:

I A. B. *do ſincerely promiſe and ſwear, That I will be faithful and bear true Allegiance to his Majeſty King* George. *So help me God.* The new Oaths.

I A. B. *do ſwear, That I do from my Heart abhor, deteſt and abjure, as impious and heretical, that damnable Doctrine and Poſition,* That Princes excommunicated or deprived by the Pope, or any Authority of the See of *Rome*, may be depoſed or murdered by their Subjects, or any other whomſoever.

And I do declare, That no Foreign Prince, Perſon, Prelate, State or Potentate, hath or ought to have any Juriſdiction, Power, Superiority, Pre-eminence or Authority Eccleſiaſtical or Spiritual within this Realm. So help me God.

The Form and Manner of making or ordaining Deacons, *&c.* is thus. When the Day appointed by the Biſhop is come, after Morning Prayer ended, there ſhall be a Sermon of Exhortation, declaring the Duty and Office of ſuch as come to be admitted Deacons, how neceſſary that Order is in the Church of Chriſt, and alſo, how the People ought to Eſteem them in their Office. Form of making Deacons, *&c.*

After which the Archdeacon or his Deputy ſhall preſent unto the Biſhop (ſitting in his Chair near to the Communion Table) ſuch as deſire to be ordained Deacons (each of them being decently habited) ſaying theſe Words:

Reverend Father in God. I preſent unto you theſe Perſons here preſent, to be admitted Deacons. Then the Biſhop ſays, *Take heed that the Perſons whom ye preſent unto us be apt and meet for their Learning and godly Converſation, to Exerciſe their Miniſtry duly to the Honour of God, and the Edifying of his Church.* And the Archdeacon ſhall anſwer. *I have inquired of them, and alſo examined them, and think them ſo to be.*

Then the Biſhop ſhall ſay unto the People. *Brethren! If there be any of you who knoweth of any Impediment or notable Crime in any of theſe Perſons now preſented to be ordered, ordained Deacons, for the which he ought not to be admitted to that Office, let him come forth in the Name of God, and ſhew what the Crime or Impediment is.*

If any Impediment or great Crime be objected againſt him that is to be made either Prieſt or Deacon at the Time that he is to be ordained, the Biſhop is bound to ſurceaſe from ordering him, until the Party accuſed ſhall be found clear of that Crime. *Rubr.* If a Perſon that doth deſire to be ordered a Prieſt or Deacon be a Baſtard, he is not without Diſpenſation to be ordered. 11 *H.* 4. 78. *a.* But the King, as well as the Archbiſhop, may diſpenſe with ſuch Perſon, ſo that he may be admitted to Holy Orders. 5 *Co. de Jure Eccleſiaſtico*, and *in Horſeful* and *Walle*'s Caſe, *Paſch.* 9 *Jac. Davis* 73. But if ſuch Perſon be ordained, and made Parſon of a Church, although he is deprivable, yet if he doth obtain a Diſpenſation from the King or Archbiſhop before he be deprived, he ſhall retain the Benefice. 11 *H.* 4. 38, 76, 77, *&c.* Upon Crimes objected, Biſhop to ſurceaſe. Baſtards.

Ordination, &c.

31 *El. c.* 6. §. 10. Againſt taking Fees or Rewards for Ordination, *&c.*

For the preventing of Orders to be given to unworthy Perſons, it hath been enacted, That if any Perſon or Perſons whatſoever, ſhall or do at any Time receive or take any Money, Fee, Reward or any other Profit directly or indirectly, or ſhall take any Promiſe, Agreement, Covenant, Bond or other Aſſurance, to receive any Money, Fee, Reward, or any other Profit, directly or indirectly, either to him or themſelves, or to any other of their, or any of their Friends (all ordinary and lawful Fees only excepted) for or to procure the ordaining or making of any Miniſter or Miniſters, or giving of any Orders or Licence or Licences to preach, that then every Perſon and Perſons ſo offending, ſhall for every ſuch Offence forfeit and loſe the Sum of Forty Pounds of lawful Money of England; and the Party ſo corruptly ordained, or made Miniſter, or taking Orders, ſhall forfeit and loſe the Sum of ten Pounds. And if at any Time within ſeven Years next after ſuch corrupt entring into the Miniſtry, or receiving of Orders, he ſhall accept or take any Benefice, Living or Promotion Eccleſiaſtical, that then immediately from and after the Inducting, Inveſting or Inſtallation thereof or thereinto had, the ſame Benefice, Living and Promotion Eccleſiaſtical ſhall be eſtſoons meerly void; and that the Perſon or Perſons to whom the Advowſon, Gift, Preſentation or Collation ſhall by Law appertain, ſhall and may, by Virtue of this Act, preſent or collate unto, give and diſpoſe of the ſame Benefice, Living or Promotion Eccleſiaſtical, in ſuch ſort to all Intents and Purpoſes, as if the Party ſo inducted, inveſted or inſtalled had been, or were naturally dead; any Law, Ordinance, Qualification or Diſpenſation to the contrary notwithſtanding. The one Moiety of all which Forfeitures ſhall be to our Sovereign Lady the Queen, her Heirs and Succeſſors, and the other Moiety to him or them that will ſue for the ſame, by Action of Debt, Bill, Plaint or Information in any of her Majeſty's Courts of Record, in which no Eſſoin, Protection, Privilege or Wager of Law ſhall be admitted or allowed.

Forfeitures.

Office of a Deacon.

It appertaineth to the Office of a Deacon, in the Church where he ſhall be appointed, to ſerve in aſſiſting the Prieſt in Divine Service, and in Diſtribution of the Communion, to read the Holy Scriptures and Homilies in the Church, to inſtruct the Youth in the Catechiſm, in the Abſence of the Prieſt to baptize Infants, and to preach, if he be admitted thereunto by the Biſhop. *Rubrick.* And alſo to bury the Dead, and ſolemnize Marriage. *Couſin*'s Tables, *Tab.* 12. But before he be four and twenty Years of Age he may not be admitted to preach, nor to baptize, nor to adminiſter the Lord's Supper, and all Tolerations, Diſpenſations, Qualifications and Licences whatſoever to be made to the contrary hereof, are meerly void in Law, as if they never were. *Stat.* 13 *Eliz. c.* 12.

Age.

Not to conſecrate and adminiſter, *&c.* until ordained a Prieſt, upon Forfeitures.

If a Deacon be of the Age aforeſaid, yet neither he, nor any Perſon, may preſume to conſecrate and adminiſter the Holy Sacrament of the Lord's Supper before ſuch Time as he ſhall be ordained Prieſt, according to the Form and Manner in and by the Book of Common Prayer preſcribed, unleſs he hath formerly been made Prieſt by Epiſcopal Ordination, upon Pain to forfeit for every Offence the Sum of one hundred Pounds; one Moiety thereof to the King's Majeſty, the other Moiety thereof to be equally divided between the Poor of the Pariſh where the Offence ſhall be

committed, and ſuch Perſon or Perſons as ſhall ſue for the ſame, by Action of Debt, Bill, Plaint or Information, in any of his Majeſty's Courts of Record, wherein no Eſſoin, Protection, or Wager of Law ſhall be allowed, and to be diſabled from taking, and being admitted into the Order of Prieſt, by the Space of one whole Year next following. But this Penalty doth not extend to the Foreigners or Aliens of the Foreign Reformed Churches allowed, or to be allowed, by the King's Majeſty, his Heirs and Succeſſors in *England*. *Stat.* 14 *Car.* 2. *c.* 4. **Nor to any Perſon diſſenting from the Church of** England, **(except Papiſts and Popiſh Recuſants) in holy Orders, or pretended holy Orders; nor to any Preacher or Teacher of any Congregation of diſſenting Proteſtants, taking the Oaths, and ſubſcribing and making the Declaration, as by the Act is directed.** Stat. 1 W. & M. cap. *Quære*, Whether it be lawful or ſafe, for one that is but a Deacon, to aſſiſt a Prieſt in the Diſtribution of the Communion; for if that be conſtrued to be an Adminiſtration thereof, it is prohibited to a Deacon, and by doing it he forfeits one Hundred Pounds, *Stat.* 14 *Car.* 2. *c.* 4. for the Words of the Statute are, **Nor may he preſume to Conſecrate or Adminiſter,** &c.

Ordination, &c.

14 *Car.* 2. *c.* 4. Not to extend to Diſſenters.

1 *W. & M. c.* Q.

A Prieſt by his Ordination receives Authority to preach the Word, and adminiſter the Holy Sacraments in the Congregation where he ſhall be lawfully appointed thereto. *Rubr. Stat.* 1 *Mar. c.* 3. Yet notwithſtanding he may not preach without the Licence either of the King, or his reſpective Archbiſhop, Biſhop or other lawful Ordinary, or one of the Univerſities of *Oxford* or *Cambridge*. *Stat.* 1 *Mar. c.* 3. 14 *Car.* 2. *c.* 4. 13 *Eliz. c.* 12. But a Licence by the Biſhop of any Dioceſe, is ſufficient, although it be only to preach within his Dioceſe, the Statute not requiring any Licence by the Biſhop of the Dioceſe where the Church is. *Paſch.* 15 *Car.* 2. *B. R. Brown* v. *Spence*, 1 *Keble* 503. See *ch.* 33. But if a Perſon, that is a meer Lay-man, be admitted and inſtituted to a Benefice with Cure, and doth Adminiſter the Sacraments, marry, *&c.* theſe, and all other Spiritual Acts, performed by him during the Time he continues Parſon in Fact, are good, ſo that the Baptized by ſuch Perſon are not to be re-baptized, nor Perſons married by him to be married again, to ſatisfy the Law. *Paſch.* 42 *Eliz. B. R. Coſtard* v. *Windet*, 3 *Cro.* 775. and by *Moor* the ſame Caſe, 606.

A Prieſt's Authority.

Licence to preach.

If a Lay-man admitted, adminiſter, *&c.*

To what is before ſaid touching Ordination, *&c.* we may add the following Remarks, *viz.*

See *Nelſon's* Rights of the Clergy, p. 14 and 429.

The thirty-third Canon expreſly requires, *That no Perſon ſhall be admitted into holy Orders, except he produce a Preſentation to the Biſhop of ſome Eccleſiaſtical Living then void within his Dioceſe, and bring a Certificate that he is provided of ſome Church, or of ſome Miniſter's Place vacant, either in a Cathedral, or a Collegiate Church, or that he is a Fellow or Chaplain in ſome College, either in* Oxford *or* Cambridge, *or Maſter of Arts of five Years ſtanding in the Univerſity, and Living there at his own Charge, or unleſs the Biſhop himſelf ſhortly intends to admit him to ſome Benefice or Curacy.*

And 'tis ſaid, If a Biſhop Ordains a Clerk without a Title, he is bound to keep him till preferred to ſome Benefice. In Conformity whereto Archbiſhop *Laud* ſent Letters to all his provincial Biſhops, requiring them not to admit any Perſons into Orders, but thoſe who had a Title for their Maintenance; and in thoſe Letters declared what ſhould be a Title, *viz.*

Eccleſiaſtical Titles.

Method of Ordination.

A Preſentation to ſome Eccleſiaſtical Preferment, a Certificate that he is provided of ſome void Church, a Grant of ſome Petty Canon's Place, or the like in a College or Cathedral Church, a Fellow of ſome College in our Univerſities, or a Chaplain there, a Maſter of Arts of five Years ſtanding, or if the Biſhop who Ordains him, intends in ſome ſhort Time after to admit him to ſome Benefice or Curacy then void. But 'tis query'd, whether a Lecturer or a Chaplain to a Nobleman will fall within any of thoſe Titles?

Canon 44. *Note* alſo, by the forty-fourth Canon, No Biſhop is to admit any Perſon into Orders, who is not of his own Dioceſe, unleſs he is of one of our Univerſities, or bring Dimiſſory Letters from the Biſhop in whoſe Dioceſe he reſides.

15 El. c. 12. And by the Statute 15 *Eliz. c.* 12. **He who is to be ordained a Prieſt muſt bring a Teſtimonial from four Perſons (known to the Biſhop, to be of ſound Religion) of his Life and Doctrine**; that is as to his Manners, for the chief Things to be inquired into are, Whether the Perſon be *commendandus ſcientia & Moribus*: and the Biſhop himſelf may on his Examination be the proper Judge of his Learning, but as to his Manners he muſt be directed by the Teſtimony of other Perſons.

Form of ordaining a Prieſt. The Form now uſed in ordaining a Prieſt is thus:

After the *Veni Creator* Sung, and ſome Prayers Read, the Biſhop with ſuch Prieſts as are preſent, laying their Hands ſeverally on the new Prieſt's Head, the Biſhop Pronounces theſe Words.

Receive thou the Holy Ghoſt for the Office and Work of a Prieſt in the Church of God now committed to thee by the Impoſition of our Hands, whoſe Sins thou doſt forgive are forgiven, and whoſe Sins thou doſt retain are retained, and be thou a faithful Diſpenſer of the Word of God, and of his holy Sacraments, in the Name of the Father, and of the Holy Ghoſt. Amen.

Then the Biſhop delivers a Bible to him with theſe Words.

Take thou Authority to Preach the Word of God, and to Miniſter the Sacraments in the Congregation where thou ſhalt be lawfully appointed.

Hiſt. Refor. 2 Part. p. 145. The late learned Biſhop of *Sarum* informs us, That ſome Additions were made to this Form, after its firſt Inſtitution, by aſking the Prieſt theſe Queſtions previous to his Ordination, *viz.*

1. Whether he thinks himſelf truly called, according to the Will of God?

2. If he believes that the Holy Scriptures contain all Doctrines ſufficient for Salvation?

3. If he will inſtruct the People out of thoſe Scriptures?

4. If he will be faithful to Adminiſter thoſe Doctrines and Sacraments?

5. If he will (endeavour to) baniſh all falſe Doctrines?

6. If he will be diligent in Prayers and Reading the Scriptures, and in his Studies, laying aſide the Study of the World?

7. If he will be diligent to order himſelf and his Family according to the Doctrine of Chriſt.

8. If he will maintain and promote Quietneſs and Peace, and Love among Chriſtian People?

9. Whether he will obey his Ordinary?

To all which he was to Anſwer in the Affirmative.

CHAP.

CHAP. XV.

Preſentations, Nominations, &c.

Of Preſentations, Nominations, Collations, Election, Inſtitution and Induction; and of Donatives. Vide Chap. 20. *of Preſentations, Admiſſions,* &c.

The Ways and Means by which a Clerk may become lawfully Incumbent, &c.

IT being declared in the foregoing Chapters, what Things are to be known, and obſerved, by a Perſon that would take a Title to an Eccleſiaſtical Benefice; in order thereto, I come now to ſpeak particularly of the ſeveral Ways or Means by which ſuch Title may be taken, or by which a Perſon may make himſelf the lawful and complete Incumbent of a Church Promotion.

Are ordinary or extraordinary.

The Ways or Means, by which a Clerk may become the lawful Incumbent of a Church, are either ſuch, as that one of them muſt be obſerved by every one that will ſettle himſelf by legal Title in any Eccleſiaſtical Benefice, or ſuch as are only to be uſed to open his Way, in caſe the Clerk is ſtopped in his Proceedings by any of thoſe Means by which a Title may be had. The Ways by which a legal Title is taken, are either ordinary, or extraordinary; the ordinary Ways or Means are by Preſentation, Inſtitution, or Collation, and Induction, or by Donation, or laſtly by Election and Confirmation.

Several ordinary Ways.

1ſt, To obtain a right Preſentation.

The firſt Thing to be done then, and which is the moſt uſual Way of taking a Title, is to obtain the Preſentation of him that ought to preſent to the void Benefice, with Admiſſion, Inſtitution, and Induction thereupon. The Patron's Preſentation is the Nomination of a Clerk unto the Biſhop or Ordinary for the Time, to be by him admitted and inſtituted into the Church, or Benefice that is void. *Hughes's Abr.* Tit. *Advowſon* 132. Preſentation, Nomination and Collation, are ſometimes in Law uſed for the ſame Thing, 14 *H.* 7. 22. and yet they are commonly diſtinguiſhed; for Preſentation is an Offering of the Clerk to the Ordinary; and as is before ſaid, Nomination may be the Offering of a Clerk to him that may and ought to preſent him to the Ordinary, by reaſon of a Grant made by him that hath the Power of preſenting, obliging him thereto; and Collation is the Giving of the Church to the Clerk, and is that Act by which the Ordinary doth admit and inſtitute a Clerk to a Church, or Benefice of his own Gift, in which Caſe there is no Preſentation. Preſentation ſometimes is taken to comprehend not only Preſentation, but Admiſſion, Inſtitution and Induction alſo; as if one grant an Annuity until a Clerk be preſented to a Benefice, it ſhall not determine until Induction, which is the perfecting of the Preſentation; by *Twiſden* Juſtice; yet upon the Statute 12 *Car.* 2. for Confirmation of Miniſters, which hath a Proviſo not to Prejudice thoſe who were preſented by the King before 9 *December* 1659. it was held, that thoſe who were then preſented, although not inſtituted and inducted, were within that Proviſo. *Hill.* 16 & 17 *Car. B. R. Harris* v. *Willis*, 1 *Levinz* 156. ſame Caſe. 1 *Siderfin* 239, and 1 *Keble* 844. If Preſentation or Nomination be made

Preſentation, Nomination and Collation, ſometimes ſignify the ſame, ſometimes are diſtinguiſhed.

Preſentation largely taken.

Preſentation in Writing is as a Letter Miſſive.

Preſentation, &c. The Form thereof.

in Writing, it is not properly a Deed, but an Inſtrument in the Nature of a Letter Miſſive to the Biſhop or Ordinary, to exhibit to him a Clerk to have a Benefice voided, *Co. Litt.* 120. *a.* and it is uſually in this, or the like Form, when it is made to the Archbiſhop of *Canterbury: Reverendiſſimo in Chriſto Patri & Domino Domino* A. *Permiſſione Divina Cantuarienſi Archiepiſcopo totius Angliæ Primati & Metropolitano, ejuſve in abſentia Vicario ſuo in rebus Spiritualibus generali; aut alicuicunque in hac parte ſufficientem authoritatem habenti.* If it be made to the Archbiſhop of *York*, the Word *totius* is to be omitted: If to any other Biſhop, it muſt ſay, *Reverendo in Chriſto Patri & Domino Domino* P. *Permiſſione Divina Epiſcopo, ejuſve in abſentia Vicario ſuo in Spiritualibus generali, aut alicuicunque in hac parte ſufficientem authoritatem habenti, Prænobilis* A. B. *Baro de* C. *verus & indubitatus Patronus Rectoriæ Eccleſiæ Parochialis de* D. *ſalutem in Domino ſempiternam, ad Eccleſiam Parochialem de* D. *prædict' veſtræ Diœceſis modo per mortem naturalem* E. F. *ultimi Incumbentis ibidem vacantem, & ad meam Præſentationem pleno Jure ſpectantem, Dilectum mihi in Chriſto* G. H. *Sacræ Theologiæ Profeſſorem Paternitati veſtræ præſento, humiliter ſupplicans ut præfatum* G. H. *ad dictam Eccleſiam admittere, ipſumq; in Rectoriam ejuſdem Eccleſiæ inſtitui, & induci facere, cum ſuis Juribus & pertinentiis univerſis, cæteraque omnia & ſingula peragere & adimplere in hac parte, quæ ad veſtrum munus Epiſcopale pertinere videbantur, dignemini cum favore. In cujus rei teſtimonium, &c.* If it ſay, [*ad Rectoriam*] it is as good as if it be [*ad Eccleſiam*] *Trin.* 8 *Jac. King* v. —— 2 *Cro.* 248. And the Preſentation being made in this Form, if the Biſhop be inhibited, or the See voided, before Inſtitution is had of the immediate Biſhop, yet the Preſentation is good to the Metropolitan or other Guardian of the Spiritualties.

Damus, Concedimus, &c. in the King's Preſentment.

If the King doth grant a Preſentment by his Letters Patent by theſe Words, *Damus, Concedimus, &c.* without any Words of Preſentment, yet it ſeems, that this ſhall amount to a Preſentment, and to be a ſufficient Warrant to the Biſhop to inſtitute the Clerk preſented. 2 *Roll's Abr.* 353. *Dubitatur* 19 *E.* 3. *Quare Impedit* 60. And it is not material what Seal is put to the Preſentation; and yet it is ſaid, that a Preſentation made by the King under the Exchequer Seal is not good. *Trin.* 8 *Jac. King* v. -— 2 *Cro.* 248. However, if the King doth preſent *pleno Jure* by Letters Patent under the great Seal of *England*, to a Church, Parcel of his Duchy of *Lancaſter*, it is as good as if it had been made under the Duchy Seal. *Trin.* 8 *Jac. King* v. *Emerſton*, *Brownlow* and *Gouldſborough* 1. 162. 2 *Roll's Abr. p.* 182. *The King* v. *The Biſhop of Lincoln*, *Mich.* 11 *Jac. Moor* 874. So if it had been made under the Privy Seal without the Broad Seal, tho' I think thoſe that have Livings of the King above Value have both. *Trin.* 8 *Jac. King* v. —— 2 *Cro.* 248. The Reaſon of theſe Caſes ſeems to be, becauſe nothing is granted or given by a Preſentation, it being but a Commendation of a Clerk to the Ordinary, or a Declaration of the King's Will, and not any Intereſt, and may be made as well by the Word of the Patron only (unleſs a Corporation aggregate be Patron, for they muſt preſent under their common Seal,) 13 *H.* 8. 12 *Br. Corporation* 81. as by an Inſtrument in Writing. 19 *E.* 3. *Quare Impedit* 60. 38 *E.* 3. 3. *Trin.* 8 *Jac. King* v. —— 2 *Cro.* 248. *Co. Litt.* 120. *Dubitat' Mich.* 1649. *Canes* and *Oſby*'s Caſe, *Style p.* 156. And that not only in the Caſe of the King, but alſo of a common Perſon. *Mich.* 21 *Car.* 2. *B. R. Clerk* v. *Heath*, 1 *Siderfin* 426. 2 *Keble* 484. *Co. Litt.* 120. That is, if the Patron be in the Preſence of the Ordinary: However, the

What Seal.

That a Preſentation may be by Word only.

King may preſent to a Living by his Letter. *Mich.* 1649. *Stile* 156. 2 *E.* 1. *Rot. patentium Membrana* 5.

Admiſſion and Inſtitution.

2. Admiſſion and Inſtitution are to be ordained, and how.

The Clerk being furniſhed with a Preſentation, he is to apply himſelf to his Ordinary for Admiſſion and Inſtitution; and the Biſhop of the Dioceſe within which is the void Church, for the moſt part, is the Ordinary by whom he ought to be admitted and inſtituted; and tho' the Church is lapſed to the Metropolitan, yet if the Patron doth preſent before the Metropolitan collate his Clerk, his Preſentation may be directed to the Ordinary of the Dioceſe, who may thereupon inſtitute the Clerk preſented. *Roll's Abr.* 2. *p.* 348. *Contra*,. *Hill.* 41 *Eliz. B. R.* by *Popham.* But when the See is void, the Dean and Chapter, or other Guardian of the Spiritualties by Cuſtom have the Authority of admitting and inſtituting; or if the See being full, the Archbiſhop viſiting his inferior Biſhop doth him inhibit, during his Viſitation, (as the Uſe is) and a Church within the Dioceſe viſited doth Lapſe to the Ordinary of the Dioceſe, the Biſhop, and not the Metropolitan, ſhall have the Benefit thereof, and the Biſhop may not collate his Clerk, (becauſe by the Inhibition his Power of Juriſdiction is ſuſpended) but muſt preſent him to the Metropolitan, who ought to inſtitute him. *Trin.* 13 *Car. B. R.* between *Dodſon* and *Lynn*, agreed by the Civilians. But this Caſe being argued upon another Point, was not reſolved. *Intrat. Trin.* 11 *Car. Rot.* 446. *Roll's Abr.* 2. *p.* 357. Admiſſion and Inſtitution may alſo be made by a Commiſſary, having a Deputation to that Purpoſe, 3 *E.* 3. 5, *&* 6. and may be by another Perſon than the Ordinary. *Roll's* 2 *Rep.* 100.

Peculiars.

For there are many Peculiars, wherein neither the Archbiſhop or the Biſhop are to make Inſtitution, *&c.* but the Proprietor of that Peculiar, in which there is this Difference in ſuch Peculiars; that if it belong to a Dean and Chapter, or other Eccleſiaſtical Body, there, although they have the Right of making all Inſtitutions, *&c.* within the Peculiar, yet Inſtitution made in ſuch Caſe by the Metropolitan is not void, but voidable only, for that the Dean and Chapter being an Eccleſiaſtical Body, ſhall not be intended free from ordinary Juriſdiction and Viſitation, therefore the Archbiſhop ſhall be ſuppoſed to have a concurrent Juriſdiction there; but where Peculiars are in Lay-Hands, which are free from all ordinary Juriſdiction, in ſuch caſe Inſtitution by the Ordinary or Archbiſhop is meerly null and void. *Hill.* 36 *&* 37 *Car.* 2. *C. B. Wrighton* v. *Brown*, 3 *Levinz* 211.

Examination in what Time.

The Ordinary, whoever he be, that doth admit the Clerk, is firſt to examine him, that he may be able to judge of his Ability to ſerve the Cure of the Church to which he is preſented. 14 *H.* 7. 22. 4 *E.* 3. *Quare Impedit* 128. *Doctor and Student*, *c.* 26. *l.* 2. But the Ordinary is not bound inſtantly, upon Requeſt made, to examine the Preſentee, *&c.* but may appoint a convenient Time and Place for the Clerk to attend him to be examined. 15 *H.* 7. 6, 7. 14 *H.* 7. 22. And by the Canon made 1 *Jac. c.* 95. it is Ordained, *That although the Ordinary in former Times had two Months given him to inquire, and inform himſelf of the Sufficiency and Quality of every Clerk, the Ordinary ſhall have but twenty-eight Days only for that purpoſe.* *Roll's Abr.* 2. *p.* 355. And the Common Law doth allow him Time to be adviſed. 14 *H.* 7. 22. 15 *H.* 7. 6, 7.

The thirty-nine Articles to be ſubſcribed.

After the Clerk is examined, (if he be to be admitted unto a Benefice with Cure) he is to ſubſcribe the Articles of Religion, commonly called the Thirty-nine Articles, agreed upon in Convocation in the Year 1562. And this Subſcription muſt be made in the Preſence of the Ordinary, (and not

Admiſſion and Inſtitution.

not of his Chaplain, or Secretary only) and that alſo before the Clerk is admitted to the Benefice to which he is preſented. *Stat.* 13 *Eliz.* 12. And the Ordinary is not bound to offer the Articles to the Clerk to be by him ſubſcribed, and to require him to do it, but the Clerk is himſelf to offer to ſubſcribe them; and in this Caſe, upon the Clerk's Neglect to ſubſcribe the Articles, the Church remains void, as never full of ſuch Clerk, and no Sentence of Deprivation is neceſſary, by reaſon that he never was Incumbent, but the Admiſſion and Inſtitution are void; but otherwiſe it is, upon Neglect, or refuſing to read the Articles. *Trin.* 24 *Eliz. The Queen* v. *Biſhop of Lincoln* and *Cock*, 1 *Anderſon*, Caſe 136.

Stat. 14 *Car.* 2. *c.* 4. *Memorand.* as to the 36th Article for Conſecration of Biſhops, &c.

And in ſubſcribing unto the ſaid Articles, the Clerk ſhould remember that it hath been enacted that —— Whereas the ſix and thirtieth Article of the Nine and thirty Articles aforeſaid, is in theſe Words following: (That the Book of Conſecration of Archbiſhops, and Biſhops, and ordaining of Prieſts and Deacons lately ſet forth in the Time of King Edward the Sixth, and confirmed at the ſame Time by Authority of Parliament, doth contain all Things neceſſary to ſuch Conſecration and Ordaining, neither hath it any Thing that of it ſelf is ſuperſtitious and ungodly; and therefore, whoſoever are Conſecrated, or Ordered, according to the Rites of that Book, ſince the ſecond Year of the aforenamed King Edward, unto this Time, or hereafter, ſhall be Conſecrated or Ordered according to the ſame Rites; we decree all ſuch to be rightly, orderly and lawfully Conſecrated and Ordered): It is alſo enacted, That all Subſcriptions hereafter to be had or made unto the ſaid Articles, by any Deacon, Prieſt or Eccleſiaſtical Perſon or other Perſon whatſoever, who by any Law now in force is required to ſubſcribe unto the ſaid Articles, ſhall be conſtrued, and taken to extend, and ſhall be applied (for and touching the ſaid ſix and thirtieth Article) unto the Book, containing the Form and Manner of Making, Ordaining and Conſecrating of Biſhops, Prieſts and Deacons, in this Act mentioned, in ſuch Sort and Manner, as the ſame did heretofore extend unto the Book ſet forth in the Time of King Edward the Sixth, mentioned in the ſaid Six and thirtieth Article; any Thing in the ſaid Article, or in any Statute, Act or Canon heretofore had or made to the contrary thereof, in any wiſe notwithſtanding.

Alſo every Perſon, before his or their reſpective Admiſſion to be Incumbent, or have Poſſeſſion of any Deanery, Canonry, or Prebend, in any Cathedral or Collegiate Church, Maſterſhip, or other Headſhip, Fellowſhip, Chaplain's Place, or Tutor's Place, of or in any College, Hall, Houſe of Learning, or Hoſpital, publick Profeſſor's or Reader's Place in either of the two Univerſities, or in any College elſewhere, or to any Parſonage, Vicarage, or any other Eccleſiaſtical Dignity or Promotion, Curate's Place, Lecturer's Place, publick or private School, or to teach any Youth in any Houſe, or private Family, as a Tutor, or Schoolmaſter, ought before his reſpective Archbiſhop, Biſhop, Ordinary of the Dioceſe, to have ſubſcribed all the Declaration, or Acknowledgment following, only the Maſters, Heads, Fellows, Chaplains, and Tutors of, or in any College, Hall, or Houſe of Learning, and every publick Profeſſor and Reader in either of the Univerſities, are to ſubſcribe the ſame before the Vice-Chancellor of the reſpective Univerſity, or his Deputy. *Scilicet*—*I* A. B. *do declare, That it is not lawful upon any Pretence whatſoever, to take up Arms againſt the King; and that I do abhor that traiterous Poſition, of taking Arms by his Authority againſt his*

Declaration of Conformity to be ſubſcribed.

Perſon, or againſt thoſe that are commiſſionated by him; and that I will conform to the Liturgy of the Church of England, *as it is now by Law eſtabliſhed: And I do declare, that I do hold, there lies no Obligation upon me, or any other Perſon, from the Oath, commonly called,* The Solemn League and Covenant, *to endeavour any Change, or Alteration of Government, either in Church or State, and that the ſame was in it ſelf an unlawful Oath, and impoſed upon the Subjects of this Realm, againſt the known Laws and Liberties of this Kingdom.* And after ſuch Subſcription made, every Parſon, Vicar, Curate, or Lecturer, ſhall procure a Certificate, under the Hand and Seal of the reſpective Archbiſhop, Biſhop, or Ordinary of the Dioceſe (who are bound to make and deliver the ſame) teſtifying as much, to the end the ſame may be read in his Pariſh-Church. But after the Five and Twentieth Day of *March*, which ſhall be in the Year of our Lord God 1682. there ſhall be omitted in the ſaid Declaration, or Acknowledgment, ſo to be ſubſcribed, and read, theſe Words following, *Scilicet*——*And I do declare, That I do hold there lies no Obligation on me, or any other Perſon, from the Oath commonly called,* The Solemn League and Covenant, *to endeavour any Change or Alteration of Government, either in Church, or State, and that the ſame was in itſelf an unlawful Oath, and impoſed upon the Subjects of this Realm, againſt the known Laws and Liberties of this Kingdom.* So as none of the Perſons aforeſaid ſhall from henceforth be at all obliged to ſubſcribe, or read that Part of the ſaid Declaration, or Acknowledgment, *Stat.* 14 *Car.* 2. *c.* 4. And by the Statute, 1 *W. & M. ſeſſ.* 1. *c.* 8. ſo much of this Declaration, as is expreſſed in theſe Words, (*viz.*) *I.* A. B. *declare, That it is not lawful upon any Pretence whatſoever, to take up Arms againſt the King; and that I do abhor that traiterous Poſition, of taking Arms by his Authority, againſt his Perſon, or againſt thoſe that are commiſſioned by him, ſhall not from henceforth be required or enjoined, nor any Perſon ſuffer any Forfeiture, Penalty, or Loſs, by the not ſubſcribing the ſame.* So that at this Day, no Part of this Declaration, or Acknowledgment, is to be ſubſcribed unto, except this only Part of it, (*viz.*) *That I will conform to the Liturgy of the Church of* England, *as it is now by Law eſtabliſhed.*

Oaths, &c. on Admiſſion.

Certificate to be had.

Words to be omitted.

Other Words to be omitted.

Likewiſe every Perſon and Perſons, that at any Time ſhall be preferred, promoted, or collated to any Archbiſhoprick, or Biſhoprick, or to any other Spiritual or Eccleſiaſtical Benefice, Promotion, Dignity, Office, or Miniſtery, within this Realm, or any other the King's Dominions, before he or they ſhall take upon him or them to receive, uſe, exerciſe, ſupply, or occupy any ſuch Archbiſhoprick, Biſhoprick, Promotion, Dignity, Office, or Miniſtry, ſhall make, take, and receive the Oaths of Supremacy and Allegiance, before ſuch Perſons as have, or ſhall have Authority to admit any ſuch Perſon, to any ſuch Office, or Miniſtry; or elſe before ſuch Perſon, or Perſons, as by Commiſſion under the Great Seal of *England* ſhall be named, aſſigned or appointed, to adminiſter the ſaid Oaths. And if any ſuch Perſon, or Perſons, as at any Time hereafter ſhall be promoted, preferred, or collated to any ſuch Promotion, Spiritual, or Eccleſiaſtical Benefice, Office, or Miniſtry, ſhall and do peremptorily and obſtinately refuſe to take the ſame Oath ſo to him to be offered, that then he or they ſo refuſing ſhall preſently be adjudged diſabled in the Law to receive, take, or have the ſame Promotion, Spiritual or Eccleſiaſtical, within this Realm, or any other the King's Dominions, to all Intents, Conſtructions, and Purpoſes. *Stat.* 1 *Eliz. c.* 1. and *Stat.* 1 *W. & M. c.* 8. See the Oaths before, *Chap.* 14.

Oaths of Supremacy and Allegiance.

Oaths, &c. on Admiſſion.

Oath againſt Simony.

It is alſo uſual for the Ordinary, that doth admit and inſtitute, to require of the Preſentee to take this Oath as followeth: (*I* N. N. *do ſwear, That I have made no Simoniacal Contract, Payment, or Promiſe, directly or indirectly, by myſelf, or by any other, to my Knowledge, or with my Conſent, to any Perſon or Perſons whatſoever, for or concerning the procuring, and obtaining of this Eccleſiaſtical Dignity, Place, Preferment, Office, or Living,* (reſpectively, and particularly naming the ſame whereinto he is to be admitted, inſtituted, collated, inſtalled, or confirmed,) *nor will at any Time hereafter perform or ſatisfy any ſuch kind of Payment, Contract, or Promiſe, made by any other, without my Knowledge or Conſent:* So help me God, through Jeſus Chriſt. This Oath is by the Fortieth Canon made in the Year—*viz. To avoid the deteſtable Sin of Simony, becauſe Buying and Selling of Spiritual and Eccleſiaſtical Functions, Offices, Promotions, Dignities, and Livings, is execrable before God; therefore the Archbiſhop, and all and every Biſhop, or Biſhops, or any other Perſon, or Perſons, having Authority to admit, inſtitute, collate, inſtal, or to confirm the Election of any Archbiſhop, Biſhop, or other Perſon, or Perſons, to any Spiritual or Eccleſiaſtical Function, Dignity, Promotion, Title, Office, Juriſdiction, Place, or Benefice with Cure, or without Cure, or to any Eccleſiaſtical Living whatſoever, ſhall before every ſuch Admiſſion, Inſtitution, Collation, Inſtallation, or Confirmation of Election, reſpectively adminiſter to every Perſon hereafter to be admitted, inſtituted, collated, inſtalled, or confirmed in or to any Archbiſhoprick, Biſhoprick, or other Spiritual or Eccleſiaſtical Function, Dignity, Promotion, Title, Office, Juriſdiction, Place, or Benefice with Cure, or without Cure, or in any Eccleſiaſtical Living whatſoever.* But ſee *Stat.* 13 *Car.* 2. *c.* 12.——*That it ſhall not be lawful for any Archbiſhop, Biſhop, Vicar-General, Chancellor, Commiſſary, or any other Spiritual or Eccleſiaſtical Judge, Officer or Miniſter, or any other Perſon, having or exerciſing Spiritual or Eccleſiaſtical Juriſdiction, to tender or Adminiſter unto any Perſon whatſoever, the Oath, uſually called the Oath* Ex Officio, *or any other Oath, whereby ſuch Perſon, to whom the ſame is tendered or adminiſtred, may be charged, or compelled, to confeſs, or accuſe, or to purge him or herſelf, of any criminal Matter or Thing, whereby he, or ſhe, may be liable to any Cenſure or Puniſhment; any thing in this Statute, or any other Law, Cuſtom, or Uſage heretofore to the contrary hereof, in any wiſe notwithſtanding.* And yet probably (although the Words of this Statute ſeem to take away the Uſe of the aforeſaid Oath) its Makers had no Conſideration of it, in paſſing thereof; therefore (*Quære.*)

By what Canon this Oath.

Stat. 13 *Car.* 2. *c.* 12. §. 4. The *Ex Officio*

Oath aboliſhed.

Admiſſion and Inſtitution what.

If the Biſhop by Examination doth find the Clerk capable of the Benefice, after he hath ſeen other Matters performed in him, which are required of him, in order thereunto, he is to admit and inſtitute him: Admiſſion is nothing elſe but the Ordinary's Declaration, that he doth approve of the Preſentee as a fit Perſon to ſerve the Cure of the Church, to which he is preſented; and Inſtitution is that Act by which he doth commit to him the Cure thereof.

It is not of Neceſſity, that the Examination, Admiſſion, or Inſtitution be made by the Ordinary within the Dioceſe in which the Church is; for the Juriſdiction of the Ordinary, as to ſuch Matters, is not local, but follows the Perſon of the Ordinary where-ever he goes. *Hill.* 9 *Car. Cort* v. *Biſhop of St. Davids, Jones* 331. *Owen* and *Prichard*'s Caſe, 1 *Cro.* 341. *Hutton*'s Caſe, *Hobart* 15. *Parſons Counſellor* 8, 9. 21 *E.* 4. 14. The Clerk being inſtituted, the Inſtitution is good without any After-Act, yet the Ordinary is wont to make Letters Teſtimonial thereof;

Letters Teſtimonial.

but

but what Seal the Ordinary doth make uſe of in that Caſe is not material. *Hill.* 9 *Car. Cort* v. *Biſhop of St. Davids*, *Jones* 331. *Owen* and *Prichard*'s Caſe, 1 *Cro.* 341. Induction, &c.

After Inſtitution is had, Induction muſt be obtained, which is the putting the Clerk in Poſſeſſion of the Church, and is that Act by which he is made Complete Incumbent: And therefore the Biſhop, or other Ordinary inſtituting, doth make a Mandate to that Perſon who hath the Right, and upon whom doth lie the Duty of inducting, thereby requiring him to induct the inſtituted Clerk into his Benefice. 38 *E.* 3. 3. *b. Parſons Counſellor* 8, 9. But ordinarily, the Archdeacon is the Perſon to whom the Biſhop is to direct his Mandate, as being he who ought to induct, or give Poſſeſſion unto the Clerks inſtituted to any Churches within his Archdeaconry. 38 *E.* 3. 3. *b.* But the Biſhop may direct his Mandate to ſuch other Clergymen as he pleaſes to make Induction. *Parſons Counſellor* 8. And by Preſcription, or Compoſition, others as well as Archdeacons may make Inductions; for by Preſcription the Dean and Chapter of *Litchfild* do make Induction, and ſo do the Dean and Chapter of St. *Paul*'s. 11 *H.* 4. 2. And if Induction be made by the Biſhop, when it doth appertain to the Dean and Chapter by Preſcription, the Induction is ſaid to be void, 11 *H.* 4. 9. but the contrary is held, *Fitz. Tit. Quare Impedit* 162. that in ſuch Caſe it is only voidable, and ſo reſolved, *Hill.* 36, 37 *Car.* 2. *C. B.* in the Caſe of *Wrighton* v. *Brown*, 3 *Levinz* 211. See *Hobart* 15. And it is ſaid to be granted, that where a Dean and Chapter have uſed to make Induction to a Prebend, upon Preſentation by the Biſhop, or others; yet if the Biſhop doth induct the Prebend, it is good at the Common Law, for that he is Officer and Ordinary immediate to the Court, and the Court ſhall not take Conuſance of the peculiar Juriſdiction. 11 *H.* 4. 7. *Preſentation al Egliſe* 13. It is ſaid, that an Induction made by the Patron is void. 11 *H.* 4. 10. *Parſons Counſellor* 8. But this, I ſuppoſe, is to be underſtood, when it is done of his own Authority, without ſpecial Privilege: For I doubt not, but that a Biſhop may give Induction as well as Inſtitution to a Benefice of his own Gift, where the Right of Induction to a Benefice within his own Dioceſe is in him; or however, that the Archdeacon may induct to a Benefice within his Archdeaconry, although he be Patron thereof; nevertheleſs, the Rule is *Modus & Conventio vincunt legem*; and therefore, though *De Jure Communi* neither Biſhop, nor Archdeacon, may induct a Clerk to their Benefices of which they are Patrons, yet by Preſcription, or Compoſition, their Induction in ſuch Caſe muſt be good. And accordingly, though the Biſhop of *Chicheſter* doth admit the Dean of the exempt Juriſdiction of *Battel* within that Dioceſe, and doth commit to him the Cure and Juriſdiction of that Church, yet the Patron thereof is to inſtitute and induct the Dean, and the Patrons accordingly have given the Deans Inſtitution and Induction for ſome Hundreds of Years, and without Queſtion ſuch Inſtitution and Induction is good; but this Deanery was originally given to the Incumbent as a Donative only by the Patron, and the Biſhop admits or approves of the Patron's Preſentee, and commits to him the Cure and Juriſdiction by Compoſition only.

3. Induction and Poſſeſſion muſt be obtained.

Preſcription.

Peculiar Juriſdiction.

If by the Patron.

By Preſcription and Compoſition.

If the King doth grant one of his free Chapels, the Grantee ſhall be put in Poſſeſſion by the Sheriff of the County, and not by the Ordinary of the Place. 14 *H.* 4. 11. *b.* And in ſome Places a Prebend ſhall have Poſſeſſion without Induction, as at *Weſtminſter*, where the King makes Collation by his Letters Patent, and thereupon the Party enters

When by the Sheriff.

Induction, &c.

enters upon the Prebend without other Induction, and good; and in ſome Places, the Biſhop makes the Induction, in ſome Places others make it, and the Uſage generally ſhall hold Place. 11 *H.* 4. 7. *Preſentation al Egliſe* 13. For the moſt part the Archdeacon doth not give Induction in his proper Perſon, but ſends a Mandate for the Induction of the Clerk; which if it be made *Univerſis & ſingulis Rectoribus, Vicariis, Clericis & literatis infra Archidiaconatum meum ubicunque conſtitutis*, and a Miniſter, or Preacher, who is not reſident within that Archdeaconry, doth upon ſuch Mandate make the Induction, the Induction is good; and the Opinion of four Doctors of Law was ſhewed to the Court accordingly. *Trin.* 7 *Jac. Chriſtopher Dean*'s Caſe, *Noy* 134.

Archdeacon's Mandate.

Though by Induction the Church is compleat and full.

By Admiſſion and Inſtitution alone the Church is full againſt all Perſons but the King; yea, and againſt the King too, (as 'tis ſaid by ſome Books) if he claim from a common Perſon, or that the Right of preſenting to the Church be not truly in him. 13 *Jac. Hitching* and *Glover*'s Caſe, *Roll's* 1 *Rep.* 191 and 227, and thereby the Clerk hath Authority, and is obliged to attend the Cure of Souls belonging thereto. 22 *H.* 6. 27. 44 *E.* 3. 3. 11 *H.* 4. 9. 33 *H.* 6. 13. 38 *E.* 3. 4. 33 *H.* 6. 24. 21 *E.* 4. 34. *b.* 13 *Jac. Hitching* and *Glover*, 1 *Roll's Rep.* 227. *Hill.* 14 & 15 *Jac. Hutching* and *Glover*, 2 *Cro.* 463. *Mich.* 15 *Jac. Rone*'s Caſe, *Popham* 133. *Mich.* 19 & 20 *Eliz. Dyer* 360. 4 *Eliz. Dyer* 217. 62. 6 *Co.* 44. 49. *Boſwell*'s Caſe, 4 *Co.* 79. *b.* 7 *Co.* 26. *Dav.* 82. *b.* Alſo he, that is inſtituted, may enter into the Glebe and take the Tithes before Induction, and hath Right to have them againſt any Stranger; by *Coke* in *Hitching* and *Glover*'s Caſe, *Paſch.* 13 *Jac. Roll's* 1 *Rep.* 227. And yet before Induction he hath not, nor is ſeiſed of the Temporalties of the Church, ſo that he may grant or ſue for any of them. 22 *H.* 6. 27. 38 *E.* 3. 4. *Trin.* 20 *Eliz. Hare* v. *Bickly*, *Plowden* 528. But after Induction is had, the Church is full as well againſt the King, as againſt any other Perſon. *Hill.* 11 *Jac. Needler* v. *Winton* and *Needler*, 1 *Brownlow* and *Gouldſborough* 163. 38 *E.* 3. 4. 13 *Jac. Hitching* and *Glover*'s Caſe, 1 *Roll's Rep.* 227. 4 *Eliz. Dyer* 217. 33 *H.* 6. 24. 6 *Co.* 49. *b.* 7 *Co.* 26.

And the Temporalties, as Tithes, Glebe, and Oblations, are actually inveſted in him, as is ſhewed elſewhere.

Yet ſome other Things muſt afterwards be punctually performed. *Stat.* 13 & 14 *Car.* 2. *c.* 4. *ſect.* 2, 3, 4, &c.

Tho' the Clerk be ſaid to be Incumbent to all Purpoſes, by due Admiſſion, Inſtitution, and Induction; yet for the perfecting, or at leaſt continuing his Title, other Things remain to be afterwards punctually performed by him at his Peril; for it hath been enacted 13 & 14 *Car.* 2. **That every Perſon that ſhall hereafter be preſented or collated, or put into any Eccleſiaſtical Benefice or Promotion within this Realm of** England, **Dominion of** Wales, **or Town of** Berwick **upon** Tweed, **ſhall in the Church, Chapel, or Place of publick Worſhip, belonging to his ſaid Benefice, or Promotion, within two Months next after that he ſhall be in the actual Poſſeſſion of the ſaid Eccleſiaſtical Benefice, or Promotion, without ſome lawful Impediment to be allowed and approved by the Ordinary of the Place, hinder, and that within one Month after ſuch Impediment removed, upon ſome Lord's Day, openly, publickly, and ſolemnly read the Morning and Evening Prayers appointed to be read by and according to the ſaid Book of Common Prayer, at the Times thereby appointed, and after ſuch Reading thereof, ſhall openly, and publickly, before the Congregation there aſſembled, declare his unfeigned Aſſent and Conſent unto all Things therein contained and preſcribed, ac-**

He muſt read the Morning and Evening Prayers.

cording to this Form of Words, and no other:——*I* A. B. *do here declare my unfeigned Aſſent and Conſent to all and every thing contained and preſcribed in and by the Book intitled, The Book of Common Prayer, and Adminiſtration of the Sacraments, and other Rites and Ceremonies of the Church, according to the Uſe of the Church of* England; *together with the Pſalter, or Pſalms of* David, *pointed as they are to be ſung or ſaid in Churches; and the Form or Manner of Making, Ordaining and Conſecrating of Biſhops, Prieſts and Deacons.* Induction, &c.

Alſo every Parſon and Vicar muſt publickly and openly read the aforeſaid Certificate of his declaring, that he will conform to the Liturgy of the Church of *England*, as it is now by Law eſtabliſhed, mentioned before, together with the Declaration, or Acknowledgment itſelf, concerning which the Certificate is made of his Subſcribing thereto, upon ſome Lord's Day within three Months then next following, in his Pariſh Church where he is to officiate, in the Preſence of the Congregation here aſſembled, in the Time of Divine Service. *Stat.* 14 *Car.* 2. 4. Muſt read his Certificate of conforming, &c.

And Note, That although the aforeſaid Certificate, to be had under the Hand and Seal of the Biſhop, ſhould contain the very Words of the Declaration, or Acknowledgment, to be read together with it; yet it may be a Queſtion, Whether by only reading ſuch Certificate, which doth contain the Declaration as a Part thereof, be all that the Statute of 14 *Car.* 2. 4. doth require in this Caſe? Or, Whether after the Certificate is read, that doth contain the Declaration, or Acknowledgment, and ſo is read with it, the Parſon, or Vicar, be not alſo obliged again to read the Declaration, or Acknowledgment apart, thereby making a Declaration of the Contents thereof at that Time? And if the Deſign of the Act be, that the Parſon, or Vicar, ſhould only inform the People, what he had ſubſcribed before the Biſhop, then it may be ſufficient to read it only as a Part of the Certificate; but if it be the Meaning of that Law, as I conceive it is, that he ſhould make a Verbal Declaration, or Acknowledgment, in the Preſence of the People of that which he hath ſubſcribed before the Biſhop, (as in the Caſe of the Thirty-Nine Articles,) to read the Form of the Declaration in the Certificate as a Part thereof, is no making of any Verbal Declaration; and therefore, that it ought to be read again alone, if that be the Meaning of the Statute; however, it is moſt ſafe ſo to do. And alſo to read again the Declaration apart.

And it is alſo enacted, by 13 *Eliz. c.* 12. **That every Perſon hereafter to be admitted to a Benefice with Cure, except that within two Months after his Induction, he doth publickly read the Thirty-Nine Articles of Religion, agreed upon by the Convocation** Anno Domini 1592. **in the ſame Church where he ſhall have Cure, in the Time of Common Prayer there, with Declaration of his unfeigned Aſſent thereto, ſhall be upon ſuch Default,** ipſo facto, **deprived.** The two Months herein mentioned are to be accounted by Twenty-Eight Days to the Month, therefore one inducted the 5th of *September* read the Articles the 5th of *November*. This was held not to be ſufficient reading within two Months according to this Statute. *Paſch.* 15 *Car.* 2. *B. R. Brown* v. *Spence*, 1 *Lev. Rep.* 101. And this Declaration of unfeigned Aſſent muſt be abſolute; for if he ſhould add, ſo far forth as they are agreeable to the Word of God, or the like, his Declaration of Aſſent is not what the Law doth require. *Mich.* 32 & 34 *Eliz. Smith* v. *Clerke*, 3 *Cro.* 252. 4 *Inſt.* 324. In the Caſe of *Brown* v. *Spence*, *Paſch.* 15 *Car.* 2. *B. R.* 1 *Keb.* 502, it was held *per Cur.* *Stat.* 13 *Eliz. c.* 12. *ſect.* 1. To read publickly the 39 Articles of Religion, with Declaration of his unfeigned Aſſent thereunto. See 4 *Inſt.* 123. *Cro. El.* 252, 511, 679. *Hob.* 168. *Dyer* 377. 6 *Co.* 29.

39 Articles. At what Place.

that the Reading the Thirty-Nine Articles in the Church Porch, was ſufficient (the Divine Service being read there alſo) by reaſon of the Denial of the Key of the Church. But it is made a *Quære*, Whether Reading the ſaid Thirty-Nine Articles at a reputative Hamlet Church, belonging to the principal Church being kept ſhut, that the Clerk cannot enter thereinto, be a ſufficient Reading to ſatisfy the Statute; and as the Caſe is reported 1 *Lev. Rep.* 101. it may be held, that it was ſufficient Reading.

In Time of Common Prayer.

And note that it is ſaid, That the aforeſaid Certificate, together with the Declaration, or Acknowledgment, and alſo the Thirty-Nine Articles, ſhall be read, and the Aſſent thereto given, in Time of Common Prayer; and that therefore theſe are not to be neglected, until Divine Service, or Common Prayer is ended.

The Articles of Religion to be ſubſcribed before Admiſſion, and to be read, *&c.* in Time of Divine Service, are as followeth:

I. Of Faith in the Holy Trinity.

The 39 Articles.

THere is but One living and true God Everlaſting; without Body, Parts, or Paſſions; of infinite Power, Wiſdom, and Goodneſs; the Maker and Preſerver of all Things, both viſible and inviſible. And in Unity of this Godhead there be Three Perſons, of One Subſtance, Power, and Eternity; the Father, the Son, and the Holy Ghoſt.

II. Of the Word or Son of God, which was made very Man.

THE Son, which is the Word of the Father, begotten from everlaſting of the Father, the very and eternal God of one Subſtance with the Father, took Man's Nature in the Womb of the bleſſed Virgin, of her Subſtance: So that the Two whole and perfect Natures, that is to ſay, the Godhead and Manhood, were joined together in one Perſon, never to be divided, whereof is one Chriſt, very God and very Man, who truly ſuffered, was crucified, dead and buried, to reconcile his Father to us, and to be a Sacrifice not only for original Guilt, but alſo for actual Sins of Men.

III. Of the going down of Chriſt into Hell.

AS Chriſt died for us, and was buried; ſo alſo is it to be believed, that he went down into Hell.

IV. Of the Reſurrection of Chriſt.

CHriſt did truly riſe again from Death, and took again his Body with Fleſh, Bones, and all Things appertaining to the Perfection of Man's Nature, wherewith he aſcended in Heaven, and there ſitteth, until he return to judge all Men at the laſt Day.

V. Of the Holy Ghoſt.

THE Holy Ghoſt proceeding from the Father and the Son, is of one Subſtance, Majeſty, and Glory with the Father and the Son, very and eternal God.

39 Articles, &c.

VI. Of the Sufficiency of the Holy Scriptures for Salvation.

HOly Scripture containeth all Things neceſſary to Salvation: So that whatſoever is not read therein, nor may be proved thereby, is not to be required of any Man, that it ſhould be believed as an Article of the Faith, or be thought requiſite or neceſſary to Salvation. In the Name of the Holy Scriptures, we do underſtand thoſe Canonical Books of the Old and New Teſtament, of whoſe Authority was never any Doubt in the Church.

Of the Names and Number of the Canonical Books.

GEneſis.
Exodus.
Leveticus.
Numbers.
Deuteronomy.
Joſhua.
Judges.
Ruth.
The I. Book of Samuel.
The II. Book of Samuel.
The I. Book of Kings.
The II. Book of Kings.
The I. Book of Chronicles.
The II. Book of Chronicles.
The I. Book of Eſdras.
The II. Book of Eſdras.
The Book of Eſther.
The Book of Job.
The Pſalms.
The Proverbs.
Eccleſiaſtes.
The Song of Solomon.
The four greater Prophets.
The twelve leſſer Prophets.

And the other Books (*as* Hierome *ſaith*) *the Church doth read for Example of Life, and Inſtruction of Manners; but yet doth it not apply them to eſtabliſh any Doctrine; ſuch are theſe following:*

THE III. Book of Eſdras.
The IV. Book of Eſdras.
The Book of Tobias.
The Book of Judith.
The reſt of the Book of Eſther.
The Book of Wiſdom.
Jeſus the Son of Sirach.
Baruch the Prophet.
The Song of the Three Children.
The Story of Suſanna.
Of Bell and the Dragon.
The Prayer of Manaſſes.
The I. Book of Maccabees.
The II. Book of Maccabees.

All the Books of the New Teſtament, as they are commonly received, we do receive and account them Canonical.

VII. Of the Old Teſtament.

THE Old Teſtament is not contrary to the New: For both in the Old and New Teſtament, everlaſting Life is offered to Mankind by Chriſt, who is the only Mediator between GOD and Man, being both GOD and Man. Wherefore they are not to be heard, which feign that the old Fathers did look only for tranſitory Promiſes. Although the Law given from God by Moſes, *as touching Ceremonies and Rites, do not bind Chriſtian Men, nor the civil Precepts thereof ought of Neceſſity to be received in any Commonwealth: Yet notwithſtanding, no Chriſtian Man whatſoever is free from the Obedience of the Commandments which are called Moral.*

39 Articles.

VIII. Of the Three Creeds.

THE Three Creeds, Nice *Creed,* Athanasius *Creed, and that which is commonly called the Apostles Creed, ought thoroughly to be received and believed: For they may be proved by most certain Warrants of the Holy Scripture.*

IX. Of Original Birth or Sin.

ORiginal Sin standeth not in the following of Adam (*as the* Pelagians *do vainly talk*), *but it is the Fault and Corruption of the Nature of every Man, that naturally is ingendred of the Off-spring of* Adam, *whereby Man is very far gone from original Righteousness, and is of his own Nature inclined to Evil, so that the Flesh lusteth always contrary to the Spirit; and therefore in every Person born into this World, it deserveth God's Wrath and Damnation. And this Infection of Nature doth remain; yea, in them that are regenerated, whereby the Lust of the Flesh, called in Greek,* φρόνημα σαρκὸς, *which some do expound the Wisdom, some Sensuality, some the Affection, some the Desire of the Flesh, is not subject to the Law of God. And although there is no Condemnation for them that believe and are baptized, yet the Apostle doth confess, That Concupiscence and Lust hath of itself the Nature of Sin.*

X. Of Free-Will.

THE Condition of Man after the Fall of Adam *is such, That he cannot turn and prepare himself by his own natural Strength and good Works, to Faith and Calling upon God: Wherefore we have no Power to do good Works pleasant and acceptable to God, without the Grace of God by Christ preventing us, that we may have a good Will, and working with us when we have that good Will.*

XI. Of the Justification of Man.

WE are accounted righteous before God, only for the Merit of our Lord and Saviour Jesus Christ by Faith, and not for our own Works, or Deservings. Wherefore, that we are justified by Faith only, is a most wholsome Doctrine, and very full of Comfort, as more largely is expressed in the Homily of Justification.

XII. Of Good Works.

ALbeit that good Works, which are the Fruits of Faith, and follow after Justification, cannot put away our Sins, and endure the Severity of God's Judgment; yet are they pleasing and acceptable to God in Christ, and do spring out necessarily of a true and lively Faith, insomuch that by them a lively Faith may be as evidently known, as a Tree discerned by the Fruit.

XIII. Of Works before Justification.

WOrks done before the Grace of Christ, and the Inspiration of his Spirit, are not pleasant to God, forasmuch as they spring not of Faith in Jesus Christ, neither do they make Men meet to receive Grace, or

(as the School Authors say) deserve Grace of Congruity: Yea, rather for that they are not done as God hath willed and commanded them to be done, we doubt not but they have the Nature of Sin. 39 Articles.

XIV. Of Works of Supererogation.

VOluntary Works besides, over and above God's Commandments, which they call Works of Supererogation, cannot be taught without Arrogancy and Impiety; for by them Men do declare, That they do not only render unto God as much as they are bound to do, but that they do more for his Sake, than of bounden Duty is required: Whereas Christ saith plainly, When ye have done all that are commanded to you, say, We are unprofitable Servants.

XV. Of Christ alone without Sin.

CHrist, in the Truth of our Nature, was made like unto us in all Things, (Sin only except) from which he was clearly void, both in his Flesh, and in Spirit. He came to be a Lamb without Spot, who by Sacrifice of himself once made, should take away the Sins of the Word: And Sin (as St. John *saith) was not in him. But all we the rest (although baptized, and born again in Christ) yet offend in many Things; and if we say we have no Sin, we deceive ourselves and the Truth is not in us.*

XVI. Of Sin after Baptism.

NOT every deadly Sin willingly committed after Baptism, is Sin against the Holy Ghost, and unpardonable. Wherefore the Grant of Repentance is not to be denied to such as fall into Sin after Baptism. After we have received the Holy Ghost, we may depart from Grace given, and fall into Sin, and by the Grace of God (we may) arise again, and amend our Lives. And therefore they are to be condemned, which say they can no more sin as long as they live here, or deny the Place of Forgiveness to such as truly repent.

XVII. Of Predestination and Election.

PRedestination to Life, is the Everlasting Purpose of God, whereby (before the Foundations of the World were laid) he hath constantly decreed by his Counsel, secret to us, to deliver from Curse and Damnation, those whom he hath chosen in Christ out of Mankind, and to bring them by Christ to everlasting Salvation, as Vessels made to Honour. Wherefore they which be endued with so excellent a Benefit of God, be called according to God's Purpose by his Spirit working in due Season: They thro' Grace obey the Calling: They be justified freely: They be made Sons of God by Adoption: They be made like the Image of his only begotten Son Jesus Christ: They walk religiously in good Works, and at length by God's Mercy they attain to everlasting Felicity.

As the Godly Consideration of Predestination and our Election in Christ, is full of sweet, pleasant, and unspeakable Comfort to Godly Persons, and such as feel in themselves the working of the Spirit of Christ, mortifying the Works of the Flesh, and their earthly Members, and drawing up their Mind to high and heavenly Things, as well because it doth greatly establish and confirm their Faith of eternal Salvation, to be enjoyed through Christ, as

39 Articles. *becauſe it doth fervently kindle their Love towards God: So, for curious and carnal Perſons, lacking the Spirit of Chriſt, to have continually before their Eyes the Sentence of God's Predeſtination, is a moſt dangerous Downfal, whereby the Devil doth thruſt them either into Deſperation, or into Wretchleſneſs of moſt unclean Living, no leſs perilous than Deſperation.*

Furthermore, we muſt receive God's Promiſes in ſuch-wiſe as they be generally ſet forth to us in Holy Scripture: And in our Doings, that Will of God is to be followed, which we have expreſly declared unto us in the Word of God.

XVIII. Of obtaining eternal Salvation only by the Name of Chriſt.

THey alſo are to be had accurſed, that preſume to ſay, That every Man ſhall be ſaved by the Law or Sect which he profeſſeth, ſo that he be diligent to frame his Life according to that Law, and the Light of Nature: For Holy Scripture doth ſet out unto us only the Name of Jeſus Chriſt, whereby Men muſt be ſaved.

XIX. Of the Church.

THE viſible Church of Chriſt is a Congregation of faithful Men, in the which the pure Word of God is preached, and the Sacraments be duly miniſtred, according to Chriſt's Ordinance, in all thoſe Things that of Neceſſity are requiſite to the ſame.

As the Church of Jeruſalem, Alexandria, *and* Antioch, *have erred; So alſo the Church of* Rome *hath erred, not only in their Living and Manner of Ceremonies, but alſo in Matters of Faith.*

XX. Of the Authority of the Church.

THE Church hath Power to decree Rites or Ceremonies, and Authority in Controverſies of Faith: And yet it is not lawful for the Church to ordain any Thing that is contrary to God's Word written, neither may it ſo expound one Place of Scripture, that it be repugnant to another. Wherefore although the Church be a Witneſs and a Keeper of the Holy Writ, yet as it ought not to decree any Thing againſt the ſame, ſo beſides the ſame ought it not to inforce any Thing to be believed for neceſſity of Salvation.

XXI. Of the Authority of General Councils.

GEneral Councils may not be gathered together without the Commandment and Will of Princes. And when they be gathered together (foraſmuch as they be an Aſſembly of Men, whereof all be not governed with the Spirit and Word of God) they may err, and ſometimes have erred, even in Things pertaining unto God. Wherefore Things ordained by them as neceſſary to Salvation, have neither Strength nor Authority, unleſs it may be declared that they be taken out of Holy Scripture.

XXII. Of Purgatory.

THE Romiſh Doctrine concerning Purgatory, Pardons, Worſhipping and Adoration, as well of Images, as of Relicks, and alſo Invocation of Saints, is a fond Thing vainly invented, and grounded upon no Warranty of Scripture, but rather repugnant to the Word of God.

XXIII. Of Miniſtring in the Congregation.

IT is not lawful for any Man to take upon him the Office of publick Preaching, or Miniſtring the Sacraments in the Congregation, before he be lawfully called, and ſent to execute the ſame. And thoſe we ought to judge lawfully called and ſent, which be choſen and called to this Work by Men who have publick Authority given unto them in the Congregation, to call and ſend Miniſters into the Lord's Vineyard.

XXIV. Of ſpeaking in the Congregation in ſuch a Tongue as the People underſtandeth.

IT is a Thing plainly repugnant to the Word of God, and the Cuſtom of the Primitive Church, to have publick Prayer in the Church, or to miniſter the Sacraments in a Tongue not underſtood of the People.

XXV. Of the Sacraments.

SAcraments ordained of Chriſt, be not only Badges or Tokens of Chriſtian Men's Profeſſion; but rather they be certain ſure Witneſſes, and effectual Signs of Grace, and God's good Will towards us, by the which he doth work inviſibly in us, and doth not only quicken, but alſo ſtrengthen and confirm our Faith in him.

There are two Sacraments ordained of Chriſt our Lord in the Goſpel; that is to ſay, Baptiſm and the Supper of the Lord.

Thoſe five commonly called Sacraments, that is to ſay, Confirmation, Penance, Orders, Matrimony and Extreme Unction, are not to be counted for Sacraments of the Goſpel, being ſuch as have grown partly of the corrupt following of the Apoſtles, partly are States of Life allowed by the Scriptures: But yet have not like Nature of Sacraments with Baptiſm and the Lord's Supper, for that they have not any viſible Sign or Ceremony ordained of God.

The Sacraments were not ordained of Chriſt to be gazed upon, or to be carried about, but that we ſhould duly uſe them. And in ſuch only as worthily receive the ſame, they have a wholſome Effect or Operation: But they that receive them unworthily, purchaſe to themſelves Damnation, as St. Paul *ſaith.*

XXVI. Of the Unworthineſs of the Miniſters, which hinders not the Effect of the Sacraments.

ALthough in the viſible Church the Evil be ever mingled with the Good, and ſometimes the Evil have chief Authority in the Miniſtration of the Word and Sacraments; yet foraſmuch as they do not the ſame in their own Name, but in Chriſt's, and do miniſter by his Commiſſion and Authority, we may uſe their Miniſtry, both in hearing the Word of God, and in the receiving of the Sacraments. Neither is the Effect of Chriſt's Ordinance taken away by their Wickedneſs, nor the Grace of God's Gifts diminiſhed from ſuch, as by Faith, and rightly do receive the Sacraments miniſtred unto them, which be effectual, becauſe of Chriſt's Inſtitution and Promiſe, although they be miniſtred by evil Men.

Nevertheleſs, it appertaineth to the Diſcipline of the Church, that Inquiry is made of evil Miniſters, and that they be accuſed by thoſe that have

Knowledge

39 Articles. *Knowledge of their Offences: And finally, being found guilty, by juſt Judgment be depoſed.*

XXVII. Of Baptiſm.

BAptiſm is not only a Sign of Profeſſion, and Mark of Difference, whereby Chriſtian Men are diſcerned from others that be not Chriſtened; but it is alſo a Sign of Regeneration or new Birth, whereby, as by an Inſtrument, they that receive Baptiſm rightly, are grafted into the Church: The Promiſes of the Forgiveneſs of Sin, and of our Adoption to be the Sons of God, by the Holy Ghoſt, are viſibly ſigned and ſealed: Faith is confirmed, and Grace increaſed by Virtue of Prayer unto God. The Baptiſm of young Children is in any wiſe to be retained in the Church, as moſt agreeable with the Inſtitution of Chriſt.

XXVIII. Of the Lord's Supper.

THE Supper of the Lord is not only a Sign of the Love that Chriſtians ought to have among themſelves one to another; but rather it is a Sacrament of our Redemption by Chriſt's Death: Inſomuch, that to ſuch as rightly, worthily, and with Faith receive the ſame, the Bread which we break, is partaking of the Body of Chriſt: and likewiſe the Cup of Bleſſing is a partaking of the Blood of Chriſt.

Tranſubſtantiation (or the Change of the Subſtance of Bread and Wine) in the Supper of the Lord, cannot be proved by Holy Writ: But it is repugnant to the plain Words of Scripture, overthroweth the Nature of a Sacrament, and hath given Occaſion to many Superſtitions.

The Body of Chriſt is given, taken, and eaten in the Supper only after an Heavenly and Spiritual Manner. And the Mean whereby the Body of Chriſt is received and eaten in the Supper, is Faith.

The Sacrament of the Lord's Supper was not by Chriſt's Ordinance reſerved, carried about, lifted up, or worſhipped.

XXIX. Of the wicked which eat not the Body of Chriſt in the Uſe of the Lord's Supper.

THE Wicked, and ſuch as be void of a lively Faith, altho' they do carnally and viſibly preſs with their Teeth (as St. Auguſtine *ſaith) the Sacrament of the Body and Blood of Chriſt; yet in no wiſe are they Partakers of Chriſt, but rather to their Condemnation do eat and drink the Sign or Sacrament of ſo great a Thing.*

XXX. Of both Kinds.

THE Cup of the Lord is not to be denied to the Lay People: For both the Parts of the Lord's Sacrament, by Chriſt's Ordinance and Commandment, ought to be miniſtred to all Chriſtian Men alike.

XXXI. Of the one Oblation of Chriſt finiſhed upon the Croſs.

THE Offering of Chriſt once made, is that perfect Redemption, Propitiation and Satisfaction for all the Sins of the whole World, both original and actual, and there is none other Satisfaction for Sin, but that alone. Wherefore the Sacrifices of Maſſes, in the which it was commonly ſaid, that

that the Prieſt did offer Chriſt for the Quick and the Dead, to have Remiſſion of Pain or Guilt, were blaſphemous Fables, and dangerous Deceits. 39 Articles.

XXXII. Of the Marriage of Prieſts.

BIſhops, Prieſts and Deacons, are not commanded by God's Law, either to vow the Eſtate of ſingle Life, or to abſtain from Marriage: Therefore it is lawful for them, as for all other Chriſtian Men, to marry at their own Diſcretion, as they ſhall judge the ſame to ſerve better to Godlineſs.

XXXIII. Of Excommunicate Perſons, how they are to be avoided.

THAT Perſon which by open Denunciation of the Church, is rightly cut off from the Unity of the Church, and excommunicated, ought to be taken of the whole Multitude of the Faithful, as an Heathen and Publican, until he be openly reconciled by Penance, and received into the Church by a Judge that hath Authority thereunto.

XXXIV. Of the Traditions of the Church.

IT is not neceſſary that Traditions and Ceremonies be in all Places one, or utterly like; for at all Times they have been divers, and may be changed according to the Diverſity of Countries, Times, and Men's Manners, ſo that nothing be ordained againſt God's Word. Whoſoever thro' his private Judgment willingly and purpoſely doth openly break the Traditions and Ceremonies of the Church, which be not repugnant to the Word of God, and be ordained and approved by common Authority, ought to be rebuked openly, (that other may fear to do the like) as he that offendeth againſt the common Order of the Church, and hurteth the Authority of the Magiſtrate, and woundeth the Conſciences of the weak Brethren.

Every particular or national Church, hath Authority to ordain, change, and aboliſh Ceremonies or Rites of the Church, ordained only by Man's Authority, ſo that all Things be done to Edifying.

XXXV. Of Homilies.

THE Second Book of Homilies, the ſeveral Titles whereof we have joined under this Article, doth contain a godly and wholſome Doctrine, and neceſſary for theſe Times, as doth the former Book of Homilies, which were ſet forth in the Time of Edward *the Sixth; and therefore we judge them to be read in Churches by the Miniſters, diligently and diſtinctly, that they may be underſtood of the People.*

Of the Names of the Homilies.

1. OF the right Uſe of the Church.
2. Againſt Peril of Idolatry.
3. Of repairing and keeping clean of Churches.
4. Of good Works, firſt of Faſting.
5. Againſt Gluttony and Drunkenneſs.
6. Againſt Exceſs of Apparel.
7. Of Prayer.
8. Of the Place and Time of Prayer.

39 Articles. 9. That Common Prayers and Sacraments ought to be miniſtred in a known Tongue.

10. Of the Reverend Eſtimation of God's Word.

11. Of Alms doing.

12. Of the Nativity of Chriſt.

13. Of the Paſſion of Chriſt.

14. Of the Reſurrection of Chriſt.

15. Of the worthy Receiving of the Sacrament of the Body and Blood of Chriſt.

16. Of the Gifts of the Holy Ghoſt.

17. For the Rogation Days.

18. Of the State of Matrimony.

19. Of Repentance.

20. Againſt Idleneſs.

21. Againſt Rebellion.

XXXVI. Of Conſecration of Biſhops and Miniſters.

THE Book of Conſecration of Archbiſhops and Biſhops, and Ordering of Prieſts and Deacons, lately ſet forth in the Time of Edward *the Sixth, and confirmed at the ſame Time by Authority of Parliament, doth contain all Things neceſſary to ſuch Conſecration and Ordering: Neither hath it any Thing that of itſelf is Superſtitious and Ungodly. And therefore, whoſoever are conſecrated, or ordered according to the Rites of that Book, ſince the ſecond Year of the aforeſaid King* Edward, *unto this Time, or hereafter ſhall be conſecrated or ordered according to the ſame Rites, we decree all ſuch to be rightly, orderly, and lawfully conſecrated and ordered.*

XXXVII. Of the Civil Magiſtrates.

THE Queen's Majeſty hath the chief Power in this Realm of England, *and other her Dominions, unto whom the chief Government of all Eſtates of this Realm, whether they be Eccleſiaſtical or Civil, in all Cauſes doth appertain, and is not, nor ought to be ſubject to any foreign Juriſdiction.*

Where we attribute to the Queen's Majeſty the chief Government, by which Titles we underſtand the Minds of ſome ſlanderous Folks to be offended; we give not to our Princes the miniſtring either of God's Word, or of the Sacraments, the which Thing the Injunctions alſo lately ſet forth by Elizabeth *our Queen do moſt plainly teſtify; but that only Prerogative which we ſee to have been given always to all godly Princes in holy Scriptures by God himſelf,* that is, *that they ſhould rule all Eſtates and Degrees committed to their Charge by God, whether they be Eccleſiaſtical or Temporal, and reſtrain with the Civil Sword the ſtubborn and evil Doers.*

The Biſhop of Rome *hath no Juriſdiction in this Realm of* England.

The Laws of the Realm may puniſh Chriſtian Men with Death for heinous and grievous Offences.

It is lawful for Chriſtian Men, at the Commandment of the Magiſtrate, to wear Weapons, and ſerve in the Wars.

Induction, &c.

XXXVIII. Of Chriſtian Mens Goods, which are not common.

THE Riches and Goods of Chriſtians are not common, as touching the Right, Title and Poſſeſſion of the ſame, as certain Anabaptiſts *do falſly boaſt. Notwithſtanding, every Man ought of ſuch Things as he poſſeſſeth, liberally to give Alms to the Poor, according to his Ability.*

XXXIX. Of a Chriſtian Man's Oath.

AS we confeſs, that vain and raſh Swearing is forbidden Chriſtian Men by our Lord Jeſus Chriſt, and James *his Apoſtle: So we judge that Chriſtian Religion doth not prohibit, but that a Man may ſwear when the Magiſtrate requireth, in a Cauſe of Faith and Charity, ſo it be done according to the Prophets teaching, in Juſtice, Judgment and Truth.*

Things convenient to be obſerved for a Clerk inducted.

It is convenient that the Clerk be able, upon any Occaſion, to make Proof of his being inducted, and of the Time thereof, and alſo of his due Performance of all thoſe Things to be done by him after his Induction; and therefore that he have ſome intelligent Perſons, whom he may truſt, preſent when he is inducted; and (if it may be) the ſame Perſons preſent at ſuch Time when he ſhall perform the other Matters required by the Law to be performed in his Pariſh-Church; and that they may be able to teſtify, that all Things are done as they ought to be, the Clerk may cauſe them to read with him, or to obſerve as he reads the Morning and Evening Prayers, (which he is to read exactly according as they are appointed to be read on the Day he reads by the ſaid Book); and let him alſo give them a Copy of his Certificate, under the Hand and Seal of the Biſhop, and of the Declarations which he is to read; and alſo provide for them a Book containing the Thirty-nine Articles, to the End that they may read them with him, or obſerve that he doth read them as he ought to do, and then that he procure them to ſet their Hands to the Book of the Articles, and that he read a true Copy of the Articles; for otherwiſe, if their Teſtimony be wanted, it will be hard for them to depoſe, that he read a true Copy of the Articles, and that all Things were done according to Law: And it is alſo adviſable, that the Clerk doth keep the ſaid Book ſubſcribed, and alſo doth make a Writing to be ſubſcribed by his Witneſſes, after this or the like Form:

WE whoſe Names are underwritten, do hereby certify and declare, That A. B. *Rector of* C. *within the Dioceſe of* D. *was in the Preſence of us inducted into his Church of* C. *aforeſaid, by* D. E. *Rector of* F. *on the Day of in this preſent Year, by Vertue of certain Letters of Induction made under the Hand and Seal of* G. F. *Arch-deacon of* J. *within the Dioceſe aforeſaid, for that Purpoſe directed* —— Univerſis & ſingulis Rectoribus, &c. *Alſo that the aforeſaid* A. B. *on the Day of within the ſaid Year, being a Lord's-Day, did read in his Pariſh-Church aforeſaid, openly, publickly and ſolemnly, the Morning and Evening Prayers appointed to be read by, and according to the Book intituled,* The Book of Common Prayer, &c. *at the Time thereby appointed; and after ſuch Reading thereof, did openly and publickly before the Congregation there aſſembled, declare his unfeigned Aſſent and Conſent to the Uſe of all Things therein contained and preſcribed, according to this Form,* (ſetting down the Form to be uſed *verbatim*;) *alſo that he did publickly and openly on the*

Day

Induction, &c.

Day and Year aforeſaid, in the Pariſh-Church aforeſaid, in the Preſence of the Congregation there aſſembled, in the Time of Divine Service, read a Certificate, under the Hand and Seal of the Right Reverend Father in God, A. *Lord Biſhop of* C. *in theſe Words,* (inſerting the very Words of the Certificate) *which was atteſted by* J. B. *and after the Reading thereof, at the ſame Time, and in the ſame Place, the Congregation being preſent, did read the Declaration, or Acknowledgment contained in the ſaid Certificate,* viz. *I will conform to the Liturgy of the Church of* England *as it is now by Law eſtabliſhed. And laſtly, That on the Day and Year aforeſaid he did read the Articles of Religion, commonly called the* 39 *Articles, agreed upon in Convocation in the Year* 1562, *in his Pariſh-Church aforeſaid, in the Time of Common-Prayer there, and did declare his unfeigned Aſſent thereto. And theſe Things we promiſe to teſtify upon our Corporal Oaths, if at any Time we ſhall be duly called thereto. In Witneſs hereof, we have hereunto ſet our Hands this Day of in the Year of our Lord,* &c. See the *Parſon*'s Counſellor, 73, 74. and *Johnſon*'s Clergy-man's *Vade mecum*, *p.* 316.

Where the Law doth preſume the Affirmative the Negative ſhall be proved.

Though I adviſe the Clerk ſo to order his Buſineſs, as to be able to prove all Things to be performed by him, of which the Law requires his Performance; yet this, I ſuppoſe, is only neceſſary for him to do, in caſe he ſhall be put to prove, that he did read and declare, *&c.* in ſuch due Manner as the Law appoints, which in ſome Caſes he ſhall be put to do; yet a Parſon ſuing for Tithes in the Spiritual Court, the Defendant pleaded, That the Parſon had not read the Thirty-nine Articles according to the Statute; and the Court put the Defendant to prove this Negative; and upon a Motion for a Prohibition, *Coke* and *Doderidge* ſaid, That the Law doth preſume, That a Parſon hath read the Articles, becauſe otherwiſe he is to loſe his Benefice; and where the Law doth preſume the Affirmative, the Negative ſhall be proved. *Mich.* 12 *Jac. B. R. Monke* v. *Butler*, *Roll's* 1 *Rep.* 83. So in an Action for Tithes upon the *Stat.* 2. *E.* 6. the Defendant's Counſel inſiſted, That the Plaintiff ought to prove his Admiſſion, Inſtitution and Induction, reading of the Articles, *&c.* but it was ruled by the Judge, who tried the Cauſe at the Aſſizes at *York*, that he ſhould not then be put to it, for thoſe Things ſhall be preſumed; and if otherwiſe, the Defendant is to prove it. *Clayton's Rep. Caſe* 13. So in a *Quare Impedit*, the Plaintiff declares, That the Earl of *Lincoln* was ſeiſed in the Church of *B.* and preſented the Defendant, who after accepted a ſecond Living, and was inſtituted thereunto, *&c.* and it was adjudged, that this was well enough, without ſaying he ſubſcribed the Declaration in the Preſence of the Biſhop, (*præter Vaughan* Chief Juſtice) *Paſch.* 25 *Car.* 2. *Com. B.* Earl of *Lincoln* and *Clyſam*, 3 *Keble* 152.

Preſumption of the Law.

Nota.

But in an *Ejectione firmæ*, for the Rectory of *Amunſham*, it was inſiſted on by the Counſel for the Defendant, that the Plaintiff ought to prove his Reading, and Subſcribing the Articles, *&c.* within the Time appointed by the Statute: And the Opinion of the Court ſeems to be, as one may collect from the Report of the Caſe, that the Plaintiff was to prove all thoſe Matters in that Action. *M.* 16 *Car.* 2. *Snow Leſſey* of Dr. *Crawley* v. *Philips*, 1 *Sid.* 220.

In moſt Caſes the ſame Method to be uſed.

The aforeſaid Method is to be obſerved, in taking a Title to any Benefice that is Preſentative, and ſuch for the moſt part are Parſonages, and Vicarages, Archdeaconries and Prebends, though commonly Archdeaconries and Prebends are given by Biſhops, who do therefore prefer to them by Collation, which is the ſame Thing with Inſtitution, ſaving that no

Preſentment

Preſentment is made; but if an Archdeaconry or Prebend be in the Gift of a Lay-man, the Patron doth preſent to the Biſhop, who doth inſtitute in like Manner as to another Benefice. *Paſch.* 32 *Eliz. Sale* v. *Biſhop of Coventry* and *March*, 1 *Anderſon* 241. And then the Dean and Chapter do induct them; that is, after ſome Ceremonies, Place them in a Stall in the Cathedral Church, to which they belong, whereby they are ſaid to have *Locum in Choro*. So a Deanery may be preſentable, 17 *E.* 3. 40. and an Hoſpital, 21 *E.* 3. 6. *b.* and alſo a Chapel. 14 *H.* 3. *Quare Impedit* 183. And all thoſe that take Titles to any of the aforeſaid Benefices, are to read and declare, as is before directed; to wit, Parſons, Vicars, *&c.* in their Parochial Churches; Archdeacons and Prebendaries, in their reſpective Cathedral Church; ſo are they to ſubſcribe, as is ſaid, before the Ordinary; ſaving that he, who takes a Title for any Archdeaconry or Prebend, is not thereby obliged to ſubſcribe and read the Thirty-nine Articles, a Prebendary not being a Benefice with Cure; and an Archdeaconry, altho' it be a Benefice with Cure, yet is not ſuch a Benefice with Cure, as ſeems to be intended by the Statute 13 *Eliz. c.* 12. that Statute intending only ſuch Benefices with Cure, as have Pariſh-Churches belonging to them: But they that accept of Archdeaconries, Prebends, or any other Eccleſiaſtical Preferments, are obliged at or before their Admiſſion, *&c.* thereto, to ſubſcribe the Declaration or Acknowledgment herein before-mentioned, (although Archdeaconries be not expreſly mentioned in the Statute) by reaſon that the Perſons taking Archdeaconries muſt be in Holy Orders, **and all Perſons in Holy Orders taking any Eccleſiaſtical Dignity or Promotion,** as in the Statute expreſſed, are required to ſubſcribe the ſame Declaration. See the *Stat.* 14 *Car.* 2. *c.* 4. *ante.*

Donations, &c.

Locum in Choro.

Archdeaconry or Prebend.

What Benefices with Cure intended by 13 *Eliz. c.* 12.

The ſecond Way or Means, by which the Title to an Eccleſiaſtical Benefice is to be had, is by Donation, and the Benefices ſo to be conferred and taken, are called Donatives; and they are ſo called, becauſe the Patron in conferring them, doth not make a Preſentment of his Clerk to any Ordinary, to the End to have him admitted and inſtituted by him, and ſo inducted by the Archdeacon, or other Perſon; but the Patron (though a Layman) doth by his Inſtrument in Writing immediately confer the ſame upon his Clerk, *Da.* 1. 46. *b.* and this Conferring is (as the Biſhop's Conferring) called a Collation, in *Fairchild* and *Gair*'s Caſe, *Paſch.* 3 *Jac. Yelverton* 60. the ſame Caſe, 1 *Brownlow* and *Goulſborough* 202. But the Benefices to which Biſhops do collate, are not of the ſame Nature with theſe Donatives: For a Benefice that is given by a Biſhop's Collation, whilſt in the Poſſeſſion of a Biſhop, is preſentative when in a Lay-hand; and a Biſhop's Clerk is inducted as any other Patron's Clerk is: But theſe Donatives, in whoſe Hands ſoever they be, are generally given only by Donation, and the Clerk to whom the ſame is given, needs no ſuch Induction. *Hill.* 41 *Eliz. Quarles* v. *Fairchild*, 3 *Cro.* 653. And if a Donative be given without a Limitation of Eſtate, for Life, or otherwiſe, the Gift is good, and the Grantee hath as large an Eſtate therein by ſuch Grant, as if it had been granted to him expreſly for Life, or he had come to it by Election, or by Inſtitution and Induction; for a Spiritual Benefice cannot be granted for Years, or at Will; for then the Freehold thereof might be always in perpetual Abeyance, which Inconvenience the Law will not ſuffer. *Paſch.* 3 *Jac. B. R. Davis f.* 45, 46. And though generally theſe Donatives be in themſelves to be had only by the Patron's Collation; yet if the true Patron of ſuch a Donative doth once preſent to the Ordinary of the reſpective Dioceſe, and doth ſuffer Admiſſion and Inſtitution thereupon, he thereby hath made

The ſecond ordinary Way or Mean, is by Donation.

Which is as a Collation.

Donatives need no Induction.

Given without Limitation.

Abeyance.

Donatives.

Donatives may become presentable.

it always presentable, *Pasch.* 3 *Jac. Fairchild* v. *Gair*, 2 *Cro.* 63. *Co. Litt.* 344. *a.* and hath made it also for ever to become a Benefice with Cure of Souls. *Clerk* v. *Heath*, *Mich.* 21 *Car.* 2. *B. R.* 2 *Keble* 556. And this holds not only in the Case of common Patrons of Donatives, but in the Case of the King also; by *Latch* in his Argument of *Cremer* and *Burnet*'s Case, *Pasch.* 1651. *Style* 172. But the King hath many Donatives in *Wales*, whereunto the Parsons are presented and instituted by the Bishop; as was said by Sir *Jeffery Palmer*, the King's Attorney General, and in the said Case of *Clerk* v. *Heath*, as reported 1 *Siderfin* 426. But if a Stranger, who hath no Title, doth present a Clerk to the Ordinary, who is instituted and inducted, this is so far from making the Donative presentable for the future, that it doth not so much as intitle the Clerk to it, for 'tis meerly void. *Co. Litt.* 344. *a. Hill.* 41 *Eliz. Quarles* v. *Fairchild*, 3 *Cro.* 653. *Roll's Abr.* 2. 342.

But not by a Stranger's Presentation.

Donatives may be of all sorts of Ecclesiastical Preferments. Royal Donatives.

There is not any one particular sort of Ecclesiastical Preferments, that are peculiarly said to be Donatives; for some of all sorts may be Donative, as well as Presentative, or Elective; for Bishopricks were Donative in *England* after the Conquest, and before the Time of King *John*. *Roll's* 2. *p.* 342. 1 *Inst.* 344. *a.* And a Deanery may: For those Deaneries that were translated from Priories and Covents, or which were founded after the Dissolution of Abbies and Monasteries, by King *Henry* the Eighth, or other Kings of this Realm, are now Donative, and by the King's Letters Patent the Deans are installed. 1 *Inst.* 344. *Dyer* 273. *Parson's Law*, *c.* 2. So a Prebendary may be Donative, as at *Windsor* and *Westminster*, in the Chapels of the King: When a Prebend is void, it is said, that the King shall make Collation of his Clerk by a Patent, *Et luy envoyera ove Cell*; and by force thereof he shall take Possession, 11 *H.* 4. 9. without any Institution or Induction. *Roll's Abr.* 2 *Part*, *p.* 356. Also a Benefice with Cure of Souls may be a Donative, as the Rectory of *Briary*, or *Burien* in *Cornwal*. *Hill.* 21 *Eliz. Quarles* v. *Fairchild*, 3 *Cro.* 655. *Pasch.* 3 *Jac. Fairchild* v. *Gair*, 2 *Cro.* 63. And so the Church of the Tower of *London*, is a Cure of *Souls*, and the King's Donative. *Mich.* 9 *Car. Fletcher* and *Mackaller*'s Case, *Roll's Abr.* 341. *Co. Lit.* 344. And this also appears by what is said in the Case of *Clerk* v. *Heath*, 1 *Siderfin* 426. But though a Church Parochial, having Cure of Souls, may be a Donative, yet no meer Lay-man was capable thereof by the Common Law, but a Clerk in Holy Orders, *Co. Litt.* 344. cited *Hill.* 1 *Jac.* in *Fairchild* and *Gair*'s Case, *Roll. Abr.* 2. *p.* 341. because, though he may come in by Lay-Donation, and not by Admission and Institution, yet his Function is Spiritual; and now by the Statute 14 *Car.* 2. one is not capable of any Donative, unless he be a Priest lawfully ordained; because every Donative must be either Parsonage, Vicarage, Benefice, or other Ecclesiastical Promotion or Dignity, and so is within the said Statute, 14 *Car.* 2. *c.* 4.

Requisites to be observed by a Clerk taking Title to a Donative.

Though a Clerk taking Title to a Donative, doth not, or need not apply himself to the Ordinary for Admission thereto, yet I conceive, that he ought (what Donative soever he takes) at or before his Admission to be Incumbent, or have Possession thereof, to subscribe before his respective Archbishop, Bishop or Ordinary of the Diocese, the Declaration injoined to be subscribed by Stat. 14 *Car.* 2. *c.* 4. that is, so much of it as is now in force; and if the Donative be either Parsonage or Vicarage, to have a Certificate under the Hand and Seal of the Person before whom he subscribed; and to read the same with the Declaration aforesaid, in the Church belonging to his Donative. (*Quære.*) So ought he to take the

Donatives.

Oath of Supremacy, before he takes the Donation, *viz.* before ſuch Perſon who hath Authority to admit him thereto, who is his Patron, or before ſuch Perſon as ſhall by Commiſſion under the Great Seal have Authority to miniſter the ſaid Oath. *Stat.* 1 *Eliz. c.* 1. And if his Donative be a Benefice with Cure, he that takes it ought firſt to ſubſcribe the Thirty-nine Articles in the Preſence of the Ordinary; which I ſuppoſe is to be underſtood of the Ordinary of the Dioceſe, and not of his Patron, although the Patron hath the Power of viſiting, and correcting him, and not the Ordinary, for he hath nothing to do therewith. 1 *Inſt.* 344. *a.* and *Fairchild* v. *Gayre*, 2 *Cro.* 63. and it is ſafe for him to read the ſaid Articles within two Months after he hath Poſſeſſion, as is before directed, and declare his Aſſent thereto, although the Words of the Statute be—— (within two Months after his Induction;) and he is not inducted, at leaſt in the ordinary Way, leſt it be ſaid, that his Caſe is however within the Reaſon and Equity of the Statute, and therefore that the Statute extends to it, and he ought to read the Morning and Evening Prayers in his Church within two Months after he ſhall be in actual Poſſeſſion of his Donative, and the Form of giving Aſſent and Conſent thereto, for this is clearly the Statute 14 *Car.* 2. *c.* 4.

The Difference between Donations, Collations, Royal Prebends, and perpetual Curacies.

Note; ſome of the Inſtances before-mentioned may rather be called *quaſi Donations* than properly Donations, ſuch are, 1. The Collation of a Biſhop without any Preſentation. 2. The Grant of the King to Prebends, *&c.* without Inſtitution, and 3. The Nomination to perpetual Curacies, which is without either Preſentation, Inſtitution or Induction. For theſe differ from Donatives properly ſo called, which are given and fully poſſeſſed by the ſole Donation of the Patron in Writing, in as much as Collations and Royal Grants are to be followed by Induction and Inſtalment. And Perſons nominated to Curacies are to be authorized by a Licence from the Biſhop before they can legally officiate. Whereas Poſſeſſion by Donation is not ſubject to any of theſe Conſequents, but receives its full Eſſence and Effect from the ſingle Act and ſole Authority of the Donor as aforeſaid; and if what is ſaid in the Caſe of *Clark* and *Heath* be true, That the King hath ſeveral Donatives in *Wales*, which yet receive Inſtitution from the Biſhop, it ſeems to be as true, that by ſuch Inſtitution they have loſt the proper Nature of Donatives. For *Siderf.* 427.

Gibſon's Code 865.

The Grant of a Donative being once made, creates a Right as full and laſting as Preſentation, Admiſſion, Inſtitution and Induction can, *viz.* a Right not to be deveſted or taken away, but by the Reſignation or Deprivation of the Donee, whereof the firſt muſt be made to, and the ſecond by the Donor, for both the Church and the Clerk are exempted from ordinary Juriſdiction: And to this purpoſe is what we find in Sir *John Davis*'s Reports, *viz.* That a Donative cannot be granted for Years, or at Will only, becauſe this great Inconvenience would follow, That the Freehold (of the Church, *&c.*) might be in perpetual Abeyance, which is an Inconvenience that the Law will not ſuffer.

The original of perpetual Curacies, *&c.*

The Caſe of thoſe Curacies called perpetual in Oppoſition to temporary Curates, who ſerve under other Incumbents, was originally otherwiſe, being ſuch Churches the intire Revenue whereof was united and annexed *ad Menſas Monachorum*, and not (as other Appropriations were) under the Tye of having perpetual Vicars appointed in them, but left to be ſerved by temporary Curates belonging to their own Houſes, and ſent out as Occaſion required. The like Liberty of not appointing a perpetual Vicar, was ſometimes granted by Diſpenſation in Benefices not annexed to their Tables, in Conſideration of the Poverty of their Houſe, or the Nearneſs of

Donatives. of the Church. But when ſuch Appropriations, together with the Charge of providing for the Cure, were transferred from ſpiritual Societies to ſingle Lay Perſons, who were not capable of ſerving them by themſelves, and who by Conſequence were obliged to nominate ſome particular Perſon to the Ordinary, for his Licence to ſerve the Cure, the Curates by this Means became ſo far perpetual, as not to be wholly at the Pleaſure of the Appropriator, nor removable, but by a due and legal Revocation of the Licence of the Ordinary.

Vide Yelv. 61. 3 *Salk.* 140. *And if the Patron of a Donative or ſuch perpetual Curacy do not nominate a Clerk, there can be no Lapſe. But the Biſhop may compel him to do it by ſpiritual Cenſures.* This with reſpect to Donatives was declared in the before cited Caſe of *Fairchild* and *Gair*; becauſe tho' the Church is exempted from the Power of the Ordinary, yet the Patron is not; and the Rule holds much more ſtrongly in the Caſe of perpetual Curacies, where both Church and Patron are ſubject to the Ordinary's Juriſdiction. And where therefore he may likewiſe ſequeſter the Profits, and appoint another to take Care of the Cure, till the Patron ſhall nominate a fit and proper Clerk. And it was ſaid in the Caſe of *Britton* and *Wade*, That if any take the Profits of a Donative during its Vacation, the Patron cannot maintain the Action, but he ought to put in his Clerk who ſhall maintain the Action. Alſo

2 *Cro.* 518.

1 *Roll. Rep.* 453. It was ſaid *obiter* in *Roll's Reports*, That in the ſaid Caſe of *Fairchild* and *Gair*, the Court agreed, That if the Patron would not nominate to a Donative, the Biſhop might put it under Sequeſtration. But thoſe who report the Caſe itſelf, go no further than to ſpiritual Cenſures upon the Patron, and at the ſame time aſſert an Exemption of the Place from the Biſhop's Juriſdiction. And tho'

It has been generally held for Law, That if the Patron of a Donative doth once preſent to the Ordinary, and ſuffer an Admiſſion and Inſtitution, thereupon the Church, *&c.* is no longer Donative, but ſhall be for ever after preſentative and liable to Lapſe, and in all Things ſubject to the Juriſdiction of the Ordinary; in which Doctrine the ancient Books ſeem to agree without Exception even to the Crown. Yet there are later Authorities which ſay, Though a Preſentation may deſtroy an Impropriation, it cannot deſtroy a Donative, becauſe the Creation thereof was by Letters Patent, by which the Land was ſettled to ſuch a Perſon and his Succeſſors, and he to come in by Donation which was the antient way of conferring Benefices, and the Inſtitution to Churches was not ordained by any Temporal Law, there being only a Papal Proviſion, and was not received in ſome Places here in *England*; and where it was not received, they ſtill went on in the old Way and Method of conferring Benefices, which afterwards were called Donatives.

1 *Inſt.* 344. 2 *Cro.* 63. *Style* 172. See 2 *Salk.* 551. 3 *Salk.* 140.

3 *Salk.* 140. 'Tis alſo ſaid, That Donatives are either by Royal Foundation, or by Royal Licence, or by Agreement with the Ordinary (but *Quære* of the laſt Kind); and when eſtabliſhed, the Ordinary hath nothing to do with it; it is viſitable by the Patron's Commiſſioners, it muſt be reſigned to the Patron, no Lapſe can incur, *&c.* and the Incumbent is exempted from attending at Viſitations, *&c.* But *per Holt* Chief Juſtice, The Ordinary hath in ſome Caſes a Power as to the Perſon, tho' not to the Place; for if the Parſon marries without a Licence, or commits any Miſdemeanor, the Ordinary may puniſh him; and if the Patron will not preſent, the Ordinary may compel him; but the Ordinary cannot regulate the State of the Church or Viſit, *&c.* A Miniſter of a Donative was ſued in the Eccleſiaſtical Court, for that when he read Prayers he did not read the

Elections.

the whole Service, but left out what Parts of it he thought fit; and for preaching without Licence: On Motion for a Prohibition it was argued, that Donatives are exempt from the Juriſdiction of the Ordinary, and only viſitable by the Founders. But held in *B. R.* that the Spiritual Court may in ſuch Caſe proceed *pro reformatione morum*; but not to Deprivation, for then a Prohibition ſhould go. Prohibitions have been often denied to Suits againſt Parſons of Donatives for marrying without Licence. *Colefatt* v. *Newcomb*, 2 *Ld. Raym.* 1205, 1206.

Note; It is ſaid in the Caſe of *Sprat* and *Nicholſon*, If Iſſue be joined, whether *Donative* or *Preſentative*, it ſhall be tried by Jury at Common Law; and in ſome other Caſes, if the Patron of a Donative be diſturbed in Collating, and Recover by a *Quare Impedit* (which he may well have) againſt the Biſhop and the Diſturber, a Writ ſhall be directed to the Sheriff to put his Clerk in Poſſeſſion. *Style* 172. *ſupra.* *Vide ibid.*

But though Clerks, on whom Donatives and ſuch perpetual Curacies are beſtowed, do not gain Poſſeſſion by Preſentation, Inſtitution and Induction; yet they are obliged in order to preſerve and maintain their Poſſeſſion, to be qualified, and to qualify themſelves in many Things as other Clerks do, who are preſented, inſtituted and inducted; as *Firſt*, *To be Prieſts in Orders*, without which by 13 & 14 *Car.* 2. *c.* 4. none ſhall be admitted to any Eccleſiaſtical Promotion. *Secondly*, To ſubſcribe the Thirty-Nine Articles, if the Donative be, as all perpetual Curacies are, with Cure, by 13 *Eliz. c.* 12. Whereby alſo, they are in Caſe of ſuch Donatives to be ſubſcribed in the Preſence of the Ordinary. *Thirdly*, To ſubſcribe the Declaration required by 13 & 14 *Car.* 2. to be ſubſcribed before the Ordinary, and (if with Cure) to take a Certificate thereof. *Fourthly*, To take the Oaths of Allegiance and Supremacy, by 1 *Eliz.* and 1 *W. M. c.* 8. §. 5. *Fifthly*, To read the Common Prayer, and declare his Aſſent, *&c.* by 13 & 14 *Car.* 2. *c.* 4. §. 6. *Sixthly*, To read and aſſent to the Thirty-Nine Articles, (if with Cure) by 13 *Eliz. c.* 12. §. 2. which though it ſays, *within two Months after Induction*, (and here is no Induction) yet the Cure of Souls being the Foundation wherever there is ſuch Cure, Induction is to be interpreted, *any actual Poſſeſſion*. *Seventhly*, To read the Certificate, and make Declaration for the Reaſons in the Third Article *ſupra*. *Eighthly*, To take the Oath of Abjuration. For the Stat. 13 & 14 *W.* 3. ſays, *it ſhall be taken by all Eccleſiaſtical Perſons, who ſhall be admitted into, or enter upon any Preferments, Benefices, Offices or Places.* *Vide F. N. B.*

But *Note*; The Incumbent of a Donative was cited into the Spiritual Court to take a Licence from the Biſhop to preach, *&c.* and *per Cur.* if 'tis a Donative, and the Biſhop will viſit, *&c.* a Prohibition ſhall be granted. *Mod.* 90. 3 *Sal.* 141.

The third Way or Means of taking a Title to an Eccleſiaſtical Preferment, is by Election and Confirmation, and this is the Way by which a Title is had to the greateſt Dignities in the Church, *viz.* Archbiſhopricks and Biſhopricks, Conſecration being alſo made, where the Perſon promoted was not a Biſhop before: And in what manner Archbiſhops and Biſhops ſhall be made, and ſettled in their Dignities, hath been declared by Act of Parliament, *viz.* 25 *H.* 8. *c.* 20. But Biſhop Suffragans are not in like Manner to be made, but by way of Preſentation, according to the Direction of an Act made for that Purpoſe. See *Stat.* 26 *H.* 8. *c.* 14. Alſo the ancient Deans of Chapters come into their Deaneries as Biſhops now do, by a *Conge d'Elire* from the King, and are confirmed by their reſpective Biſhop. 1 *Inſt.* 95. *a.* *Parſons Laws*, *c.* 2. The third ordinary Way, or Means, is by Election to the greateſt Dignities.

First Fruits.

And the Perſons taking theſe ancient Deaneries, are to ſubſcribe the aforeſaid Declaration or Acknowledgment, to take the Oath of Supremacy before they are admitted, and to read the Morning and Evening Prayers in their reſpective Cathedrals, and the Form of Aſſent and Conſent thereto, within two Months after their Inſtallment. *Stat.* 14 *Car. c.* 4.

To pay or compound for Firſt Fruits.

Alſo Every Perſon who ſhall be nominated, elected, prefected, preſented, collated, or by any other Means appointed to have any Dignity, Benefice or Promotion Spiritual, before any actual or real Poſſeſſion, or medling with the Profits of any ſuch Dignity, Benefice or Promotion Spiritual, is to pay, or to agree and compound for his Firſt Fruits; the ſeveral Acts of Parliament which relate to the paying of Firſt Fruits, are theſe that follow:

By 26 *H.* 8. *c.* 3.

'Tis enacted, That the King's Highneſs, his Heirs and Succeſſors, Kings of this Realm, ſhall have and enjoy from Time to Time, to indure for ever, of every ſuch Perſon and Perſons, which at any Time after the Firſt Day of January next coming, ſhall be nominated, elected, prefected, preſented, collated, or by any other Means appointed to have any Archbiſhoprick, Biſhoprick, Abbacy, Monaſtery, Priory, College, Hoſpital, Archdeaconry, Deanry, Provoſtſhip, Prebend, Parſonage, Vicarage, Chauntry, Free Chapel or other Dignity, Benefice, Office or Promotion Spiritual, within this Realm, or elſewhere within any of the King's Dominions, of what Name, Nature or Quality ſoever they be, or to whoſe Foundation, Patronage or Gifts ſoever they belong, the Firſt Fruits, Revenues and Profits for one Year of every ſuch Archbiſhoprick, Biſhoprick, Abbey, Monaſtery, Priory, College, Hoſpital, Archdeaconry, Deanry, Provoſtſhip, Prebend, Parſonage, Vicarage, Chauntry, Free Chapel or other Dignity, Benefice, Office or Promotion Spiritual afore-named, whereunto any ſuch Perſon or Perſons after the ſaid Firſt Day of January be nominated, elected, prefected, preſented, collated, or by any other Means appointed.

The Firſt Fruits and Profits for one Year of every Spiritual Living, is granted to the King.

Every Spiritual Perſon ſhall be bound for his Firſt Fruits before his actual Poſſeſſion of his Benefice.

And that every ſuch Perſon and Perſons before any actual or real Poſſeſſion, or medling with the Profits of any ſuch Archbiſhoprick, Biſhoprick, Abbacy, Monaſtery, College, Hoſpital, Deanry, Provoſtſhip, Prebend, Parſonage, Vicarage, Chauntry, Free Chapel, Priory or other Dignity, Benefice, Office or Promotion Spiritual, ſhall ſatisfy, content or pay, or compound, or agree to pay to the King's Uſe at reaſonable Days, upon good Sureties, the ſaid Firſt Fruits and Profits for one Year.

And 'tis thereby further enacted, That an Obligation for the Firſt Fruits ſhall be of the ſame Strength, that the Statute of the Staple is: And that all Firſt Fruits payable to other Perſons ſhall ceaſe, and be paid to the King, his Heirs and Succeſſors.

A Yearly Tenth of all Spiritual Livings given to the King.

Alſo by the ſaid Statute 'tis enacted, That the King's Majeſty, his Heirs and Succeſſors, Kings of this Realm, for more Augmentation and Maintenance of the Royal Eſtate of his Imperial Crown and Dignity of Supreme Head of the Church of England, ſhall yearly have, take, injoy and receive, united and knit to his Imperial Crown for ever, One yearly Rent or Penſion amounting to the Value of the Tenth Part of all the Revenues, Rents, Farms, Tithes, Offerings, Emoluments, and all other Profits, as well called Spiritual as Temporal, now appertaining or belonging, or that hereafter ſhall belong to any Archbiſhoprick, Biſhoprick, Abbacy, Monaſtery, Priory, Archdeaconry, Hoſpital, College, Houſe Collegiate,

legiate, Prebend, Cathedral Church, Collegiate Church, Conventual Church, Parsonage, Vicarage, Chauntry, Free Chapel or other Benefice or Promotion Spiritual, of what Name, Nature or Quality soever they be within any Diocese of this Realm, or in Wales. Also it is thereby provided, That the said Tenth shall be paid at Christmas Yearly. First Fruits.

Also by a Statute made 26 *H.* 8. *cap.* 17. 'tis enacted, That all and singular Farmors and Lessees of any Manors, Lordships, Lands, Tenements or other Hereditaments, Parsonages, Vicarages or Portions of Tithes, or other whatsoever Profits or Commodities belonging to any Archbishop, Bishop or other Prelate, or Spiritual Person or Persons, or Spiritual Body Corporate or Politick, whereof any First Fruits, or yearly Pension of the Tenth Part was granted to the King in the said Session of Parliament, shall be discharged, and not chargeable to pay to the King, of his or their proper Money, Cost or Charge, for, or in Discharge of the Lessor or Lessors, Owner or Owners of the same, by reason of any Covenant, Bargain, Bond, Condition, Clause of Re-entry, or other Thing thentofore made or concluded. 26 *H.* 8. *c.* 18. Farmors of Spiritual Persons not to pay any First Fruits of the Tenths granted to the King.

But that every of the said Lessors and Owners, and their Successors, shall be charged and chargeable to pay and satisfy the same of his or their proper Cost and Charge to the King, his Heirs and Successors, according to the Grant thereof; any Covenant, Bargain, Contract, Bond, Condition, Clause of Re-entry, or other Thing thentofore made or concluded, to the contrary thereof in any wise notwithstanding.

And by the Stat. 27 *H.* 8. *c.* 8. it is enacted, That whensoever any Person or Persons shall be named, prefected, presented, collated, or by any other Means appointed to have any Archbishoprick, Bishoprick, Abbacy, Monastery, Priory, College, Hospital, Archdeaconry, Deaconry, Provostship, Prebend, Parsonage, Vicarage, Chauntry, Free Chapel or other Dignity, Benefice or Promotion Spiritual, by virtue whereof they shall be charged or chargeable, as well for the Payment of the Tenth of every said Archbishoprick, Bishoprick, &c. as with the Payment of the First Fruits of the same, and every of the same shall at his or their Composition, Agreement or Entry into Specialty or Specialties for the Payment of the said First Fruits, have Allowance and Deduction of the said Tenth Part of the whole, out of the Sum to be paid for the said First Fruits, for the Year wherein he or they shall be first nominated, prefected, presented, collated, or by any other Means appointed, to have any the said Dignities, Benefices, Offices or other Promotions Spiritual, according to the just Rate, Taration and Sessment of the Tenth of every such Archbishoprick, &c. Office or Promotion Spiritual within this Realm, or elsewhere within any of the King's Dominions, of what Name, Nature or Quality soever they be, or to whose Foundation, Patronage or Gift soever they belong, now being inrolled, or that hereafter shall be inrolled in the King's Exchequer, or in any other the King's Courts of Record. 27 *H.* 8. *c.* 8. No Spiritual Person shall pay any Tenth the same Year they pay their First Fruits.

Then follows a Clause, That Commissioners and other Persons authorized to compound for the First Fruits, may deduct the Tenth Part out of the First Fruits. Out of the First Fruits may be deducted the Tenth.

Also, That he who hath his Tenth deducted out of the First Fruits, for the Year he shall be first nominated, &c. shall pay it to the King, his To be paid to the King, &c.

First Fruits.

Remedy where a Succeſſor pays the Tenth for his Predeceſſor.

his Heirs and Succeſſors, in like manner as is limited by the Act or the Grant of the ſaid Tenth and First Fruits.

With a Clauſe of Remedy for the Succeſſor, who is compelled to pay the Tenth for his Predeceſſor, *viz.* by Diſtreſs and Retainer of Goods till Satisfaction, and in Default of Diſtreſs, by Bills in *Chancery*, or Action, or Plaint of Debt, to be taken and commenced by ſuch Succeſſor, by Order of the Common Law.

28 *H.* 8. *c.* 11. That the next Incumbents charged to the King for First Fruits, ſhall begin from the firſt Vacation of the Benefice, *&c.*

And by a Clauſe in the Statute 28 *H.* 8. *c.* 11. 'tis enacted, That the ſaid Year in which the First Fruits ſhall be paid to the King, ſhall begin and be accounted immediately after the Avoidance or Vacation of any ſuch Benefice or Promotions Spiritual.

And that the Tithes, Fruits, Oblations, Obventions, Emoluments, Commodities, Advantages, Rents, and all other whatſoever Revenues, Caſualties or Profits, certain and uncertain, afferring or belonging to any Archdeaconry, Deanry, Prebend, Parſonage, Vicarage, Hoſpital, Wardenſhip, Provoſtſhip or other Spiritual Promotion, Benefice, Dignity or Office, (Chauntries only except) within this Realm, or other the King's Dominions, growing, riſing or coming during the Time of Vacation of the ſaid Promotion Spiritual, ſhall belong and affer to ſuch Perſons as ſhall be thereunto next preſented, promoted, inſtituted, inducted or admitted, and to his Executors, towards the Payment of the First Fruits to the King's Highneſs, his Heirs and Succeſſors, &c. [See more concerning this Statute of First Fruits in *Chap.* 40.]

The Forfeiture of the Ordinary, *&c.* which receiveth the First Fruits in Time of Vacation.

And Note, That by this Statute the Forfeiture of the Ordinary, *&c.* which receiveth the Fruits of a Benefice during the Vacation, and doth not reſtore them to the next Incumbent, is the Treble Value; one Moiety to the King, the other to the Incumbent. However, ſuch Archbiſhops, *&c.* ſhall be allowed the Charge of the Cure, and of inning Tithes and other Profits. And here if the Fruits be not ſufficient to pay the Curate, the next Incumbent ſhall do it within Fourteen Days after his Induction. [See *Chap.* 40.]

Stat. 37 *H.* 8. *c.* 2. The King's Tenths and First Fruits reſerved.

Alſo by a Clauſe in a Statute made 37 *H.* 8. *c.* 21. concerning the Union of Churches, there is a ſaving unto the King's Majeſty, his Heirs and Succeſſors, of all the Tenths and First Fruits of all ſuch Churches and Chapels, as were thentofore united or conſolidated in one, or that thereafter ſhould be united and conſolidated into one, according to the ſame, or ſuch like Rates and Valuations, as the ſame Churches and Chapels, or any of them were then rated or valued at to the King, in the Court of the First Fruits and Tenths.

By 2 & 3 *P. M. c.* 4. The ſaid Statutes repealed, but again revived by 1 *Eliz. c.* 4.

Note; All theſe Statutes were repealed by Stat. 2 & 3 *Ph. & M. c.* 4. and the Payment of the First Fruits and Tenths ceaſed from the then Eighth Day of *Auguſt*; but this Statute of Repeal was repealed by 1 *Eliz. c.* 4. made for the Reſtitution of the First Fruits to the Crown. And thereby it was enacted as followeth, *viz.* That ſo much of all and every the Acts and Statutes firſt recited, or of any other Act or Statute touching or concerning the Order, Levying, true Anſwering, and Payments or Qualification of the ſaid First Fruits and Tenths, and of the ſaid Rectories, Parſonages and Benefices Impropriate, and of the Rents, Revenues, Emoluments and Profits thereof, and of all other the Premiſſes, and alſo the Charge, Diſcharge or Alteration of them, or any of them, or any Matter or Thing in any wiſe ſounding or tending thereunto, which were ſtanding and being in force, effect, and unrepealed, at and before the ſaid

Eighth Day of Auguſt, (except only the Acts of the Erections of the Courts of Augmentations, and Firſt Fruits and Tenths) ſhall be, remain and continue in their full and perfect Strength and Force, and be obſerved and put in due Execution, according to the Tenures and Purports of the ſame, and every of them. *First Fruits.*

Alſo by this Statute 'tis enacted, That Vicarages of 10 l. per Annum, and Parſonages of 10 Marks per Annum, or under, ſhall not be chargeable with Firſt Fruits. *Vicarages and Parſonages diſcharged.*

That if any Incumbent continue in the Benefice half a Year after the laſt Avoidance, and die, or be legally outed before the End of the Year, he, his Executors, Adminiſtrators or Sureties, ſhall only pay a fourth Part of the Firſt Fruits: If he live out the Year, and die, or be outed within Six Months after the Year, only half the Firſt Fruits ſhall be paid: And if he live out the Year and the Half, and die, or be outed within one Year, only the Quarter of it ſhall be paid. *The Charge of an Incumbent living half a Year, &c. after an Avoidance.*

That Diſcharge of Firſt Fruits and Tenths, heretofore granted by any of the Queen's Predeceſſors to the Univerſities, or the Colleges in them, or to thoſe of Eaton or Wincheſter, ſhall remain good, notwithſtanding this Act; alſo the Dean and Canons of Winſor ſhall be henceforth diſcharged of the Tenths and Firſt Fruits beforementioned. *Grants made to the Univerſities and Colleges, &c. Windſor.*

That all Grants of Impropriations made to the Archbiſhop of Wells ſhall remain good notwithſtanding this Act; yet the ſaid Archdeaconry, and all Spiritual Promotions aſſigned to it, ſhall from henceforth pay Firſt Fruits and Tenths. *Archbiſhop of Wells charged.*

That all Impropriations, or other Profits or Emoluments Eccleſiaſtical, which were formerly within the Duchy Court of Lancaſter, ſhall be recontinued, notwithſtanding this Act, or that of 2 & 3 P. & M. *Duchy of Lancaſter.*

That the Revenues of Hoſpitals and Schools ſhall not be charged with the Payment of Firſt Fruits or Tenths, notwithſtanding this Act, i. e. 1 Eliz. c. 4. *Hoſpitals and Schools diſcharged.*

And note by Stat. 17 *Car.* 2. *c.* 3. for Union of Churches, *&c.* (which ſee in the next Chapter) there is a Saving of all Firſt Fruits and Tenths to the King, *&c.* *Stat.* 17 *Car.* 2. *c.* 3.

By Stat. 2 & 3 Annæ, c. 11. 'tis enacted, That the Queen may by Letters Patents incorporate ſuch Perſons as ſhe ſhall appoint, to have a Common Seal, and perpetual Succeſſion, and by the ſame, or other Letters Patents, may limit and ſettle upon the ſaid Corporation, the Firſt Fruits of all Benefices Spiritual, for the Augmentation of the Maintenance of Miniſters of the Church of England, officiating in any Church or Chapel in England, Wales, or Berwick, not ſufficiently provided for, with ſuch Rules, and in ſuch Manner as ſhall be therein expreſſed. *The Queen may erect a Corporation, and ſettle the Firſt Fruits and Tithes for Augmentation of the Maintenance of the meaner Clergy.*

That the Statutes and Proviſions touching the Levying, Payment and Qualification, ſhall continue in Force as to the ſaid Firſt Fruits.

That this Act ſhall not affect or avoid any Grant, Alienation, or Incumbrance made of, or on the ſaid Firſt Fruits. And that all Perſons (except within Age, or Non ſane Memory, or Women Covert without their Husbands) may give Lands, Tenements or Goods to the ſaid Corporation. *Not to avoid any former Grant, &c.*

First Fruits.

That one Bond only shall be given for the Four Payments of First Fruits, to be paid accordingly as they have been usually rated and paid, and not four Bonds; and no fifth Bond taken for a further Value or Payment in respect of the same, shall be sued or recovered.

One Bond only to be taken for the Four Payments of the First Fruits.

And Note by Stat. 5 *Annæ*, *c.* 24. All Benefices with Cure of Souls, not exceeding the clear yearly Value of 50 l. by the improved Valuation (the Tenth whereof by Her Majesty's Letters Patents, dated 3d Nov. in the Third Year of Her Majesty's Reign, are vested in a Corporation, by the said Letters Patents, constituted by the Name of The Bounty of Queen ANNE for the Augmentation of the poor Clergy) and the Incumbents thereof, their Heirs, Executors, Administrators and Sureties, shall be discharged from the said First Fruits and Tenths, and Arrears thereof.

St. 5 *Annæ*, *c.* 24. Ecclesiastical Benefices not exceeding 50*l.* *per Annum*, discharged from Payment of First Fruits, *&c.* for ever.

That the Bishops of every Diocese, Guardians of the Spirituals, sede vacante, and Ordinaries of Peculiars, should by Oaths of two or more credible Witnesses, (which they, or some Commissioned by them, were impowered to administer) as by other lawful Ways, inform themselves of the improved yearly Value of every Benefice with Cure of Souls within their respective Jurisdictions, the clear yearly Value whereof doth not exceed 50 l. and on or before the 25th of March 1708. under their Hands and Seals, certify the same into the Exchequer, which Certificate filed there, shall ascertain the yearly Value of the Benefice, to be discharged by this Act.

Bishops to certify the clear yearly Value of Benefices with Cure of Souls.

Proviso, That this Act shall not discharge any Benefice with Cure of Souls, the Tenths whereof were granted to any Person in Perpetuity before the 3d of November in the Third Year of Her Majesty's Reign.

Not to discharge Tenths formerly granted in Perpetuity.

That when any Part of the First Fruits remaining to be disposed of shall be disposed of towards the Maintenance of any Minister officiating in any Church or Chapel, such Part shall ever be in like Manner continued to the Minister from Time to Time, officiating in the same Church or Chapel, who shall injoy the same for ever. And this Act shall be taken in all Courts and Places as a publick Act.

First Fruits once applied, *&c.* to continue for ever.

Proviso, That this Act shall not be construed to avoid or diminish any Stipend or Pension granted to any Person, and charged on the said First Fruits: But in case it happen, that by discharging such small Benefices, the First Fruits in any Diocese shall not be sufficient to satisfy such Sums they stand charged with, then the whole First Fruits throughout England shall be liable to make good such Deficiencies.

Not to diminish Pensions, *&c.* heretofore granted out of the First Fruits, *&c.*

Stat. 6 *Ann.* *c.* 27. All Ecclesiastical Benefices not exceeding 50 *l.* *per Annum*, *&c.* Discharged for ever from First Fruits, *&c.*

By Stat. 6 *Ann.* *c.* 27. All Ecclesiastical Benefices with Cure of Souls, not exceeding the clear yearly Value of 50 l. by the improved Valuations (the Tenths whereof are not vested in the Corporation of The Governors of the Bounty of Queen ANNE, *&c.*) and the Incumbents thereof, their respective Heirs, Executors and Administrators, Successors and Sureties, shall be discharged from the said First Fruits. And the ascertaining the said yearly Valuations of such Benefices hereby discharged, shall be as other Livings mentioned in 5 Ann. cap. 24.

Further Time for the Certificates.

That the Certificates of the proper Ordinaries into the Exchequer, of the yearly Value of Livings hereby intended to be discharged,

charged, may be made at any Time before the 24th of December 1708.

Union of Churches.

That such Certificates as shall be made into the Exchequer of the yearly Valuation of Livings, intended to be discharged by the said Act 5 Ann. c. 24. before the said 24th of December 1708. shall be as good as if made before the 25th of March 1708. And that this Act shall be taken and accepted as a publick Act.

And shall be as good as if made before 25 *March* 1708. This a publick Act.

That every Archbishop and Bishop shall have four Years allowed them, when he or they shall compound for the same, for the Payment of First Fruits, which shall commence from the Time of Restitution of the Temporalities, and every Year shall pay one fourth Part; and if he die or be removed before the four Years expire, he, his Heirs, Executors and Administrators, shall be discharged of so much as was not payable before his Death or Removal.

Four Years allowed to Archbishops and Bishops, to pay their First Fruits.

That Deans, Archdeacons and other Dignitaries, shall compound for their First Fruits, as Rectors and Vicars have been accustomed to do; and in case of Death or Removal within the Time allowed to Rectors and Vicars for Payment of First Fruits, shall have the Benefit allowed Rectors and Vicars, by 1 Eliz. c. 4. for Restitution of First Fruits to the Crown.

Proviso in case of Death, Deans, Archdeacons, &c. to compound for First Fruits, as Rectors, Vicars, &c.

By *Stat.* 1 *Geo.* 1. *sess.* 2. *chap.* 10. Divers Regulations are made concerning the Bounty of Queen *Anne*. Bishops are impowered to inquire into, and return the Values of small Livings not before ascertained; stipendiary Preachers or Curates, and Incumbents of Donatives are made capable of partaking of the Benefit of the Augmentation, and augmented Cures are made perpetual. The Act is very long, we therefore refer to it.

By *Stat.* 3 *Geo.* 1. *chap.* 10. The Letters Patent to the Governors of the Bounty of Queen *Anne*, &c. are in Part recited, and then the Archbishops and Bishops are discharged from being Collectors of the First Fruits and Tenths, to which they were appointed by Stat. 26 *H.* 8. and other subsequent Statutes. And it is enacted, That from the 26th of December 1715. there shall be but one Collector or Receiver thereof. For divers Regulations, see the Act at large.

CHAP. XVI.

Of Union of Churches.

see 2. Gibs. Cod. 1. ed. 959. & in Append. tit. nat. book 55. 1. Stillingfl. Eccles. Cas. 226.

The extraordinary Ways or Means.
1. Union.
2. Appropriation.
3. Commendam.

THE extraordinary Ways or Means, by which an Ecclesiastical Person may have a Title to a Benefice in the Church, are either by procuring an Union to be made of a Church to the Church or Benefice of which he was before possessed, or by causing another Benefice to be appropriated to him and his Successors, as Incumbents of another Church, or by *Commendam recipere*. At Common Law the Patron, Parson and Ordinary might make Union of two weak Churches, without the Consent of the King, 5 *Ed.* 3. 26. if they were very poor, because the King's

Union of Churches.

King's Concern was very ſmall, but if they were of reaſonable Value, then the King's Conſent muſt concur.

In 11 *H.* 7. the Common Law would not examine by whom an Union was made; it was the making of *Stat.* 37. *H.* 8. *Ch.* 31. which gave Juriſdiction to the Common Law to examine, whether Unions were well made.

Such an Union is commonly made in the Time of the Vacancy of the Church, for if the Church was full, the Act of the Ordinary could not prejudice the Incumbent; for by the Union, the Incumbency would be deſtroyed; therefore if the Church was full, the Conſent of the Incumbent was neceſſary. But if the Church was full, and the Incumbent would not conſent, the Union could not be made *de verbis in præſenti*, but it might be made *de verbis in futuro, quando vacaverit, &c.* 6 *H.* 7. 14. And after the Union, the Ordinary might compel the Pariſhioners to come to the Church to which the Union was made, and to pay their Tithes by Proceſs in his Court, and no Prohibition was grantable. Their *Modus's* continued good; the Pariſhes as to Taxes, *&c.* continued diſtinct. *Hob.* 67. The Reparations were ſeveral, but the Union made it one Church and one Benefice. The Patrons of united Churches have their Rights and their Poſſeſſions ſeveral; by *Powell* J. in the Caſe of *Reynoldſon* v. *Blake* and the *Biſhop of London*, 1 *Ld. Raym.* 195, 196, 197.

In a *Quare Impedit* for an united Church, after the Patron has had a Preſentation, he may declare that he was ſeiſed of every ſecond Turn, as in Groſs. S. C. 1 *Ld. Raym.* 200. by *Treby* C. J.

Concerning the Union of two Churches into one, two Acts of Parliament have been made, *viz.* 37 *H.* 8. *c.* 21. and *Car.* 2. *c.* 3. the Words of which, ſo far as they touch this Matter, are as followeth:

Union of two Churches by Acts of Parliament, 37 *H.* 8. *c.* 21.

Where in divers and ſundry Places within this Realm of England, there be many and ſundry Parſonages, the Glebes, Tithes, and yearly Revenues and Profits whereof be not ſufficient to find a Prieſt or Curate to ſerve, or miniſter to the Pariſhioners thereof, within a Mile or leſs of the Church; of which poor Parſonages there is in many Places another Church pertaining to another Pariſh, ſtanding as neceſſary and commodiouſly for the Acceſs of the Pariſhioners of the other poor Pariſh, as their own doth:

And foraſmuch as the Charges for the Maintenance of two ſuch Churches and Chapels, with all manner of Reparations, Ornaments, and other accuſtomed Duties pertaining to a Church, be much greater than may be well raiſed or born amongſt ſuch poor Pariſhioners, and might and ſhould be eaſed and remedied by the uniting and knitting of ſuch Churches in one:

It may therefore pleaſe the King's Royal Majeſty, with the Aſſent of his Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, that it may be enacted and eſtabliſhed, That an Union or Conſolidation of two Churches in one, or of a Church and Chapel in one, the one of them not being above the yearly Value of ſix Pounds, as it is rated and valued at to the King's Highneſs, in the Court of the Firſt Fruits and Tenths, and not diſtant from the other above one Mile in any Place or Places within this Realm of England, may be from henceforth had or made by the Aſſent of the Ordinary or Ordinaries of the Dioceſe where ſuch Churches and Chapels ſtand in; and by the Aſſents of the Incumbents of them, and of all ſuch as have a juſt

Of what Value.

How diſtant.

Right,

Right, Title and Interest to the Patronages of the same Churches and Chapels, being then of full Age: And that all such Unions and Consolidations, had or made of two Churches in one, or of a Church and Chapel in one, as is aforesaid, shall be good, sufficient, lawful, firm, stable, and available in the Law, to remain, indure and continue for ever united and knit in one, in such Manner and Form, as by Writing or Writings under the Seals of such Ordinaries, Incumbents and Patrons, it shall be declared and set forth. Union of Churches.

And be it further enacted by the Authority aforesaid, That all Unions and Consolidations of all Churches and Chapels, which have heretofore been united or knit together in one by the Assent of the Ordinaries, Incumbents, and true and lawful Patrons in Fee-simple of them, as is aforesaid, shall also remain, and be from henceforth adjudged and deemed in the Law, to indure and continue for ever united and knit in one without any Dissolution, Undoing, Unknitting, or Repeal of them or any of them, by any manner of Means or Way. Of former Unions.

Saving unto the King's Majesty, his Heirs and Successors, all the Tenths and First Fruits of all such Churches and Chapels as be heretofore united or consolidated in one, or that hereafter shall be united and consolidated in one, according to the same, or such like Rates and Valuations as the same Churches and Chapels, or any of them now are rated or valued at to the King's said Majesty, in his said Highness's Court of the First Fruits and Tenths; provided always, That all Unions and Consolidations, and every of them hereafter to be had or made of any Church or Chapel, within any City or Town Corporate within this Realm of England, without the Assent of the Mayor, Sheriffs and Commonalty of the City where such Churches, Church or Chapel be, or shall be, or without the Assent of such Bodies Corporate of other Towns Corporate, where such Churches, Church or Chapel be, or shall be, by the Names of their Corporations in Writing under their Common Seal, shall be clearly void, and of no Force nor Effect; any thing before expressed, or any Ordinance, Law, Custom or Statute to the contrary thereof in any wise notwithstanding. Saving of Tenths and First Fruits.

Provided also, That where the Inhabitants of any such poor Parish, or the more part of them, within one Year next after the Union or Consolidation of the same Parish, by their Writing, sufficient in the Law, shall assure the Incumbent of the said Parish, for the yearly Payment of so much Money, as with the Sum that the said Parish is rated and valued at in the King's Highness's said Court of the First Fruits and Tenths, shall amount to the full Sum of Eight Pounds Sterling, to be levied and paid yearly by the said Inhabitants to the said Incumbent and his Successors, that then all such Unions or Consolidations hereafter to be had or made of any such poor Parish as is aforesaid, shall be void and of none effect; any thing Statuted or Ordained to the contrary hereof in any wise notwithstanding. Proviso for making void an Union.

Provided always, That this said Proviso shall not extend to any Union or Consolidation of any Church or Chapel, had or made before the making of this Statute; any thing in the said Proviso mentioned to the contrary thereof notwithstanding.

Union of Churches.

17 *Car.* 2. *c.* 3. for Union of Churches in Cities and Towns Corporate, *&c.*

FOrasmuch as the settled Provision for Ministers in most Cities and Towns Corporate within this Realm, is not sufficient for the Maintenance of able Ministers fit for such Places, whereby mean and stipendiary Preachers are entertained to serve the Cures there, who wholly depending for their Maintenance upon the good Will and Liking of their Auditors, have been, and are hereby under Temptation of too much complying and suiting their Doctrines and Teaching to the Humour, rather than the Good of their Auditors, which hath been a great Occasion of Faction and Schism, and of the Contempt of the Ministry: The Lords and Commons in Parliament assembled, being deeply sensible of the ill Consequence thereof, and piously desiring able Ministers in such Places, and a competent settled Maintenance for them by the Union of Churches, which is also become necessary, by reason of the great Ruin of many Churches and Parishes in the late ill Times, and otherwise, do therefore most humbly beseech your most excellent Majesty, that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal and the Commons in this present Parliament assembled, and by the Authority of the same, That in every City or Town Corporate, and their Liberties within the Kingdom of England, and Dominion of Wales, which have a Mayor and Aldermen, and particular Justices of the Peace, by Charter or Commission, or Bailiff or Bailiffs, or other chief Officer or Officers, and other Assistants by like Charter; and where two or more Churches or Chapels, or a Church and a Chapel, and the Parishes thereunto belonging, do lie within the said Corporation or Liberties thereof, convenient to be united; in such Cases, the Bishop of the Diocese where such Parish and Parishes are, with the Consent of the Mayor, Aldermen and Justices of the Peace, Bailiff or Bailiffs, or other chief Officer or Officers, or the major Part of them, and of the Patron or Patrons of such Church or Churches, Chapel or Chapels, shall or may, according to due Form of Law, unite the said Churches or Chapels, or Church and Chapel, or any of them; and shall appoint at which Church or Chapel, Churches or Chapels, the said Parishioners and Inhabitants of the Parishes or Places, to which the said Churches or Chapels, or Church and Chapel do belong, shall usually meet for the Worship of God; and which of the said Churches or Chapels, or Church or Chapel, shall be united and annexed unto the other, which shall be the Church presentative, unto which all Presentations shall thereafter be only made, and unto which the Parishioners shall resort as their proper Church. And after such Order made, the said Churches or Chapels, or Church and Chapel, shall accordingly for ever stand united. And the Parishioners, Landholders and Inhabitants of the said Parishes and Places belonging to such Churches or Chapels, or Church and Chapel so united and annexed, shall, as they, or any of them become void, and from thenceforward, pay all such Tithes and other Duties, as belong, or did belong to the Incumbent of any of the said Churches or Chapels, or Church and Chapel so united and annexed unto the Incumbent of the said presentative Church or Chapel, unto which the said other Churches or Chapels, or Church or Chapel, shall be so united and annexed.

Union of Churches.

And it is hereby also enacted, That notwithstanding any such Union to be made by virtue hereof, each of the Parishes so united shall continue distinct as to all Rates, Taxes, parochial Rites, Charges and Duties, and all other Privileges, Liberties and Respects whatsoever, other than what is herein before-mentioned and specified, and Church-Wardens shall be elected and appointed for each Parish, as they were before such Union made.

Parishes to continue distinct.

When to take effect.

And it is further enacted and provided, That where one or more of the said Churches or Chapels, or Church and Chapel so united and annexed, shall be full at the Time of making such Union, that the said Union shall take effect for every such Church or Chapel, upon the first Avoidance after such Union made. And that the several Patrons of the said Churches and Chapels so united, shall and may present by Turns to that Church only which shall remain, and be presentative from Time to Time, in such Order as the said Bishop, with the Consent of the said Mayor, Aldermen and Justices of Peace, Bailiff or Bailiffs, or other chief Officer or Officers within such Parishes, or the major Part of them, and of the Patron or Patrons of such Church or Churches, Chapel or Chapels, shall determine and decree for the Preservation of their respective Rights therein, Respect being therein had to the Differences of the Value of the yearly Maintenance belonging to such Churches or Chapels, or any of them, saving unto the King's Majesty, his Heirs and Successors, all the Tenths and First Fruits of all such Churches and Chapels so to be united according to the Rates and Valuations at which the said Churches and Chapels are rated and valued, in the Office of First Fruits and Tenths, in his Majesty's Court of Exchequer; and also reserving all Procurations and Pensions to all Persons to whom they are now, and have been formerly, or shall be hereafter due and payable; any thing herein contained notwithstanding.

Presentation by Turns.

Saving of Tenths and First Fruits, &c.

Union to be registred.

Provided always, That no Union of Parishes or Places to be made, by virtue of this Act, shall commence or be effectual in Law, until it be registred in the Register-Book of the Bishop of the Diocese, which the Register is hereby required to do.

If the Maintenance exceed 100 *l. per Annum.*

Provided always, That no Union made by virtue hereof, shall be good and effectual, where the settled Maintenance belonging to the Parsons, Vicars and Incumbents of the Church or Chapel, or Churches or Chapels so united, shall exceed the Sum of One hundred Pounds per Annum, clear and above all Charges and Repризes; unless the respective Parishioners, or the major Part of them, under their Hands, desire otherwise.

Minister to be a Graduate.

Provided always, and be it enacted, That every Minister settled as aforesaid, the Incumbent of any Church or Chapel, or Churches and Chapels united according to this Act, shall be the full and lawful Incumbent thereof to all Intents and Purposes, so as such Minister be a Graduate in one of the Universities of this Kingdom.

How poor Churches were formerly united.

Before either of these Statutes were made, it was lawful for the Ordinary, by the Assent of the Patrons, to unite or consolidate two Churches; and this by *Gaudy* and *Fenner*, without the King's Licence precedent, or Confirmation subsequent, especially if the Churches were Poor: But, say they, the Ordinary, with the Consent of the Patrons, without the King's Confirmation, could not have made an Union of Churches, which had sufficient to maintain an Incumbent each of them

by

Union of Churches.

by itſelf; but by the Conſent of the King, Patrons and Ordinary, an Union may be made of any Churches, of whatſoever Value they be; yet the Ordinary is the principal Actor in the Union, and if the King's Conſent be either precedent, or ſubſequent, it ſufficeth. 40 *E.* 3. 28. *a.* 50 *E.* 3. 26. 32 *H.* 6. 22. 4 *H.* 7. 6. 9 *H.* 6. 22. *Br. Abr. Appropriation, &c.* 2 *Mich.* 38. 39 *Eliz.* *Auſten* and *Twine*'s Caſe, *Roll's Abr. p.* 778. the ſame Caſe. *Moor* 408. and 661. and 3 *Cro.* 500. *Parſon's Law, c.* 28. And ſo it doth ſuffice to have the Patron's Conſent before the Union; for it is not material which of them doth begin the Union, if the Words be ſufficient, although that the Ordinary be the principal Agent; for that he ſaith, *Unimus*, and hath the Cure of the Souls. *Roll's Abr. p.* 778. But the Civilians, Doctor *Steward* and Doctor *Crompton*, agreed, that by the expreſs Text of the Canon Law, the Ordinary with the Patron's Aſſent might have made an Union of two Churches, although either of them were worth One hundred Pounds *per Annum*, and ſufficient to maintain a Miniſter by itſelf, and that ſuch Unions might have been made without the Pope's Confirmation: And by *Steward*, if an Union had been unlawfully made by the Pope's Confirmation, it had been for ever good; and ſuch Authority as the Pope had, the King now hath by the Statute: But *Crompton* ſaid, That an Union made upon a ſuppoſed and pretended Poverty, which appears to be falſe, and the Ordinary to be deceived, is void; and ſo if a Surmiſe be, that the two Churches be diſtant but one Mile, that there are but few Inhabitants, and that one of the Churches is in Decay, the Surmiſes being falſe, the Union is void; and if the Inhabitants of one Pariſh do ſue in the Spiritual Court, to compel thoſe of the other Pariſh to come to their Church, a Prohibition lies. *Mich.* 9, 10 *Car.* Sir *Robert Mordent* and *Dobſon*'s Caſe, *Roll's Abr. p.* 2. 778. However, the Court at length agreed, That ſuch Unions, as might have been lawfully made before Statute 37 *H.* 8. *c.* 21. may at this Day be made, and that ſuch Authority is not taken away, nor reſtrained, but limited what Union may be made without the the King, becauſe the ſaid Statute is in the Affirmative, and not with a Negative, and then a Statute never takes away the Common Law. 33 *H.* 8. *Dyer* 50. 4 & 5 *Philip* and *Mary*, *Dyer* 135. And ſo the Way of uniting Churches at Common Law, before the Statute, remains good at this Day. *Trin.* 37 *Eliz.* *Auſtin* v. *Twyne*, 3 *Cro.* 500. *Roll's* 2 *Abr.* 778. But *Moor* 661. reporting the ſame Caſe, ſays, that it was agreed, That if one of the Churches be not of the Value of 8 *l. per Annum*, or under, no Conſolidation can be made after the Statute 37 *H.* 8. but the Report according to *Croke* is more to be relied on; for what *Moor* reports here as the Reſolution of the Court ſeems to be only the Opinion of *Popham*, who did hold that Opinion contrary to the other Judges, but he after ſeemed to wave his Opinion, and conſented to the Judgment. *Hobart* declares his Opinion, That if a Man hath one Benefice with Cure, of the yearly Value of 8 *l.* or above, he cannot, without Qualification and Diſpenſation, procure another with Cure to be united to it after, though they make but one Benefice, and this by reaſon of the Statute 21 *H.* 8. *c.* 13. *Colt* and *Glover*'s Caſe, *Hob.* 158. But I rather think, that the Statute is not prohibitory of perpetual Unions, but hath reſpect to temporary Unions only, as for the Life of one Incumbent, which the Archbiſhop may make, and ſometimes hath made. *Mich.* 41 *Eliz.* *Queen* v. *Page* and *Biſhop of London*, 3 *Cro.* 719. In which Caſe, I ſuppoſe, that the Churches are not ſo much united together, as that the Inhabitants of the one Church ſhall be compelled to hear Divine Service, *&c.* in the

The Civilians Opinion.

Upon a pretended Poverty.

Mich. 9 & 10 *Car.* the Court agreed what Unions may be.

Statute in the Affirmative.

Diſpenſation.

Unions for Life, *&c.*

other Church, as united in the Incumbent; but only that the Incumbent may have the Profits of both, and provide for the Cure of both during his Incumbency, and the Churches do remain distinct Cures notwithstanding; and after the present Incumbent's Title ceaseth, shall be capable of distinct Incumbents again, as formerly.

Union of Churches.

The Clause in the said Statute 17 *Car.* 2. *c.* 3. which provides, **That all Unions, and every of them hereafter to be made in corporate Towns, without the Consent of the Magistrates, shall be clearly void, any thing before expressed, or any Ordinance, Law, Custom or Statute to the contrary thereof in any wise notwithstanding,** seems to me to extend to all Unions whatsoever that shall be made, *viz.* as well to those which shall be made with the King's Confirmation, as unto those that shall be made according to the Direction of this Statute, because the Words thereof are general, and with a *Non obstante.* (*Quære.*)

Q. of this Clause.

If the Churches, or Church and Chapel be in two Dioceses, both Ordinaries must concur to make the Union, 11 *H.* 7. *f.* 8, and 26. in *Grendon*'s Case, *Plow.* 497. *b.* and so must both Patrons in all Unions. 11 *H.* 7. 8. 6 *H.* 7. 13. 46 *Ass. Pl.* 4. 50 *E.* 3. 26. 48 *E.* 3. 28. And if either of the Patrons be a Bishop, the Assent of his Dean and Chapter must be also had. *Pasch.* 10 *Car. B. R. Leigh* and *Hellier*'s Case, *Roll's Abr.* 2. *p.* 357.

If two Churches in one Diocese.

A Church may be united unto another before it be void, if the Words be proper for that purpose; and he that hath the Church to which the other is united, may enter into the Church so united, when it doth become void, without any other Donation or Induction, as was done, when a Chapel being full was united to *Magdalen* College in *Oxford*, 11 *H.* 7. 8. yet it is said, that an Union ought to be made when the Church is void, or else the Union is void, and that the Law is the same as to an Appropriation; by *Keble Br. Abr. Appropriation*, &c. 5. For an Appropriation may be made by apt Words, when the Church is full, *viz.* by Words which may serve to appropriate it after it becomes void. *Greendon* v. *Bishop of Lincoln, &c. Plowden* 499. *b.* That Unions may be made when the Churches, or one of them are full, pursuant to the before recited Statutes, appears by the express Words of Stat. 17 *Car.* 2. and is implied in the Words of Stat. 37 *H.* 8. where the Consent of the Incumbent is directed to be had in such Unions. If the Patron of the Rectory of *A.* having purchased the Advowson of the Rectory of *B.* and at all Times after hath presented to the Church of *A. cum Capella de B.* yet such Presenting Time out of Mind, shall not make, or have the Effect of an Union, but the Church of *B.* still remains a distinct Church, and shall go in Lapse notwithstanding such Presenting, and the Freehold thereof will be in Suspence, and not in the Patron as Disseisor; for the Patron's Entry in the Vacation doth not gain any Freehold. *Savile, f.* 17. *Case* 46.

Union before the Church united is void.

Appropriation.

Where Presentation makes no Union.

Upon an Union made, it must be appointed who shall present next after the said Union, one of the Patrons, or both, or jointly, or severally by Turns, and upon such Union and Agreement made by Instruments or Writings, under the Hands and Seals of the Patrons, Ordinaries and Incumbents, (if the Churches be then full) each of the Patrons, if he be disturbed, may have his *Quare Impedit.* And altho' by the Union the Incumbency of one Church be lost and extinguished, yet the Patronage doth remain still in Being; and therefore if an Annuity be granted out of the Church of *B.* and afterwards the Church of *B.* is united to the Church of *A.* if the Grantee of the Annuity doth release to the Patron of the Church of *A.* the Annuity is not thereby extinct, but a Release to

Appointment for the Presentations.

Patronage remaineth.

Union of Churches.

the Patron of the Church of *B.* will extinguiſh the Annuity. *Parſon's Law* 272. Yet if a Writ of Annuity for the Recovery of this Annuity be brought againſt the Incumbent, he muſt be named Incumbent of the Church of *A.* to which the Church of *B.* is united, and not of *B.* for that there is no ſuch Church in Being. 11 *H.* 6. 33. *a.* 14 *H.* 6. 14. *b.* If the Poſſeſſions of a Prebend be united unto a Deanery, yet the Prebend itſelf remains in Being as to the Office, and as diſtinct from ſuch Deanery. *Dyer* 10 *Eliz.* 273. But if a Church Parochial be duly united unto a Prebend in a Cathedral Church by the Biſhop, *&c.* and a Clerk is collated to the Prebend, and after inſtalled in the Cathedral, although that the Pariſh Church be not in the ſame Dioceſe with the Cathedral, yet the Clerk thereby hath Poſſeſſion thereof, without any Preſentation, Inſtitution or Induction, becauſe by the Union, the Pariſh Church is become the Corps of the Prebend. *Paſch.* 10 *Car. B. R. Leigh* and *Hellier's* Caſe, *Roll's Abr. P.* 2. *p.* 357. And a Chapel it ſeems may be united to the Preſident and Scholars of a College and their Succeſſors, as was agreed by all except *Townſend*, who ſaid that a Thing united ſhall be united to a Thing of the ſame Nature; and the Chapel and College being dead Things, might therefore be united, but not a Chapel to the Preſident, *&c.* *Br. Appropriation*, &c. 9. After an Union is made, if any Queſtion doth ariſe concerning the Validity thereof, this may not be tried in the Temporal, but only in the Spiritual Court, unleſs ſuch Union as is reſtrained by the Statutes aforeſaid. *Trin.* 37 *Eliz. Auſtin* v. *Twyne*, 3 *Cro.* 500. Where there are Patrons of united Churches, each hath the whole Advowſon in his Turn, but his Writ of Right muſt be *de medietate Advocationis.* 1 *Ld. Raym.* 197. by *Powell* J. in the Caſe of *Reynoldſon* v. *Blake* and *The Biſhop of London.*

Prebend to a Deanery.

Church unto a Prebend.

Chapel to a College.

Trial in Spiritual Court.

By the Union of two Churches Parochial, the Pariſhes were not thereby united, but remained diſtinct as before; and the Reparation alſo continued to be ſeveral. *Hob.* 67. But by the Statute 4 *&* 5 *W. & M. c.* 12. the Pariſhioners of the Church united are made Contributory to the Repairs and Ornaments of the Church to which the Union is made. The Words of which Statute are as followeth:

Pariſh united to be Contributory to Repairs, *&c.*

4 *&* 5 *W. & M. c.* 12. for contributing towards Repairs, *&c.*

Whereas by an Act of Parliament, made in the Seventeenth Year of King Charles the Second of Bleſſed Memory, Proviſion was made for the uniting Churches in Cities and Towns Corporate: And forasmuch as it is highly reaſonable that Pariſhioners of Pariſhes whoſe Churches are demoliſhed, and either before or afterwards united to other Churches, ſhould be Contributors towards the Repairs and other Parochial Charges of ſuch other Church, to which by Virtue of the ſaid Act they are united;

Therefore be it enacted by the King and Queen's moſt Excellent Majeſties, by and with the Advice and Conſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That where any Churches heretofore have been, or hereafter ſhall be united by Virtue of the ſaid Act; and one of the ſaid Churches ſo united was at the Time of ſuch Union, or ſhall afterwards be demoliſhed; that in all ſuch Caſes, as often as the Church which was or ſhall be made the Church Preſentative, and to which the Union was or ſhall be made, ſhall be out of Repair, or there ſhall be need of decent Ornaments for the Performance of Divine Service therein; that the Pariſhioners of the Pariſh whoſe Church ſhall then be down or demoliſhed, ſhall bear

bear and pay, towards the Charges of such Repairs and decent Ornaments, such Share and Proportion, as the Archbishop or Bishop that shall make such Union shall by the same Union direct and appoint; and for want of such Direction and Appointment, then one Third Part of such Charges of the Repairs and decent Ornaments which shall be made or provided; and the same shall be Rated, Taxed and Levied; and in Default thereof, such Process and Proceedings shall be had and made against him or them, as if it were for the Reparation and finding decent Ornaments for their own Parish Church if no such Union had been made; any Law, Custom, Usage or Opinion to the contrary heretofore notwithstanding. 4 & 4 *W. & M. cap.* 12. But this Statute extends only to Unions made by Vertue of the Statute 17 *Car.* 2. as appears by the express Words of it, so as to Unions made in other Cases, the same still remains as it was, *viz.* the Parishioners of the Church united are not contributary to the Repairs and Ornaments of the Church to which the Union is made, according to *Hobart* 67. neither can they, I suppose, bury their Dead there, but must provide Burial-Places for themselves, as before the Union made. Union of Churches.

By *Stat.* 9 *Ann. ch.* 22. a new Imposition was laid on Coals and Culm to be brought into the Port of *London* before the 29th Day of *September* 1724, to be appropriated, *&c.* for the building of 50 new Churches with Towers or Steeples; for purchasing of Scites of Churches, Church-yards and burying Places in or near *London* and *Westminster*, or the Suburbs; for making such Chapels and Churches, as were then already built, and capable thereof, Parish Churches; and for purchasing Houses for the Habitations of the Ministers of the said Churches; and for applying 4000 *l. per ann.* towards repairing and finishing *Westminster Abbey*, and 6000 *l. per ann.* towards finishing *Greenwich* Hospital and Chapel there, and to no other Use.

And it is thereby enacted, that 50 new Churches shall be built with Towers, *&c.* whereof one to be in the Parish of *East-Greenwich.*

And the same Act (reciting that in several Parishes near the said Cities there are some Chapels erected for the Publick Worship of God, as established in the Church of *England*, which are fit to be converted into Parish Churches, and to have Districts of Parishes assigned to them, but that several are built upon Terms for Years, *&c.*) enacts, that such of them as are fit and proper, be made Parish-Churches.

And by the same Act 9 *Ann. ch.* 22. the Queen was enabled, by Letters Patent to appoint Commissioners, who were to ascertain the Bounds of Parishes to be made, and to inform themselves of many Matters mentioned in the Act, and to make a Report thereof to the Queen before the 25th of *December* 1711.

Stat. 10 *Ann. cap.* 11. recites the foregoing Act, and that the Commissioners had been appointed, but could not perfect their Matters within the Time limited in the Letters Patent, and then enacts, that they may meet and perform all Things in that or the present Statute, until they shall have compleated the same.

And they are hereby impowered to purchase Lands, *&c.* for new Churches, Church-yards and Ministers Houses, to be conveyed to five or more of them, and their Heirs, for these Purposes. And the Commissioners are authorized to build the Churches, and to convert Chapels into Churches, and to provide Houses for the Ministers, and to inclose the Church-yards; and they may provide more Cemeteries than one for

Union of Churches.

a Pariſh; and wherever they purchaſe Ground for Cemeteries for any new Pariſhes, it ſhall, after Purchaſe and Conſecration, be deemed Part of the Pariſh for the Uſe of which it was purchaſed, *&c.* and ſhall be diſcharged from Rates and Taxes to the other Pariſh out of which it was taken.

By the ſame Act 10 *Ann. ch.* 11. two or more of the Commiſſioners are impowered, by Writing on Parchment under Hands and Seals, to be inrolled in Chancery, to aſcertain the Bounds of the Scites of new Churches, and Miniſters Houſes, and Church-yards, and new Pariſhes, to be diſtinct Pariſhes for ever, except as touching Church Rates, Relief of the Poor, and Rates for the Highways, is herein after provided. And the Commiſſioners, or five or more, may by Inſtrument inrolled in Chancery take a Diſtrict out of any of the large Pariſhes in and about *London* and *Weſtminſter*, where any new Pariſh ſhall be made, and unite the ſame to any other leſſer Pariſh next adjoining thereto, wherein a Church is already erected.

By the ſame *Stat.* 10 *Ann. ch.* 11. there ſhall be a Rector (with Succeſſion) of every new Pariſh. The firſt to be appointed by the Queen, and the Freehold of the Churches, Church-yards and Miniſters Houſes are to veſt in them; and they are inabled to purchaſe to them and their Succeſſors not exceeding 200 *l.* a year each.

By the ſame Act five or more of the Commiſſioners may inform themſelves of the Right of Advowſon, *&c.* of the Church from which any Diſtrict ſhall be taken, and to agree for the more effectual dividing the Pariſh, Tithes, *&c.* to take place after the firſt Avoidance, and for ſettling the Right of Patronage of the new Churches. And all ſuch Agreements, with the Aſſent of the Ordinary, in Writing, *&c.* inrolled in Chancery, ſhall be binding. And Bodies politick, Guardians to Infants, Committees of Lunaticks and Ideots, Executors, Adminiſtrators and Truſtees, are impowered to contract with the Commiſſioners, or five of them, for Sale of Lands, and for ſettling the Right of Patronage. But this is to be done upon Petition to Chancery, which Court is to direct how the Money is to be applied for the Benefit of the Infant, *&c.* The Crown in every ſuch new Pariſh, in the mean time, and until ſuch Agreement and Settlement can be made concerning the Patronage thereof, may name from Time to Time the Rector of ſuch new Churches to ſucceed therein. And all Rectors (except where the then preaching Miniſters of Chapels are by this Act made Rectors) ſhall be preſented and inſtituted, or collated and inducted, as other Rectors, *&c.* and ſhall perform all Matters for qualifying or intitling themſelves; and they and their Churches and Church-wardens ſhall be ſubject to ſuch Juriſdiction and Viſitation as other Churches, *&c.*

Provided not to extend to deprive the Succeſſors of the preſent Rectors, *&c.* of the preſent Pariſh Churches, out of which any Diſtrict ſhall be taken, of any Tithes, *&c.* belonging to them, until ſuch Agreements be made, *&c.*

Provided alſo not to extend to alter the Property of any Proprietor of any of the Chapels which ſhall be made Pariſh Churches, or in the Pews in the ſame, without the Conſent of the Proprietor. Provided, if any of the ſaid Proprietors be minded to ſell their Properties in any of the Pews in the ſaid Chapels, they ſhall ſell only to the Inhabitants of that new Pariſh.

By the ſame Act 10 *Ann. ch.* 11. the firſt Church-wardens and Overſeers for the Poor, Scavengers and Surveyors for the Highways, and other

Union of Churches.

Pariſh Officers for every ſuch new Pariſh, ſhall by five or more of the Commiſſioners be elected out of the Inhabitants within a Month after Conſecration of the Church; and all the ſucceeding Officers ſhall be choſen, *&c.* annually according to the Laws now in Force.

By the ſame Act five, *&c.* Commiſſioners, with Conſent of the Ordinary, by Inſtrument, *&c.* may name a convenient Number of ſufficient Inhabitants to be Veſtrymen in each new Pariſh; and if there be no ſelect Veſtry in the preſent Pariſh, then they are to have ſuch Powers as the Veſtrymen of the Pariſh of *St. Martin in the Fields* now have; and from Time to Time, upon Death, Removal, *&c.* of Veſtryman, the Majority of the reſt are to elect a fit Perſon, *&c.*

Provided that all Parochial Cuſtoms, *&c.* now in Force within any preſent Pariſh which ſhall be divided by Virtue of this Act, ſhall continue in Force in each Pariſh, ſo far as not inconſiſtent with the Laws, and the Intent of this Act.

By the ſame *Stat.* 10 *Ann. ch.* 11. five or more of the Commiſſioners, with Conſent of the Rectors, *&c.* Church-wardens, *&c.* and Veſtry, or twenty principal Inhabitants of the preſent Pariſh in which there is no ſelect Veſtry, from which any Diſtrict is taken, and of Pariſh to which ſuch Diſtrict ſhall be appointed, or Rectors, *&c.* Church-wardens, *&c.* and Veſtrymen, *&c.* with Conſent of Ordinary, by Inſtrument inrolled in Chancery, may make a perpetual Diviſion as to Church Rates, Poor, Highways, and other Pariſh Rates, and ſettle an annual Sum in reſpect thereof, or for Equality of Diviſion. Provided, in the mean Time until ſuch Agreement for ſuch Rates ſhall be made and take Place, the Pariſh Rates, *&c.* ſhall be aſſeſſed through all Parts of the preſent Pariſh.

The ſame Act makes further Proviſion for ordering the Rates in the Pariſhes to be divided, until further Diviſions be made; for which ſee the Act.

The ſame Act has a Saving for Eccleſiaſtical Laws and Juriſdiction.

By the ſame Act one of the 50 new Churches is to be built in *Eaſt-Greenwich.*

By the ſame Act 10 *Ann. ch.* 11. Power is given to the Crown before 29th *September* 1712, to make new Letters Patent to Commiſſioners, and thenceforth the Powers to the former Commiſſioners are to determine.

By the ſame Act, no Burial ſhall be in or under any of the new Churches; and five or more Commiſſioners may aſcertain Burial Fees for the Cemeteries to be purchaſed.

The ſame Act concludes with a Clauſe for rebuilding the Church of *St. Mary Woolnoth.*

By *Stat.* 12 *Ann. Seſſ.* 1. *ch.* 17. Proviſion is made for the Scite of a new Church in the *Strand*; and the Right of Preſentation to Churches and Chapels in *Stepney* Pariſh is reſtored the Principal, *&c.* of *King's Hall* and College of *Brazen-Noſe* in *Oxford.*

There have been many other Acts within 30 years laſt paſt for rebuilding or endowing of particular Churches, *&c.* but as they reſpectively concern only the Inhabitants in thoſe Pariſhes, it ſhall ſuffice barely to mention them, that Perſons who have Occaſion may be enabled readily to find them.

4 *Geo.* 1. *c.* 5. concerning *St. Michael Cornhill.*
4 *Geo.* 1. *c.* 13. Rebuilding *St. Giles's in the Fields.*
5 *Geo.* 1. *c.* 9. continues the Duties for building Churches, *&c.*
12 *Geo.* 1. *c.* 39. provides for the Rector of *St. Mary le Strand.*
13 *Geo.* 1. *c.* 35. Rebuilding *Cree* or *Chriſt-Church, London,* and providing for Curate.
1 *Geo.* 2. *ſeſſ. c.* 5. concerns *Milbank* Church and Rector.

Appropriations, &c.

2 *Geo.* 2. *ch.* 10. *Stepney.*
2 *Geo.* 2. *ch.* 16. *Leeds* Chapel.
2 *Geo.* 2. *ch.* 30. *Stepney* Pariſh.
3 *Geo.* 2. *ch.* 3. *St. Mary Stratford.*
3 *Geo.* 2. *ch.* 17. *Limehouſe.*
3 *Geo* 2. *ch.* 19. *Bloomſbury, St. Giles.*
3 *Geo.* 2. *ch.* 33. *Deptford* Church.
4 *Geo.* 2. *ch.* 20. *Graveſend* Church.
5 *Geo.* 2. *ch.* 4. *Woolwich* Church.
6 *Geo.* 2. *ch.* 8. *St. George Southwark.*
6 *Geo.* 2. *ch.* 11. *Horſlydown* Church.
6 *Geo.* 2. *ch.* 19. *Tiverton* Chapel.
6 *Geo.* 2. *ch.* 21. *Oldſtreet* Church.
7 *Geo.* 2. *ch.* 27. *Bablack* in *Coventry.*
8 *Geo.* 2. *ch.* 27. *St. Leonard Shoreditch.*
9 *Geo.* 2. *ch.* 22. *Gainſbourough* Church.
10 *Geo.* 2. *ch.* 18. *St. Olave Southwark.*
10 *Geo.* 2. *ch.* 21. *Towceſter* Church.
11 *Geo.* 2. *ch.* 5. *All-Saints, Worceſter.*
11 *Geo.* 2. *ch.* 13. *Rotherhithe* Church.
11 *Geo.* 2. *ch.* 21. *Chriſt-Church, Surrey.*
11 *Geo.* 2. *ch.* 23. *St. Leonard Shoreditch.*
12 *Geo.* 2. *ch.* 4. *St. Nicholas, Worceſter.*
12 *Geo.* 2. *ch.* 7. *Ealing* Pariſh Church.
12 *Geo.* 2. *ch.* 9. *Woolwich* Church.
12 *Geo.* 2. *ch.* 17. *St. Catherine Coleman.*
13 *Geo.* 2. *ch.* 12. *Sheffield* Chapel.
14 *Geo.* 2. *ch.* 5. *Nether Knutsford* Church.
14 *Geo.* 2. *ch.* 15. *Gainſborough* Church.
14 *Geo.* 2. *ch.* 26. *Market Street* Chapel.
14 *Geo.* 2. *ch.* 27. *St. Botolph's* Church.
15 *Geo.* 2. *ch.* 12. *St. Catherine Coleman.*
16 *Geo.* 2. *ch.* 28. *Bethnal Green* Pariſh.
18 *Geo.* 2. *ch.* 3. *Kings-Lynn* Church.
19 *Geo.* 2. *ch.* 15. *Bethnal Green* Pariſh.

CHAP. XVII.

Of Appropriations; and of Vicarages and their Endowments.

2. Appropriations.

THE ſecond extraordinary Way or Means, by which a Title to an eccleſiaſtical Benefice may be had, is by procuring an Appropriation to be made of a Benefice to an Eccleſiaſtical Perſon and his Succeſſors, of ſome Church Preferment of which he is poſſeſſed. An Appropriation can be only made to a Body Politick or Corporate Spiritual that hath Succeſſion, and thereby that Eccleſiaſtical Body is perpetual Incumbent of the Benefice appropriated, and for ever ſhall enjoy all Glebe,

Appropriations, &c.

Tithes and other Profits belonging thereto, and hath therewith the Charge of the Souls belonging unto the Pariſh where the Church appropriated is; upon which it is, that an Appropriation regularly ought only to be made to a Spiritual Perſon, or at moſt, to aggregate Bodies Spiritual that conſiſt of Prieſts; in that there is no Difference betwixt a Church Appropriate and not Appropriate, ſaving that a Church appropriated is annexed to the Corporation or Perſon to whom it is appropriated, and his or their Succeſſors for ever; but a Church not appropriated, is had only for the Life of the Incumbent thereof; and therefore, thoſe that have Appropriations, can no more grant their Title of Appropriation to others, whereby to make the Grantees become perpetual Incumbents of them as Appropriators, than Incumbents of Churches preſentable can convey by their ſole Act their Incumbencies to others; but both may equally make Leaſes of the Profits thereof.

To Spiritual Perſons.

Not grantable over.

Leaſes may be.

To the making of an Appropriation, it is requiſite; Firſt, that the Right, Title and abſolute Inheritance of the Advowſon of the Church appropriate be in ſuch Spiritual Bodies Politick or Corporate to whom the Appropriation is made, and who thereby is to be perpetual Incumbent of the Church, for otherwiſe ſuch Spiritual Body is not capable of the Appropriation. If one (as a Church-man) being a Spiritual Corporation, is ſeiſed of an Advowſon, to him and his Heirs, doth purchaſe Licence of Appropriation, and gets the Church appropriated to him and his Succeſſors, the Appropriation is void, and the Advowſon will deſcend to his Heirs: For in this Caſe, if he would have the Church to be appropriated to him and his Succeſſors, he muſt firſt alien it to another, and then, after Licence of Mortmain, repurchaſe it to him and his Succeſſors. *Hugh*'s *Abr. tit. Appropriation.* 38 *H.* 6. 21. *a. Br. Abr. Appropriation, &c.* 3. 14 *H.* 4. 14. And if the King doth grant to a Spiritual Corporation, to hold a Church to their proper Uſe for ever, of which Church the King himſelf is ſeiſed of the Advowſon at the Time of the Grant made; this ſhall not enure to a Grant of the Church or Advowſon, and then to an Appropriation, but the King is deceived, and the * Grant is void. *Roll*'s *Abr.* 2. *p.* 196.

Requiſites to the making an Appropriation.

Alienation and Licence of Mortmain.

* King's Grant void.

It is alſo requiſite, that the Conſent of the Ordinary be had thereto, who in Law is looked upon as the principal Actor, becauſe the Act of Appropriation is a Thing Spiritual, and the Ordinary hath the Spiritual Juriſdiction; and it is alſo ſaid to concern the Souls of the Pariſhioners, of which the Biſhop within his Dioceſe hath Charge; alſo the Biſhop hath an Intereſt in reſpect of Lapſe. *Roll*'s *Abr.* 1. *p.* 238. 6 *Ed.* 3. *Quare Impedit* 197. And that which the Biſhop as immediate Ordinary may do, the Pope as ſupream Ordinary uſed to do without the Biſhop; and ſuch Authority and Juriſdiction as the Pope had uſed within this Realm, our Kings have, as was acknowledged by Parliament, *Anno* 25 *H.* 8. and other Statutes; ſo that the King may uſe and exerciſe all that Power that the Pope was wont to uſe within this Realm, and by Conſequence may make Appropriations without the Biſhop; yea, and the King alone, as ſupreme Patron, might have made Appropriation without the Pope. 17 *Ed.* 3. *Fitz. Quare Impedit* 19. 11 *H.* 4. And yet it is ſaid that an Appropriation made by K. *William* the Conqueror alone, is not good. 7 *Ed.* 3. *Quare Impedit* 19. However, neither Biſhop or King can make Appropriations without the Conſent of the Patron, who ought to agree to the Appropriation to make it good. 11 *H.* 7. 8. 6 *H.* 7. 13. 46 *Aſſ. p.* 4. 50 *Ed.* 3. 26. 40 *Ed.* 3. 28. 29 *Ed.* 3. 10. and his Acceptance of the Ordinary's Order, and his Execution of what he

Conſent of the Ordinary.

By the King without the Biſhop.

K. *William* Conqueror.

Patron's Conſent neceſſary.

Appropriations, &c.

he hath ordained, is a Declaration of his Conſent, and all ſhall be intended to be done at his Requeſt; and not only he who is ſeiſed of the Inheritance of the Advowſon, but alſo every other Perſon who hath any particular Eſtate or Intereſt in it, ought to conſent to the Appropriation, elſe are not to be bound by it, nor by the Conſent of him who hath the Inheritance: Therefore if there be a Leſſee for Years of an Advowſon, the Aſſent of him in Reverſion to appropriate the Church, will not bind the Leſſee for Years during his Term. 29 *Ed.* 3. 10.

King's Conſent requiſite.

But beſides the Ordinary and Patron, the King, (not only as ſupream Ordinary, but as King) muſt conſent to every Appropriation of a Church. *Mich.* 16 *Jac. B. R. Popham* 145. *Mich.* 1649. *Style, p.* 156. *Stat.* 15 *R.* 2. *cap.* 6. *Stat.* 4 *H.* 4. *cap.* 12. Becauſe his Intereſt is concerned therein, all Advowſons being held of the King, either mediately or immediately, as all Land within this Realm is, and all Poſſibility of having either Preſentation or Eſcheat, as Lord immediate, or mediate, or Lapſe as ſupream Patron, is taken away by Appropriation, in regard that the Church can never after be void of an Incumbent. *Hill.* 44 *Eliz. Robinſon* v. *Bedle*, 1 *Cro.* 873. And this Conſent of the King muſt be declared by his Licence, and the King cannot make ſuch Licence without Matter of Record, and it ought to be with a Condition to endow a Vicar.

By Licence.

To whom.

Mich. 1649. *Style, p.* 156. And note, That the King's Licence of Appropriation is to be made to the Body Spiritual, to which the Church is to be appropriated, and not to the Biſhop, *&c.* and is to be made generally. *Priddle* and *Napper*'s Caſe, 11 *Co.* 10 *B.* For though the Rector be alive at the Time of the Licence, yet he may die or reſign before the Appropriation is made. *Biſhop of Canterbury*'s Caſe, *Trin.* 38 *Eliz. B. R.* 2 *Coke* 47. And it is ſaid, that an Appropriation may be made by the King alone, where he is Patron, but by no other Patron. *Trin.* 16 *Jac. B. R. Popham* 145.

If without the King's Licence.

If any Appropriation be made without the King's Licence, it hath been held the Appropriation is good, not Mortmain. 21 *Ed.* 3. 5. *Plowd.* 499. 47 *Ed.* 3. 11. And by *Jones*, *Paſch.* 2 *Car. B. R. Copes* v. *Bedford*, *Palmer*, *p.* 406. But the king may ſeize the Advowſon, and ſhall have the Preſentments to the Avoidances thereof in the Name of a Diſtreſs until Fine be paid to the King for making the Appropriation without his Licence, by the Opinion of *Shard.* See *Plowd.* 499. So if any Prebend be divided into ſeveral Parts without the King's Licence, the Patronage thereof ſhall be forfeited to the King, and this was certified to be the Law, and Right of the Crown, *Mich.* 15 *Ed.* 2. 146. but *Quære*; and by *Stone*, if the Advowſon of the Church appropriated be held of the King, as of his Crown, or as an Eſcheat, the Charter that doth not mention of what Tenure it is, ſhall be void, and the King ſhall not be barred of his Preſentment thereby. 19 *Ed.* 3. *Fitz. tit. Grant* 58. But if an Abbey had been ſeized of an Advowſon in Fee, held of a common Perſon, an Appropriation might have been made thereof to them by the King and the Ordinary, without the Aſſent of the Lord of whom it was held. 28 *Ed.* 3. 5. *Br. Abr. Appropriation, nu.* 6.

Diſtreſs until Fine paid.

Where the Tenure ought to be mentioned.

The moſt proper Time of making.

The moſt proper Time for the making of an Appropriation, is when the Church is void, becauſe then it may be executed preſently; yet the Parties aforeſaid concurring thereto, an Appropriation may be made as well when the Church is full, as when it is void; that is, if it be made by ſuch apt words as ſhall ſerve to appropriate it after it is void. *Co.* 11. *Priddle and Napper*'s Caſe. 11 *Plowd.* 599. *b.* 50 *Ed.* 3. 26. *b.* and 27. As to ſay, that the Patron who is a Spiritual Perſon, after that the

Church ſhall become void, ſhall be Parſon, and may retain the Glebe, and the Profits of the Church to his proper uſe, *&c.* and ſuch Patrons ſhall be taken to be Incumbents, without any other Admiſſion or Inſtitution, and may enter upon the Profits of the Church without Induction; but if ſuch Appropriation be not made by Words *in futuro*, it is void. Appropriations, &c.

So if a Spiritual Corporation be ſeiſed of an Advowſon in Fee, and the Church being full of an Incumbent, the King doth give Licence to appropriate it, without any Mention of the Incumbent, and after the Ordinary doth appropriate it accordingly; ſo that after the Death of the Incumbent, ſuch Spiritual Corporation and his Succeſſors may hold it to their proper Uſes. In this Caſe, altho' the Licence of the King be general, without Mention of the Incumbent, yet the Appropriation being afterwards well made, *viz.* by proper Words, this is a good Licence and a good Appropriation. *Co.* 11. *Priddle* and *Napper* 11. *Mich.* 16 *Car. B. R. Foe* and *Haſelrigg*'s Caſe, *Roll's Abr.* 1. *p.* 239. Or if the King doth give Licence to a Spiritual Corporation to purchaſe the Advowſon of a Church in Fee, and to appropriate it to him and his Succeſſor; and then he having purchaſed the Advowſon, doth preſent his Clerk to the Church, who is inſtituted and inducted, if afterwards the Biſhop doth appropriate the Church to him and Succeſſors, this is a good Appropriation, notwithſtanding the Preſentation made by the Purchaſer, upon which an Incumbency was had betwixt the Licence and the Appropriation. *Mich.* 16 *Car. B. R. Foe* and *Haſelrigg*'s Caſe, *Roll's Abr.* 1. *p.* 239. For moſt of the aforeſaid Points of Law concerning Appropriations, ſee *Grendon*'s Caſe, *Mich.* 18 and 19 *Eliz. Plowden* 499, *&c.* By which Caſe in *Plowden* it appears, That if the King being ſeiſed of an Advowſon in Right of his Crown, doth by his Letters Patent grant to a Dean and Chapter the ſame Advowſon, when the Church is full; he may alſo in the ſame Letters Patent, by his ſupream Eccleſiaſtical Authority, for himſelf, his Heirs and Succeſſors, grant and give Licence unto the ſame Dean and Chapter and their Succeſſors, to hold the Rectory of the ſaid Church immediately after it becomes void, to them and their Succeſſors for ever, without the Moleſtation of the King or his Succeſſors; and without any Preſentation, Inſtitution or Induction of any Incumbent to the ſaid Rectory at any Time after: And further, by the ſame Letters Patent, by his ſupream Authority aforeſaid, for himſelf his Heirs and Succeſſors, he may appropriate the ſame Church to ſuch Dean and Chapter, by the Words, *In Rectoriam & Eccleſiam de B. prædict', prout vacare extunc contigerit, ac omnia & ſingula Maneria, Meſſuagia, Glebas, Decimas, &c. eiſdem Decano & Capitulo & Succeſſoribus ſuis, ac dictæ Eccleſiæ ſuæ Cathedrali Appropriamus, Conſolidamus, Unimus & Incorporamus. Habendum, gaudendum, & convertendum eaſdem Rectoriam, & Eccleſiam de B. prædict', ac omnia & ſingula præmiſſa iiſdem Rectoriæ & Eccleſiæ ſpectant' & pertinent' iiſdem Decano & Capitulo, & Succeſſoribus ſuis ut prædict' eſt in proprios uſus ſuos, abſque aliqua Præſentatione, Nominatione, Inductione, ſive Admiſſione alicujus Incumbentis, aut aliquorum Incumbentium ad eandem Eccleſiam extunc impoſterum fiend', &c.* But *Dyer* objected in this Caſe, That theſe Words are inſufficient to make an Appropriation, for that they do not make the Dean and Chapter Parſon of the Church, but that it ſhould have been ſaid, That after the Church ſhall be void of the preſent Incumbent, the Dean and Chapter ſhall be Parſons thereof, inaſmuch as in Suits brought by and againſt them they ought to be named Parſons. But it was anſwered, that the Words aforeſaid do imply as much; and *Hobart* ſaith that it was reſolved in this Caſe, that

General Licence ſupplied by apt Words in the Appropriation.

Incumbency between the Licence and Appropriation.

Plowd. 499. King grants an Advowſon.

Alſo with an Appropriation.

Objection of Inſufficiency.

Vicarages indowed.

The perfect Word is to make him Parſon.

the perfect Word to make an Appropriation, is to make him Parſon, yet if the ſame be expreſſed by a Periphraſis like thereunto, this will ſerve. *Colt* and *Glover*'s Caſe, *Hobart* 148, 307. It was alſo objected by *Dyer*, that there was not in the Grant of the Advowſon to the Dean and Chapter, the Clauſe of *Non obſtante* the Statutes of Mortmain; and the King's Grant cannot be taken to two Intents, as agreed in the Aſſiſe, *inter Baget* and *Swirington*, 9 *Ed.* 4. *fo.* 6. 11. To which it was anſwered, that the Clauſe of *Non obſtante* was in the Patent, though not pleaded, and that the Patent had been however good, becauſe the King being the Head of the Law, is not to be ſuppoſed ignorant of the Law; and the Patent is *Ex certa ſcientia*, which amounts to ſuch Clauſe, and the King's Grant may enure to two Intents, unleſs one be a Foreign Matter, and therefore the Giving Lands to a Villein by the King ſhall not manumit him; and Judgment was given that the Patent was good: However, it is ſafeſt, that it be expreſly ſaid, that he to whom the Church is appropriated ſhall be Parſon, and that in all Grants of Advowſons from the Crown to any Spiritual Perſon and his Succeſſors, the Clauſe of *Non obſtante* that Statute be inſerted, or that a Precedent Licence be had, and that theſe Matters be pleaded when any Action is brought concerning the ſame. If the King had given Licence to a Guardian and Chaplains of a Chantery, to purchaſe an Advowſon to them and their Succeſſors, and to have it appropriated to them and their Succeſſors; and afterwards the Biſhop doth appropriate it to the Guardian of the Chantry and his Succeſſors; if the Chantry had been known as well by the Name of the Guardian and Succeſſors, as by the Name of the Guardian, Chaplains and Succeſſors, and ſo all one Corporation, this is a good Appropriation. *Mich.* 16 *Car. B. R. Foe* and *Haſelrigg*'s Caſe, *Roll's Abr. p.* 240. But *Quære*, how a Corporation aggregate, and a Corporation Sole, may be one Corporation Politick.

Non obſtante.

Safeſt way.

Guardian, *&c.* of a Chantry.

It is neceſſary that a Vicar be well indowed, *&c.* *Stat.* 15 *R.* 2. *c.* 6.

That an Appropriation be duly made, it is neceſſary that a Vicar be well and ſufficiently indowed; for it hath been Enacted as followeth. Item, Becauſe divers Damages and Hindrances oftentimes have happened, and daily do happen to the Pariſhioners of divers Places by the Appropriation of Benefices of the ſame Places: It is agreed and aſſented, That in every Licence from henceforth to be made in the Chancery, of the Appropriation of any Pariſh Church, it ſhall be expreſſly contained and compriſed, that the Diocеſan of the Place, upon the Appropriation of ſuch Churches ſhall ordain, according to the Value of ſuch Churches, a convenient Sum of Money to be paid and diſtributed yearly of the Fruits and Profits of the ſame Churches by thoſe that will have the ſaid Churches in proper Uſe, and by their Succeſſors, to the poor Pariſhioners of the ſaid Churches, in Aid of their Living and Suſtenance for ever; and alſo that the Vicar be well and ſufficiently indowed.

4 *H.* 4. *c.* 12. For Reformation of Appropriations.

And it was afterwards ordained by 4 H. 4. c. 2. That the Statute of Appropriation of Churches, and of the Indowment of Vicars in the ſame, made the Fifteenth Year of King Richard the Second, be firmly holden and kept, and put in due Execution: And if any Church be appropriated by Licence of the ſaid King Richard, or of our Lord the King that now is, ſithence the ſaid Fifteenth Year, againſt the Form of the ſaid Statute, the ſame ſhall be duly reformed according to the Effect of the ſame Statute betwixt this and the Feaſt of Eaſter next coming. And if ſuch Reformation be not made within the Time aforeſaid, that the Appropriation and Licence thereof made be void, and utterly repealed and annulled for ever,

except the Church of Hadenham in the Diocese of Ely; which for to eschew divers Damages, Discords and Debates, that have been before this Time betwixt the Bishop of Ely and the Archdeacon of Ely, upon the Exercise of their Jurisdiction (as it was openly declared by the same Bishop in the Presence of the King, and Lords in Parliament) was of late appropriated by the Licence of the King our Lord, to the Archdeacon and his Successors to do Divine Service, keep Hospitality, and to support other Charges as pertaineth. Moreover, it is ordained and stablished, That all the Vicarages united, annexed or appropriated, and the Licences thereof had, after the first Year of the said King Richard, how well soever that they which have united, annexed or appropriated such Vicarages, be in Possession of the same Vicarages, or by Virtue of such Licences may in any wise be in Possession of the same in any Time to come, they shall be also utterly void, revoked, repealed, annulled and disappropried for ever: And that from henceforth in every Church so appropried or to be appropried, a secular Person be ordained Vicar perpetual, canonically institute and induct in the same, and convenably indowed by the Discretion of the Ordinary to do Divine Service and to inform the People, and to keep Hospitality there, (except the Church of Hadenham aforesaid.) And that no Religious be in any wise made Vicar in any Church so appropried, or to be appropried by any Means in Time to come. Vicarages, &c.

It is said, that when the King doth make a Licence for the Appropriation of a Church, it ought to be with a Condition to indow a Vicar, and that the Indowment of the Vicar may be by distinct Instrument of the Appropriation, so that it be made at the same Time with the Appropriation. *Mich.* 1649. *Styles, p.* 156. But though the King may not make such a Licence without the aforesaid Condition, yet the Parson appropriate (because he must be Parson and Patron both) with the Ordinary, may create a Vicarage and indow it without the Assent of the King, altho' that the Vicar shall be a Corporation, because he is a Corporation by the Common Law. *Roll's Abr.* 2. *p.* 334. 8 *R.* 2. *Annuity* 53. *Contra*, 17 *Ed.* 3. 51. 3 *E.* 2. 74. But the Ordinary cannot create a Vicarage without the Assent of the Patron. 16 *Ed.* 3. *Quare Impedit* 145. 5 *Ed.* 2. *Quare Impedit* 195, and *Pasch.* 16 *E.* 3. *Monstrans de Faits* 166, *per Par.* So if a Dean and Chapter, or other like Corporation, as Nuns, *&c.* be Parsons appropriate, they may with the Ordinary create a Vicarage, although they themselves have not the Cure of Souls. *Grendon*'s Case, *Plowden* 497. And if the Appropriation be duly made when the Church is full, I suppose that a Vicarage may be then created, at least if the Incumbent consent. 8 *R.* 2. *Annuity* 53. But not so as to bind or lessen the Profits of the present Incumbent; however 'tis clear, that in the Time of the Vacation, the Patron of the Parsonage and the Ordinary alone may create a Vicarage. 8 *R.* 2. *Annuity* 53. And an Indowment was pleaded to be by Parson and Ordinary. 40 *E.* 3. 28. Where there is no Vicarage indowed, the Impropriator of the small Tithes is bound to maintain a Priest, and upon an Information by the Attorney General for that Purpose, the King may assign to the Curate such an Allowance or Proportion of the small Tithes as he shall think fit; but otherwise it is, where the Vicar is indowed, tho' but of never so small a Matter. The Case of *The King* and *Sutton* in the King's Bench was cited, 1 *Vern.* 247. *Bonsey* v. *Lee.*

King's Licence with Condition to indow a Vicar.

Assent of Patron to create a Vicarage.

Vicarage created.

Vacation-time.

When

Vicarages, &c.

Who is Patron of the Vicarage.

When a Vicarage is created, the Parſon (and not the Patron of the Parſonage) of common Right is Patron of the Vicarage, for that the Vicarage is derived out of the Parſonage. *Roll's Abr.* 2. *p.* 336. *Dubitatur.* 17 *E.* 3. 51. 6. *Contra*, 5 *E.* 2. *Quare Impedit* 165. But *Quære*, how one Perſon can be Parſon, *viz.* appropriate, and another ſaid to be Patron of the Parſonage appropriated, ſeeing, as is ſhewed, the Inheritance of the Advowſon of a Church appropriated muſt be in the Spiritual Corporation to whom the Appropriation is made; in which Caſe it is clear, that the Parſon appropriate creating a Vicarage, is Parſon thereof. 17 *E.* 3. 51. And 'tis ſaid, that a Parſon appropriate is Patron of the Vicarage. 11 *H.* 6. 18. *b.* 17 *E.* 3. 51. *b.* And where an Abbot or Prior is Parſon appropriate. 19 *E.* 2. *Quare Impedit* 178. And yet the King (before the Diſſolution) might have been Patron of a Vicarage, 11 *H.* 6. 18. *b.* and ſo may any other Lay-man be Patron of a Vicarage. 11 *H.* 6. 19. *Contra*, 39 *E.* 3. 33. Yea, both Patron of the Parſonage, and alſo of the Vicarage. 11 *H.* 6. 19.

Note; It was denied by the *Lord Chancellor*, that the Parſon *de jure* has the Nomination of the Curate, and more eſpecially where the Parſon is of a Lay Fee, as was the Caſe in Queſtion, *viz.* a Prebendary had demiſed for three Lives the Corps of his Prebend, which conſiſted of two Impropriations, and ſo now by the Statute were become Lay Fee: In the Leaſe were as general Words as poſſible, and particularly that the ſaid Leſſee ſhould find two Vicars for the aforeſaid Impropriations, and pay to one ſo much, and to another ſo much. But the *Lord Chancellor* ſaid, that by finding, was meant maintaining only, and not electing or chooſing; and he ſaid there was a great Difference as to the Parſon's Right of naming or chooſing his Vicar, where the Parſon was of a Lay Fee, and where he had a Cure of Souls; for in the latter Caſe there was Reaſon he ſhould approve of the Man, who was to Act under him in ſo high a Truſt. And the Curate that came in by Oppoſition to the Leſſee, was eſtabliſhed by the *Lord Chancellor*, and the Charity decreed to him.

Note; This Caſe came before the *Lord Chancellor* upon Exceptions to a Decree of the Commiſſioners of Charitable Uſes. One Exception was, that by the *Stat.* of 29 of this King none but Eccleſiaſtical Perſons could augment poor Vicarages, ſo as to be eſtabliſhed as a charitable Uſe within that Statute, and that the Leſſor in this Caſe, who was only a Prebendary, was not within that Statute. *Sed non allocatur.* 1 *Vern.* 42. *Mallet* v. *Trigg.*

Whether a Vicarage indowed may be appropriated.

Though a Vicarage indowed may not, according to the Statute of 4 *H.* 4. *c.* 12. be appropriated, yet it may be united to another Church, or to a Dean and Chapter or College, but then it ought to be done with the King's Conſent. *Vide Temps R.* 2. *Grants* 104. 6 *H.* 7. 13. 5 *E.* 3. 26. *Trin.* 37 *Eliz.* *Auſtin*'s Caſe, 3 *Cro.* 500. See *Robinſon*'s Caſe v. *Bedle*, *Hill.* 44 *Eliz.* 3 *Croke* 873. And yet it is ſaid by *Mountague*, that a Vicarage indowed might be appropriated, but not to the Parſon; to which *Haughton* and *Doderidge* agreed. *Trin.* 16 *Jac. B. R.* *Popham* 145.

Of an ancient Appropriation.

Albeit theſe Things be requiſite to the perfecting of an Appropriation, yet if a Church hath been anciently appropriated, although the ſame were not appropriated in due Form of Law, or that the Patron was but Tenant in Tail of the Patronage, *&c.* yet the Appropriation ſhall be taken to be good; for although, for ought any thing that can now be ſhewn to the contrary, the Appropriation is defective, yet it ſhall be intended in reſpect of the ancient and continual Poſſeſſion, that the firſt Appropriator was Patron,

Vicarages, &c.

Patron, and that all Things requiſite to make the Appropriation good were obſerved, for Records, Letters Patent and other Writings, either conſume or are loſt, or imbezilled; and God forbid, ſaith *Coke*, that ancient Grants and Acts ſhould be drawn in Queſtion, although that all Things cannot be ſhewed which at firſt were neceſſary to the perfecting of them. *Hill.* 4 *Jac. Bedle, Berd* and *Wingfield*'s Caſe, 12 *Coke* 5. *Archbiſhop of Canterbury*'s Caſe, 2 *Coke* 47. *Paſch.* 2 *Car. Cole* v. *Bedford, Palmer* 426. And therefore, although in a *Quare Impedit*, the Plaintiff made Title by a Gift in Tail of the Advowſon of the Church appropriated, made to his Anceſtor in the 18 *R.* 2. and a Verdict for another Anceſtor of his was had 12 *H.* 8. and his Grandfather had alſo preſented to the ſame Church, and his Clerk being inſtituted and inducted, had Poſſeſſion certain Years, with ſeveral other Matters to prove the Plaintiff's Title; yet the Appropriation was upon the Reaſon of an ancient Poſſeſſion adjudged good. *Paſch.* 4 *Jac. Lord St. John* and *Dean and Chapter of Glouceſter*, 12 *Coke* 3. Or if the Original Inſtrument of Appropriation be ſhewed with a Condition in it, that a Vicarage ſhould be competently indowed, and no Inſtrument or Proof can be made of ſuch Indowments, without which Indowment at firſt, the Appropriation had been void, yet if the Rectory for long Time be ſuppoſed, reputed, and taken to be appropriated, and the Vicar all that time preſented, inſtituted and inducted, as a Vicar rightfully indowed, it ſhall be preſumed in reſpect of the Continuance, that the Vicarage was lawfully indowed. *Trin.* 37 *Eliz. Grimes* and others v. *Smith*, 12 *Coke* 4. *Mich.* 8 *Jac. B. R. Hunſton* v. *Corkett*, 2 *Croke* 252.

Preſumption in reſpect of the Continuance.

The Sequeſtrator of the Tithes of a Vicarage ſued the Impropriator in the Spiritual Court for Tithes upon the Indowment; and the Defendant moved here for a Prohibition upon a Suggeſtion, that it was not a Vicarage, and that that ought to be tried at Common Law. *Holt* Chief Juſtice ſaid, that the Suggeſtion is good in Point of Law; but if the Suggeſtion appears to the Court to be notoriouſly falſe, the King's Bench will not grant a Prohibition; for they ought to examine into the Truth of the Suggeſtion, and ſee what Foundation it hath; for if it appears plainly to be falſe in Fact, the *King's Bench* ought not to grant a Prohibition. *Hob.* 66. *Aſton* v. *Caſtle Birmidge*; and it is held there, that though the Surmiſe be Matter of Fact, and triable by a Jury, yet it is in the Diſcretion of the Court to deny a Prohibition; ſo it was done *Hob.* 185. *Jones* v. *Jones*. But at laſt in this Caſe a Prohibition was granted by Conſent, and Iſſue to be taken, Vicarage or not, and to be tried at the next Aſſiſes to ſettle the Right. Note; Mr. *Bury* ſhewed in this Caſe a Copy of an Indowment and of the Book of Firſt Fruits, where the Vicarage was rated at and Receipts for Firſt Fruits. *Ex relatione m'ri Jacob.* 1 *Ld. Raym.* 587. *Smith* v. *Wallet*.

When the Parſonage and Vicarage become diſtinct.

After a Church is appropriated, and a Vicar out of the ſame indowed, the Parſonage and Vicarage are two diſtinct Eccleſiaſtical Benefices, and the Parſon and Vicar have both of them *Curam animarum*; the Parſon habitually, the Vicar actually; by *Noy* in *Britton* and *Wade*'s Caſe, 2 *Cro.* 518. And ſo it was agreed by the Judges in the Caſe of *Clark* and *Heath*, *Mich.* 21 *Car.* 2. *Banco R.* 1 *Sid.* 426. 2 *Keb.* 484, 556. 1 *Mod. Rep.* 11. And it was alſo ſaid in this Caſe, that there are ſeveral Churches in *England*, where there are Vicars indowed with Cure, and yet the Parſon had a concurrent Cure, and both of them took the Oath of Canonical Obedience: And a Parſon appropriate doth differ from another Parſon only in this, that he ſhall be Parſon perpetual, and the other but

Difference of a Parſon appropriate, &c.

Vicarages, &c.

for Life. *Roll's Abr.* 2. *p.* 341. See 31 *H.* 6. 14. 17 *E.* 3. 76. 5 *Ed.* 2. *Quare Impedit* 165. And therefore it is provided, that a Benefice appropriate ſhall not be taken to be a Benefice with Cure, in any Article of the Statute about Pluralities. *Stat.* 21 *H.* 8. *c.* 13. Elſe it had been ſo, as it yet is by the Canon Law in Caſes out of the Statute. *Colt* and *Glover*'s Caſe, *Hobart* 157, 158.

Queſtion ariſing between the Parſon and Vicar.

After a Parſonage is appropriated and a Vicarage indowed, if any Queſtion doth ariſe between the Parſon and the Vicar concerning the Indowment, it ſhall be tried in the Eccleſiaſtical Court, for that the Perſons, and the Cauſes alſo are Spiritual, and therefore where the Vicar ſued the Parſon for Tithes, and ſuggeſted the Manner of Tithing to have a Prohibition, the Prohibition being granted; yet after, upon a ſolemn Argument, a Conſultation was obtained, inaſmuch as the Manner of Tithing did not come in Queſtion, but the Indowment of the Vicarage, as was cited by *Coke* to be adjudged, *Trin.* 11 *Jac. Buſh*'s Caſe, 2 *Brownlow* and *Gouldſborough* 36. See *Moor* 907. 2 *Bulſt.* 157. 3 *Bulſt.* 220. But where the Vicar ſued in the Spiritual Court for Tithes, and the Defendant

A *Modus* not to be drawn *ad aliud examen.*

ſuggeſted a *Modus* payable to the Parſon, a Prohibition was granted, notwithſtanding it was objected, that it was a Matter proper for the Spiritual Court, being the Conteſt is between the Vicar and Parſon who are both Spiritual Perſons, to which of them the Tithes belong; but it was anſwered, that the Conteſts between the Parſon and Vicar ſhall not draw the Pariſhioner who hath a *Modus, ad aliud Examen. Paſch.* 19 *Car.* 2. 1 *Sid.* 332. 2 *Keb.* 215.

Vicarage may be reſtored again.

After a Church is appropriated, and a Vicarage indowed, yet the Vicarage may be reſtored again to the Rectory; for if the Ordinary doth unite, annex, and conſolidate the Vicarage to the Rectory or Parſonage out of which it was indowed, to be holden by the Corporation Spiritual, and his or their Succeſſors, that were Parſon of the appropriated Church, together with that wherewith it was indowed to his or their proper Uſe, ſo that the Appropriator ſhould have and take Care of the Souls which the Vicar had, and the Patron who is the Appropriator doth concur thereto; this is ſaid to be a Diſſolution and Reſtitution of the Vicarage to the Parſonage, and good, and is not ſuch an Appropriation of the Vicarage as is made void by the Statute of 4 *H.* 4. *c.* 12. As was admitted by the Juſtices, upon Reference out of the Court of Wards. *Mich.* 7 *Jac. B. R. Stafford*'s Caſe, *Roll's Abr.* 2. 337. But then this Reſtitution

For that the Appropriator is poor.

muſt be made upon the Reaſon that the Appropriator is become poor, and doth want ſuch Reſtitution. 40 *E.* 3. 28. And ſuch Diſſolution and Reſtitution of the Vicarage may be as well made when ſuch Vicarage is full, if it be ſaid that it ſhall be after the Death of the Incumbent, as when it is void; and ſuch Vicarages, as were held from the Time that the Reſtitution were to take Effect by the reſpective Appropriators with the Parſonage, as one intire Church without any Vicar, until ſuch Time as they came to the Crown by the Diſſolution of Monaſteries, cannot now be preſentable, but the King or his Patentees ſhall enjoy them, as free as the Appropriators had or held the ſame; and although that ſuch-like Reſtitutions, or Unions, had been any way defective at the Time of the making the ſame, being good in Reputation, the Statute of Diſſolution of Monaſteries hath fully ſettled them in the Crown. *Mich.* 1692. *Stafford*'s Caſe. *Lee* 14. 4 *E.* 3. 27. in *Britton* and *Wade*'s Caſe, 2 *Cro.* 517. *Hil.* 44 *Eliz. Robinſon* v. *Bedle*, 3 *Cro.* 873. *Mich.* 18 *Jac. Britton* and *Ward*'s Caſe, *Palmer* 113 & 219. However, there muſt be a real

Reſtitution muſt be real.

Reſtitution, although it be a defective one, to make the Vicarage not preſentable:

Appropriations, &c.

ſentable: For if a Vicarage be indowed, and it can be only ſhewed that for many Years, *viz.* One Hundred and Sixty Years, there hath not been any Vicar preſented; yet by this not preſenting a Vicar for ſo long Time (which is through the Default of the Parſon himſelf) it ought not to be adjudged to be a Diſſolution of the Vicarage, but ſomething muſt be ſhewed of the re-uniting thereof to the Parſonage. *Hill.* 44 *Eliz. Robinſon* v. *Bedle*, 3. *Cro.* 873. So if upon Petition of a Prior, *&c.* being the Appropriator, ſhewing that the Priory was become poor, *&c.* the Pope hath granted by Bull, that the Prior ſhould appoint one of his Monks to ſerve the Cure, who ſhould be removable *ad nutum Prioris*, *&c.* this makes no Diſſolution of the Vicarage, eſpecially being done ſince the Statute of 4 *H.* 4. for the Pope could not do any Act againſt a Statute in the Affirmative, or diſpenſe therewith; and if the Ordinary may diſſolve a Vicarage, it follows not that the Pope may: For it appears by divers Statutes, that the Pope had not any Right to meddle with Advowſons, Benefices, *&c.* and therefore may not diſſolve Vicarages. However, as the Caſe is put, the Words are not ſufficient to make a Diſſolution, nor do not amount to ſuch; nor do they ſo much as give the Prior Power to take the Profits. *Mich.* 16 *Jac. Britton* v. *Wade*, 2 *Cro.* 516. But there was a Difference taken (by *Mowbray*) when a Layman gives Land to one that is a Vicar, and when the Vicar is indowed by the Ordinary of the Parſon's Land, *&c.* For in the firſt Caſe, the Ordinary hath no Power to diſſolve the Vicarage as to the Land, though he hath in the other. 4 *E.* 3. 27. *Vide* 20 *E.* 3. *Annuity* 32. 16 *E.* 3. *Annuity* 24 & 40 *E.* 3. 28. *b.* But although it is to be admitted, that the Ordinary had anciently Power to make Reſtitution of Vicarages to the Parſonages out of which they were indowed upon juſt Cauſe, without Limitation; yet ſince the Statute of 31 *H.* 8. which made Parſonages Lay Fees, the Ordinary may not diſſolve a Vicarage, when the Parſonage is in Lay Hands, for that would be to deſtroy the Cure utterly: In *Britton* and *Wade*'s Caſe, 2 *Cro.* 518. and *Parry* and *Bank*'s Caſe, vouched in the ſaid Caſe.

That a Church appropriate may become diſappropriate, *&c.*

As the Indowment of a Vicarage may be diſſolved, ſo may a Church appropriate become diſappropriate, and preſentable, as before the Appropriation was made, and that either by Preſentment, or Recovery, or Diſſolution; and firſt by Preſentment: For if a Parſon appropriate, that is Patron of the Vicarage of the ſame Church, by Agreement betwixt him and the Ordinary, doth preſent the Vicar to the Parſonage, this doth unite the Vicarage and the Parſonage together, ſo that the Preſentee ſhall have all the Tithes and other Profits of the Church. 44 *E.* 3. 33. *B.* *admitted* 44 *Aſſ.* 37. And it is alſo ſaid generally, that if the Parſon of the Church appropriate, being Patron of the Vicarage, doth preſent thereto by the Name of a Parſonage, and his Preſentee be inſtituted, and inducted, this is a Diſappropriation of the Church, although there was no precedent Agreement betwixt the Patron and the Ordinary to that Purpoſe, and it ſhall be preſentable after. 44 *E.* 3. 33. *B.* and *Paſch.* 22 *Eliz. Savile*, *p.* 20. *Caſe* 51. And the like is ſaid by *Manwood* Chief Baron, *Trin.* 26 *Eliz.* in *The Queen* and *Lord Lumley*'s Caſe, 2 *Leonard* 80. who alſo ſaid, that a Church was diſappropriated by the Lord *Dyer* by Preſentment, which of late he made unto it. And by *Windham* Juſtice, all Appropriations are preternatural, and the Church during that Time is as it were in Bondage, and therefore by Preſentation is made preſentative; in the Caſe of *Wilkinſon* v. *Richardſon*, 1 *Keble* 906. By which it appears, that a Layman having an Appropriation which is commonly called an Impropriation, may diſappropriate it by Preſentation, if he be Patron of

By Preſentation.

Layman having an Appropriation, preſents, *&c.*

Appropriations, &c.

of the Vicarage of the ſame Church, as well as an Eccleſiaſtical Parſon may, Inſtitution and Induction being had upon his Preſentment; yea, and 'tis ſaid, that ſuch Patron, by his Act of preſenting only to the Vicarage, by the Name of a Parſonage, doth diſappropriate the Church, and unite the Parſonage, and the Vicarage into one. 11 *H.* 6. 18 *b.* 3. 38 *H.* 6. 20. *F. N. B.* 35. Therefore *Hobart* ſaith, that he is of Opinion, That if the Parſon appropriate doth, as aforeſaid, preſent to his Vicarage, and his Clerk be refuſed for juſt Cauſe, of which Notice is given by the Ordinary, Lapſe ſhall incur: For that the Appropriation gives him a Choice to hold, or not to hold. *Colt* and *Glover*'s Caſe, *Hobart* 152. But *Quære*, Whether a Diſappropriation be perfected by Preſentment before Inſtitution, and Induction be had thereupon; however, if a Woman be indowed of an Advowſon that is appropriate, and doth preſent her Clerk, who is inſtituted and inducted, it is ſaid, that this ſhall make a Diſappropriation, and ſhall never be appropriate again after the Death of the Incumbent, for that the Incumbent that comes in by Preſentation, hath all the Eſtate in him. 2 *E.* 3. 8. and cited *Mich.* 28 *Eliz.* in the Earl of *Bedford*'s Caſe, 7 *Co.* 8. 1 *Inſt.* 46. *b.* But if the Wife in ſuch Caſe had died before any was admitted and inſtituted at her Preſentment, the Church had remained appropriate; and ſo the *Quære* 6 *E.* 6. *Dyer* 71. is well reſolved, ſaith *Coke*, *Mich.* 28, 29 *Eliz. Earl of Bedford*'s Caſe, 7 *Co.* 8. where the Caſe 2 *E.* 3. 3. oft miſtaken is well explained. But if Leſſee for Years of an Appropriation doth preſent thereto a Clerk, who is inſtituted and inducted, this doth diſappropriate the Church during his Years, and not after, for this Diſappropriation doth not bind him in Reverſion. 44 *Aſſ.* 37. 44 *E.* 3. 33, 37. 20 *E.* 6. *b.* 1 *Roll*'s *Abr.* 240, 241. Yet this ſeems to be contrary to the Reaſon of the Caſe of Tenant in Dower next before; for in this Caſe, the Preſentee of the Leſſee for Years hath all the Eſtate in him as much as the Preſentee of the Wife Tenant in Dower, and for that Reaſon ought as abſolutely to make a Diſappropriation: And *Paſch.* 33 *Eliz. Lancaſter* v. *Lucas*, 1 *Leon.* 235. by *Popham*, the Preſentation of the Wife in the firſt Caſe did only diſappropriate the Church during her Life, but afterwards it ſhall ſtand; and he refers to the ſame Caſe of 2 *E.* 3. 8. Therefore *Quære*.

Lapſe.

By a Woman indowed of an Advowſon appropriate.

By Leſſee for Years.

If Leſſee for Years of an Appropriation, who for the Term is alſo Patron of the Vicarage, doth by Preſentation, *&c.* unite the Parſonage, and Vicarage, which continueth Seven Years, a Spoliation doth not lie in the Eccleſiaſtical Court for the Appropriator, or Leſſor; and if a Spoliation be brought, an *Indicavit* may be had to ſtop them in the Spiritual Court; for Spoliation doth not lie, but where a ſecond Incumbent is preſented, *&c.* upon a former, by one and the ſame Patron; in which Caſe the Right of the Patronage is not in Queſtion: But if the ſecond Preſentment be made by another, the Matter is to be tried by Aſſize, or Treſpaſs at Common Law. 44 *E.* 3. 33. But if one doth preſent to a Church appropriated by Uſurpation, having no Title, this doth not make the Church to be diſappropriated, for that all is void. *Grendon*'s Caſe, *Plowden* 500. *b.* And yet it is ſaid, that if a Stranger doth preſent, and his Clerk be inſtituted, and inducted, and continueth Incumbent for Seven Years, this Continuance for ſo long Time hath diſappropriated the Church, until it be recovered again by a Writ of Right. 44 *E.* 3. 34. 44 *Aſſ.* 37. But *Roll* in his *Abridgment* 1. *p.* 240, ſaith, that this is not Law, for that there cannot be an Uſurpation upon an Appropriation, 5 *Co.* 101. and ſo is *Plowden* in the Caſe laſt cited: And if the Patron of a Vicarage (another being Patron of the Parſonage) doth preſent thereto, by the Name of

Indicavit upon a Spoliation brought.

If Uſurpation upon an Appropriation.

of a Parſonage, and his Clerk be inducted, yet it doth continue a Vicarage; the ſame Law is, if the King doth preſent by ſuch Name to ſuch Vicarage. *Roll*'s *Abr.* 2. *p.* 338. *Dubitat'* 11 *H.* 6. 18. *B.* 19. 32. *B.* But if there be a Vicarage, and a Parſonage, in one Church preſentable, and both be void at one Time, and one doth preſent his Clerk as Parſon, who is inducted, this ſhall unite the Parſonage and Vicarage again. 11 *H.* 6. 33. *Quære.* Appropriations, &c.

As by Preſentment, ſo by Recovery an Appropriation may be diſappropriated; for if a Parſon appropriate and the Ordinary do create a Vicarage, and afterwards the Advowſon of the Church be recovered by a Writ of Right, upon a Title prior to the making of the Vicarage, the Vicarage is defeated thereby, and the Church diſappropriated; for that the Plaintiff doth recover by higher Title than the making of the Vicarage or Appropriation; but otherwiſe it is, if he doth recover by a younger Right than the Creation of the Vicarage. 17 *Ed.* 3. 51. *B.* 76. Diſappropriation by Recovery.

If a Church be appropriated to a Corporation that is diſſolved, the Church by the Diſſolution is diſappropriated, (as the Lord *Dyer* ſaid) and the Advowſon thereof doth fall to the Lord of whom it was held, ſo that he may preſent thereto, *Grendon*'s Caſe, *Plowden* 497. *a.* and by *Hobart*, in *Wright* v. *Gerrard* and *Heilderſham*, *Hobart* 307. *Trin.* 38 *Eliz. B. R.* The Archbiſhop of *Canterbury*'s Caſe, 2 *Co.* 47. or to the firſt Patron that gave the Advowſon to the Corporation. *Mich.* 18. *Jac. Wright* v. *Gerrard* and *Heilderſham*, *Jones* 2. And *Quære*, if a Dean and Chapter, or other Spiritual Corporation, be ſeiſed of a Manor to which an Advowſon is Appendant, and the Church is appropriated to them, and after they make a Feoffment, or Leaſe of the Manor *cum pertinentiis*, whether this doth diſappropriate the Church; for it ſeems to ſome (ſaith *Plowden*) that the Advowſon ſhall paſs as Appendant to the Manor, by the Order of the Common Law; but now by the Statutes, which make the King and Lay Perſons capable of Parſonages appropriated, the Advowſons in ſuch Caſe be ſevered from the Manors by the Intent of the Statutes, and by the Grant of a Parſonage appropriate, which may now be granted, and transferred to common Perſons, the Advowſons do paſs. *Grendon*'s Caſe, *Plowden* 501. *a.* See *Stat.* 31 *H.* 8. *c.* 13. By Diſſolution of a Corporation. Feoffment *cum pertinentiis.*

It is ſaid, 19 *Ed.* 1. *Rot. Pat. Membrana* 25, *in Schedula annexa*, That the Archbiſhop of *Canterbury*, with the Conſent of the Dean and Chapter, did appropriate a Church of his Dioceſe, and of his Collation to an Hoſpital of Lepers, in Compenſation of a Sum of Money due from the Archbiſhop, and that the Succeſſor of the Archbiſhop, with the Conſent of the Pope, Dean and Chapter, and Maſter of the Hoſpital, did revoke the Appropriation; but I conceive, that this Appropriation was never good, unleſs that the Patronage of the Church appropriated was firſt veſted in the Hoſpital, and afterwards appropriated, as is before ſhewed it ought to be. However, if there be a Parſon appropriated, and a Vicar indowed of the ſame Church, and after the Parſon and Ordinary do reunite the Vicarage to the Parſonage, yet this doth not diſappropriate the Church appropriated, for that the Vicarage was taken out of the Parſonage, and ſo is reſtored but to its firſt Eſtate, as was reſolved 7 *Jac.* at *Serjeants-Inn*, by the Judges, upon a Reference out of the Court of *Wards*, in one *Stafford*'s Caſe, *Roll*'s *Abr.* 1. *p.* 240. Vicarage united to the Parſonage.

If the King, or any common Perſon be ſeiſed of the Rectory as Appropriator, and doth grant *Advocationem Eccleſiæ de D.* neither the Appropriation doth paſs thereby, nor the Advowſon of the Church; not the Advowſon, becauſe it is not a Thing in *Eſſe*, by reaſon of the Appropria- Diſappropriation muſt be by a Judicial Act.

Commendams.

tion; nor is the Church diſappropriate thereby, becauſe it being appropriated by a Judicial Act, nothing but a Judicial Act, as Inſtitution and Induction upon the Proprietor's Preſentment, and not any other private Act of his, can make a Diſappropriation thereof; by *Manwood*, Chief Baron. *Trin.* 26 *Eliz. The Queen* and *My Lord Lumley*'s Caſe, 2 *Leonard* 80. *Paſch.* 22 *Eliz. Savile*'s Caſe, 51. *p.* 20. *Boſtock* and *Monin*'s Caſe, *Roll*'s *Abr.* 245. *b.* And indeed, Appropriations are not regularly grantable over, nor can be ſurrendered; therefore it hath been held, That the Grants and Surrenders of the Poſſeſſions of Monaſteries, would not have carried Appropriations without the Aid of the Statute 31 *H.* 8. *Wright*'s Caſe v. *Gerrard* and *Heilderſham*, *Hobart* 307.

Appropriations not grantable over.

If the Vicarage be diminiſhed.

Although the Rectory be not diſappropriated, and the Vicarage at the firſt was ſufficiently indowed, yet if after the Vicarage be diminiſhed, it ſhall have more from the Parſonage, if the Remnant be not ſufficient: Or if a Charge be ariſing upon the Vicarage, it ſhall be recompenſed from the Parſonage. So if the Parſonage be impoveriſhed, or that neither the Parſonage by itſelf, nor the Vicarage be ſufficient to ſuſtain themſelves, the Vicarage ſhall be determined, and reſtored to the Parſonage. 31 *H.* 6. 14. *a.* 40 *E.* 3. 28. But this is now to be underſtood of a Parſonage appropriate in an Eccleſiaſtical Perſon, which never came to the King by the Statute of Monaſteries; and in the aforeſaid Caſes, if the Parſon hath made a Leaſe for Lives, according to the Statute of 32 *H.* 8. the Vicar may well ſue in the Eccleſiaſtical Court againſt the Parſon, and his Leſſee that comes in by the Statute, for Addition of Maintenance; and the Ordinary may compel them to increaſe his Maintenance; for upon all Appropriations, ſuch Power of increaſing of the Maintenance of the Vicar was reſerved to the Ordinary by the Common Law, *March* 87. 3 *E.* 2. 74. and the Leſſee comes in ſubject to this Charge; and upon ſuch Suit in the Eccleſiaſtical Court, by the Vicar of the Pariſh-Church of *Preſhurſt* in the County of *Wilts*, againſt the Maſter of the Choriſters in the Cathedral Church of *Sarum*, and his Leſſee, the Maſter and his Leſſee ſuing for a Prohibition, it was denied. *Hill.* 9 *Car. B. R. Fitchcolt* v. *Thornborough* and *Hitchcolt*, *Roll's Abr.* 2. *p.* 337.

If Parſonage be impoveriſhed.

Suit for Addition of Maintenance.

CHAP. XVIII.

Of Commendams.

Commendam

THE Third extraordinay Way or Means of taking a Title to a Benefice in the Church, is by obtaining (as the Term is) a *Commendam recipere*, for that Purpoſe; and this may be had not only by a Biſhop after he is advanced to a Biſhoprick, but alſo by every Clerk that may hold a Plurality; as to which it is to be known, that there are two Degrees of theſe *Commendams* only allowable by Law; the one *Semeſtris*, or for ſix Months, and is made to the Clerk during the Vacancy of the Church, and is but a Sequeſtration of the Cure and Fruits, until the Patron doth prefer his Clerk, or at the moſt, until ſuch Time as the Church doth go in Lapſe to the Ordinary; or if it be granted becauſe the Church is litigious, until ſuch Time as the Controverſy ſhall be determined:

Of two Degrees: *Semeſtris*

mined: But ſuch *Commendam* neither is, or doth it give any Title to the Church, although the *Commendatory* be by Commiſſion allowed to gather the Profits, or to ſupply, or cauſe the Cure to be ſupplied; and this *Commendam* is grantable by every Ordinary that may ſequeſter the Profits of the reſpective Church. 8 *H.* 6. 9. But I ſuppoſe that ſuch *Commendam* or Sequeſtration, doth not give the Perſon that ſhall obtain it a Right to all the Profits, (eſpecially of a great Benefice) during the Vacation, by reaſon of the Statute of 28 *H.* 8. which ordains, **That the Ordinary ſhall ſequeſter, and that the Profits of the Church ariſing during the Vacancy thereof, (the Supply of the Cure for that Time being firſt paid) ſhall go to the next Incumbent.**

Commendams. Gives no Title. *St.* 28 *H.* 8. c.

The other Degree of *Commendam* is more perfect and full, and is for Life, and grantable at this Day by the King or Archbiſhop of *Canterbury* only, and there is no Difference between a *Commendam* for Life and a Preſentment, but that the one preſents the Parſon to the Church, the other commits the Church to the Parſon; and as a Patron cannot preſent to a full Church, ſo neither can a *Commendam* be made to a Church certain that is then full. Alſo the Patron's Conſent muſt be had to the taking of a Benefice in *Commendam*, and this muſt be expreſſed in the Inſtruments of *Commendam*. *Mich.* 9 *Jac. King* v. *Horsfall* and *Wale*, *Davis* 74. *Hill.* 22 *Jac. Evans* and *Kiffin* v. *Aſkwith*, *Palmer* 477. And if the Patronage be to divers, and that one is to nominate to another, who is to preſent over, the Conſent both of the Nominator and Preſenter muſt be had, and expreſſed as aforeſaid; but if a *Commendam* be made to the Patron himſelf, it may be well made by theſe Words; *Authoritate ſua propria capere & apprehendere abſque Inſtitutione, Collatione, &c.*

Commendam for Life. Patron's Conſent. *Commendam* to the Patron himſelf.

If the Archbiſhop ſhould commend to a certain Church void, *Licet Patronus non conſentiret*, the Inſtrument of *Commendam* is void, although the Patron would after conſent. Alſo if an Attorney made by a Patron to preſent to his Benefices ſhould conſent to a *Commendam*, it would be void, becauſe ſuch Adminiſtration for others are never extended beyond ordinary Caſes; and ſo if a Church doth come by Lapſe to the King or Ordinary, neither of them can conſent to have the Church taken by *Commendam*: But I ſee no Reaſon why the Church that is in Lapſe may not be filled (he conſenting to whom it is lapſed) by any Means by which a Church may lawfully be filled, and therefore by *Commendam*, for that can be but for one Turn, and the Inheritance is no Ways prejudiced or touched thereby, the Church being thereby filled, and the Cure provided for, the Truſt that comes by Lapſe is by ſuch *Commendam* as well executed to all Intents, as if Preſentation had been made, and Inſtitution and Induction had thereupon enſued; and of this Opinion is *Dodderidge*, *Mich.* 10 *Jac.* in *Colt* and *Glover*'s Caſe, *Moor* 900. Eſpecially when the Church is by Lapſe come to the King, for then the Right of preſenting for that Turn is veſted in the King, not as Ordinary, but as ſupreme Patron, ſo that the Patron cannot preſent to that Avoidance. *Quære.*

Licet Patronus non conſentiret, &c. Lapſe.

When a *Commendam* is made, if it be for longer Time than whilſt the Church ſhall remain void through the Patron's Fault, it muſt be made for the Life of the *Commendatory*, and not for Years, or ſo long as he ſhall be Biſhop of ſuch a Dioceſe, or the like; neither can a Benefice be commended by Parts, any more than it may be preſented unto by Parts, as that one ſhall have the Cure without the Fruits, or the Fruits without the Cure; or that one ſhall have the Glebe, another the Tithes, and the like; neither can ſuch *Commendatory* have a *Juris utrum*, which is *Utrum ſit libera Eleemoſyna pertinens Eccleſiæ ſuæ*; nor can he take to him, or his Succeſſors, nor can he ſue or be ſued in a Writ of Annuity, or the like.

For what Time. Not by Parts. *Juris utrum.*

But

Commendams.

Commenda perpetua.

But a *Commenda perpetua* may be admitted. 11 *H.* 4. 76. By *Thirning* and *Hankford*; for it amounts to a Collation or Proviſion, and hath full Words, that he may take or receive a Benefice void of the Gift or Preſentation of the Patron, and the *Commendatory* may enter into it without Inſtitution, *&c.* and take the Profits as Rector in *Commendam*, for Term of his Life: And it is ſaid to be adjudged, and affirmed in Error, that a *Commendam* to take a Benefice upon the Preſentation of the Patron is good. *Jenkins, Caſe* 9. *Cent.* 6. But then the Benefice muſt be void when the *Commenda* is made for the holding of it, and Words *de futuro* will not ſerve; but *Quære*. And though it be in a ſort repugnant, that a Man ſhould have an Intereſt irrevocable in a Thing that he takes only to keep, (for ſo was the Original of a *Commendam*,) yet where the Words are ample to make a full Incumbent, the Word *Commendam* ſhuffled in may be void. *Hobart* 153.

To take upon the Patron's Preſentation.

Perpetual is the beſt.

And though it may be ſaid that the Nature of a *Commendam* is to be determinable, not perpetual; yet it muſt be agreed that a *Commendam* may be perpetual, and ſuch is the beſt and perfecteſt kind of *Commendams*; and a *Commenda Temporalis* doth not ſtand with the Common Law of *England*. When any ſpiritual Perſon is made a Biſhop, he may by Diſpenſation of Retainer hold with his Biſhoprick all ſuch Benefices of which he was lawfully poſſeſſed before he was Biſhop; and ſo if he was the King's Chaplain, and had Three Benefices with Cure above the yearly Value of Eight Pounds, one of them at the leaſt being of the King's Gift, he may retain them all; but if he doth retain by Diſpenſation two Benefices, or ſo many as he might have before he was Biſhop, by the Statute 21 *H.* 8. *c.* 13. he cannot by *Commendam* take any more, becauſe the Words of the Statute are as well againſt having, as taking more Benefices, and upon other Terms than the Statute doth allow; and if he had no Benefice before, or did void them by being made a Biſhop, he can take but one Benefice *De Novo*, eſpecially if it be with Cure, and of the yearly Value of Eight Pounds, becauſe he that will have two ſuch Benefices, muſt have ſuch a Qualification and Diſpenſation as the Law requires; and a Biſhop by being Biſhop ceaſeth to be a Chaplain, and ſo makes his Qualification void; (but *Quære*, Whether he doth not continue to be qualified as a Doctor?) but he muſt have a double Diſpenſation to licenſe him to take two ſuch Benefices, and hold them with a Biſhoprick, which is ſuppoſed not to be tolerable. *Hobart* 157. But I ſee no Reaſon in Law, why a Biſhop may not as well be diſpenſed with to hold a Benefice above the Value of Eight Pounds *per Annum*, with his Biſhoprick, and another Benefice within the Statute, with that and his Biſhoprick, *viz.* by *Commendam*, (all *Commendams* being but Diſpenſations,) as was agreed *Hill.* 22 *Jac.* in *Evans* and *Kiffin*'s Caſe *v. Aſcouth*, *Noy* 94. and *Palm.* 457. as well as he that hath any Inferior Dignity may be diſpenſed with to hold two ſuch Benefices together with his Inferior Dignity; for a Biſhoprick by *Hobart* is agreed to be no more a Benefice within this Statute than a Deanery, Archdeaconry, *&c.* are, which are expreſly excepted by it.

If made a Biſhop, what Benefices he may retain.

Qualification.

Commendams are Diſpenſations.

However, as *Hobart* ſays, *Hobart* 257. Whatever Benefices a Biſhop holds in *Commendam*, he is not a Biſhop as to ſuch Benefices, whether they be in his own or another Dioceſe; but a Parſon, Vicar, or the like, (as his Caſe is) to all Purpoſes, and by that Name muſt ſue and be ſued, preſcribe and claim, and yet it is ſaid, *Hill.* 22 *Jac.* in *Evans* and *Kiffin*'s Caſe v. *Aſcouth*, *Noy* 94. the ſame Caſe is alſo reported *Palm.* 345. 457. *Latch* 31, 233. That a *Commendatory* muſt ſue by that Name; all which Particulars concerning *Commendams* are mentioned by *Hobart*, (unleſs

leſs ſuch of them for which other Authors are cited,) in *Colt* and *Glover*'s Caſe *v. The Biſhop of Coventry* and *Litchfield*, *Mich.* 10 *Jac. Hobart* 154, *&c.* Which Caſe alſo ſee in *Moor's Reports*, *p.* 826. and in *Roll's* 1 *Rep.* 451. where the principal Caſe is, that a Church being come to the King by Lapſe, and after a Biſhop (that did hold with his Biſhoprick a Benefice with Cure, being elected to be Biſhop of another Dioceſe) doth upon his Petition obtain a Grant of Diſpenſation from the Archbiſhop, that he ſhould hold the Benefice he held with his firſt Biſhoprick, *Nec non, ut unum aliud vel plura Curata vel non Curata Beneficia Eccleſiæ, infra Regnum Angliæ, cujuſcunque Nominis, Qualitatis aut Dignitatis in Commendam ibidem obtinere, acceptare & recipere, ac propria ſua authoritate capere & apprehendere, ac realem, corporalem, & actualem Poſſeſſionem ejuſdem abſque Inſtitutione, Collatione, Inductione, & alia quacunque juris Solemnitate intrare, &c.* And then being confirmed Biſhop of the ſecond Dioceſe, the King *ratione Prærogativæ, &c.* doth grant him the Benefice that was come to him by Lapſe, upon which the Biſhop doth accept of the ſaid Benefice, and did enter upon it, and held it in *Commendam*, in which Caſe, of twelve Judges, three only did hold that the ſaid *Commendam* was good in Law, at leaſt made good by the Words of the King's ſecond Grant; the other nine held that it was void, of which nine, two were to have Judgment to be given for the King; the other ſeven, that Judgment ought to be given for the Plaintiff, and for him it was given accordingly, *Quod habeat breve Epiſcopo*; but Order given that no Writ ſhould go forth, neither to the Biſhop nor the Sheriff to inquire of the Points of the Writ, till the Court give further Order, becauſe that the King's Title by Lapſe was in ſome ſort admitted, or not denied; and to the End, that (as *Coke* adviſed, who was one of the ſeven) Knowledge might be taken of the King's Title before Execution. And this is the firſt Judgment that is found to be given concerning this ſort of *Commendams*, although Queen *Elizabeth* brought a *Quare Impedit* before, in a Caſe not much unlike it; which was, That on the twenty-ſecond of *November* 1582, a Biſhop of *Coventry* purchaſed a Diſpenſation of the Archbiſhop of *Canterbury*, after confirmed by the King, whereby it was diſpenſed with the ſaid Biſhop, that he might, during the Time that he ſhould be Biſhop of the ſame See, *duo Beneficia Eccleſiaſtica infra Diœceſin ſuam, &c. in Commendam recipere, &c. Et authoritate ſua propria retinere, quam diu prædicto Epiſcopatui præeſſe contigerit, quantum in eodem Archiepiſcopo fuit, & jura Regni patiebantur.* After which, *viz.* 14 *April* 1597, a Church within his Dioceſe falling void on the tenth of *May* following, the rightful Patron *Nominavit, Deſignavit & Aſſignavit* the ſaid Biſhop to be Rector of the void Church, and that he might take it, and hold it according to his Diſpenſation, by Pretence of which Diſpenſation and Preſentation, the Biſhop, on the 24th of *October* in the ſame Year, took by his own Authority corporal Poſſeſſion of the ſame Church; as to which Diſpenſation of *Commendam*, three of the Juſtices held, that both it and the Confirmation were void. The Fourth, *viz. Walmſley*, that it was good, but the Queen put an End to the Suit, by certifying by her Attorney, that her Pleaſure was not to proſecute it further. *Paſch.* 43 *El.* argued, *Mich.* 44 & 45. *El. Queen* v. *Biſhop of Coventry* and *Compton*, 2 *Anderſon* 181. Alſo the Biſhop of *Oſſery* having obtained the like Diſpenſation, and upon Pretence thereof enjoyed during his Life the Profits of a Vicarage that came to him by Lapſe, and was full of an Incumbent when his Diſpenſation was granted; the King brought after his Death a *Quare Impedit* againſt the Patron and his Clerk, upon the Title of Lapſe,

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preſuming, that as the Church came by Lapſe to the Biſhop, ſo not being filled by his taking Poſſeſſion by Virtue of his Diſpenſation, that it came to him, and was in him by Lapſe; but what Judgment was given is not declared; however, the Arguments *Pro* and *Con* are ſet down, *Paſch.* 9 *Jac. King* v. *Horſfal* and *Wale*, *Davis*, *fol.* 68. It hath alſo ſometimes been made a Doubt, whether a Biſhop might hold any Benefice by *Commendam* within his own Dioceſe or not. *Moor* 899. 1 *Siderfin* 305. *Roll's* 1 *Rep.* 454, 463. *Davis* 69. 8.

And the Reaſon given why he cannot, is, becauſe the ſame Perſon cannot be both Viſitor and viſited, but 'tis anſwered, That the Biſhop is under the Correction of the Metropolitan as his Viſitor; and therefore might have ſuch a *Commendam*.

As to *Commendams* in General, the following Rules are found in the Books of the Common Law, and in Part collected by Biſhop *Gibſon* in his *Code*, *viz.*

1. That the Poſſeſſion of a Biſhoprick doth of common Right make void all other Promotions according to a Canon of the Council of *Lateran*, under *Alexander* III. and this not only on *Engliſh* Promotions by Biſhopricks in *England*, but alſo *Engliſh* Promotions by Biſhopricks in *Ireland*, the *Iſle of Man*, *&c.* *Et vice verſa*. *Vide Noy* 93. *W. Jones* 158. *Latch* 133. *Palm.* 344. *Vaugh.* 19. But the Law is otherwiſe of a meer Titular, or a Suffragan Biſhop, on the Stat. 21 *H.* 8. *c.* 18. See the Statute.

2. Yet ſuch Avoidance may be prevented by a Diſpenſation of *Retainer*, or a *Commendam retinere* granted before Poſſeſſion of the Biſhoprick. This Power the Pope at firſt claimed, *viz.* of diſpoſing of all Promotions becoming void in that manner; and the King may now do the ſame either ſingly and by himſelf, *vide Hob.* 453, 457, 468, or by Command to the Archbiſhop to exert the Right of Diſpenſation veſted in him by Stat. 25 *H.* 8. *c.* 21. as the Ordinary Method is, *vide* 1 *Cro.* 542. *Hob.* 154, *&c.* which ſort of *Commendam* is defined by *Hobart* to be a Faculty or Licence of Retention, and Continuation of the Benefice in the ſame Perſon and State, wherein it was, notwithſtanding ſomething intervening, as a Biſhoprick, or the like, that without ſuch a Faculty would have avoided it. By which Means the Inſtitution and Induction, or other Method whereby the Perſon obtained ſuch Benefice, remain and continue in their full Force. And it being the Doctrine both of the Canon and Common Law, That former Promotions are not vacant but by Conſecration in caſe of Creation, and by Confirmation in caſe of Tranſlation, if ſuch Faculty or Diſpenſation comes before theſe, it comes Time enough to continue the Poſſeſſion, otherwiſe it comes to late. Thus Cardinal *Beaufort*'s Diſpenſation to hold the Biſhoprick of *Wincheſter* coming after he was made Cardinal was void, but Cardinal *Wolſey*'s for the Archbiſhop of *York* coming before, was good. *Vide Noy* 93. *W. Jones* 158. *Vaugh.* 20. *Dav.* 77, 80.

3. By a *Commendam Retinere* the Incumbency is continued. This appears evident from the foregoing Propoſition, for the Avoidance is thereby prevented in the ſame manner as it is with regard to a firſt Benefice incompatible by a Diſpenſation to hold a ſecond, or a Plurality; therefore

Hob. 143. 'tis ſaid by *Hobart*, that a *Commendam Retinere*, is improperly called a *Commendam*. For ſays he, my own Benefice cannot be commended unto me. And it is clear, what the Canon Law meant by this Term, was only with regard to the ſecond Benefice taken *de Novo*, by way of Cuſtody or *Commendam*, and (to prevent the Voidance of the firſt) not

taken by way of Inſtitution; ſo that it was no more than committing to the Incumbent of one Church the Cure and Revenues of another, either for a Time limited as ſix Months, (which Time the Patron had to conſider of a proper Clerk) that the Church might be taken care of, or (with Conſent of the Patron) to the End chiefly, That ſuch Incumbent might be better ſupported; the firſt of which, *viz.* Care of the Church during the Vacancy, is now anſwered by Sequeſtration of the Benefice, and the Grant of the ſecond (*i. e.* the Profits of the Vacancy) is rendred impracticable either by the Biſhop or Patron, or both, by the Stat. 28 *H.* 8. *c.* 11. which gives the Profits of the Vacation to ſuch *Perſon as ſhall be thereunto next preſented, promoted, inſtituted, inducted or admitted.* Which Profits before the ſaid Act belonged either to the Church, and ſo were in the Diſpoſition of the Patron and Biſhop, or to the Ordinary or other Perſon to whom by Cuſtom they appertained, and ſo by the previous Conſent of ſuch Perſon might be yielded to the Commendatory. But the next Incumbent being a Perſon uncertain cannot give ſuch Conſent, and by Conſequence the Revenues of Vacancies, ſince the making of the ſaid Act, cannot be given; which ſeems to be the true Reaſon of the utter Diſuſe of that ſort of *Commendams* with regard to Preſbyters; tho' as to Biſhops it ſtill continues in Favour to the Prerogative Royal. Commendams.

4. *But a* Commendam capere, (i. e. *a Dignity or Benefice taken by a Biſhop after Conſecration, and without Inſtitution*) *doth not create a proper Incumbency.* The Canoniſts were doubtful whether during a *Commendam* the Church commended was not really vacant, and whether the Commendatory was any more than a *Cuſtos*, *Adminiſtrator* or *Procurator Eccleſiæ*, during ſuch Vacancy; and even they who held he was ſomewhat more, (for that *Commenda* is a Title or Right owned by the Canon Law) pretend not to ſay he was an Incumbent, and confeſſed he held only by a corrupt and precarious Title invented on purpoſe to elude the Laws againſt Pluralities. In like manner, tho' the Books of the Common Law ſay, a Commendatory by *retinere* remains full Incumbent, and may plead as ſuch; yet of a Commendatory *recipere* they ſay, That a Dean by ſuch a *Commendam* cannot confirm a Leaſe made by the Biſhop, and that ſuch a Commendatory Parſon cannot have a *Juris utrum*, nor take to him and his Succeſſors, nor be ſued in a Writ of Annuity, *&c.* 2 *Cro.* 691. *Hob.* 163. *Noy* 94. Whereas on the other hand, Benefices, *&c.* and *Commendams* by Retainer are frequently declared vacant by the Reſignation or Surrender of the Commendatory. *Vide Gibſon's Cod.* 955.

5. Commendams *may be temporary or perpetual at the Pleaſure of the Prince.* When it is Temporary, the preciſe Time is expreſſed and limited in the Diſpenſation; when perpetual, the Stile is *Quamdiu vixeris & eidem Epiſcopatui præfueris.* And in caſe of a *Commendam retinere* whether it be temporary or perpetual, it is only a Continuance of the original Incumbency, or the preventing of an Avoidance for ſuch a Term. But however it was taken by the old Canoniſts, it ſeems the Books of Common Law do generally ſay, That a *Commendam capere* ought to be perpetual, becauſe there being no previous Title by Inſtitution, *&c.* (as there is in the Caſe of a *Commendam retinere*) the Law knows not what to make of any Thing that can be called a Title, and not be equal to that, at leaſt in point of Perpetuity. *Vide Hob.* 152. And there is no Inſtance in our Books of a *Commendam capere*, but what is unlimited or perpetual.

6. According to the Duration of a *Commendam*, and the Commendatory, the Right of the Crown to preſent upon Promotion is ſerved, or not ſerved. If the *Commendam* be limited to a certain Term, the Crown ſhall preſent

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preſent by prerogative at the Expiration of ſuch Term, notwithſtanding the previous Grant of a *Commendam*; unleſs it ſo fall out, That the Commendatory Biſhop Dies or Reſigns before the Expiration of the Term. *Vide Dyer* 228. *b.* 4 *Mod.* 212. For in ſuch Caſe (the Church becoming void not by Ceſſion, but by Death or Reſignation) the Turn of the Crown is ſerved, and the Patron ſhall preſent as before is ſhewn, *pag* .... And ſo it is likewiſe ſerved, if the *Commendam* was originally unlimited, that is, during the Life of the Perſon, and his Poſſeſſion of ſuch a See, becauſe this amounts to a Preſentation. And therefore in this Caſe alſo, the Right of the Crown is ſerved, and the Patron may preſent. But if a Biſhop who is poſſeſſed of a *Commendam* is tranſlated to another See, and ſo a new Title accrues to the Crown by a new Promotion, the ſame *Commendam* may be continued, if the Prince ſhall pleaſe; but it muſt be by a new Diſpenſation granting it to be held with the new Biſhoprick. *Noy* 94. 2 *Roll.* 453.

G. Code 956. 7. A *Commendam* Temporary in *Retinere* may be renewed or prolonged; that is, before the original Incumbency ceaſes by the Expiration of the firſt Diſpenſation, and a ſecond Diſpenſation may be granted to prevent the Avoidance, and continue the Incumbency. But all *Commendams retinere* are now uſually granted in Perpetuity, they being deſigned as an additional Support to the Epiſcopal Character, which ſince the Reformation hath greatly needed Support in many Sees.

Ibid. 955. 8. No *Commendam* can be granted but with Conſent of the Patron, and therefore in granting a *Commendam retinere*, the King (who is Patron by the Promotion) ſignifies his Conſent by his *Mandate* to the Archbiſhop to grant a Diſpenſation. And if the *Commendam* be *recipere*, it is either to take a Promotion in the Biſhop's own Gift, and ſo his Acceptance is a Conſent, or in the Gift of ſome other Patron; and then the Conſent of ſuch Patron muſt be had in an authentick Manner, and mentioned in the Diſpenſation. And *Hobart* ſays, if the Archbiſhop ſhould commend to a certain Church void, *licet Patronus non conſenſerit*, the Inſtrument of *Commendam* would be void, tho' the Patron ſhould afterwards conſent.

Code 954. *Note*, That not only Dignities and Benefices have been granted in *Commendam*, but alſo Headſhips of Colleges and Hoſpitals, and that by Diſpenſation; as of Headſhips, St. *John's Oxon*, to Dr. *Mew*, Biſhop of *Bath* and *Wells*; of *Magdalen* College, *Oxon*, to Dr. *Hough*, Biſhop of *Oxford*; of *Pembroke* College, to Dr. *Hall*, Biſhop of *Briſtol*; and of Hoſpitals, St. *Croſs* near *Wincheſter*, to Dr. *Compton*, Biſhop of *Oxford*, and St. *Oſwald* near *Worceſter*, to Dr. *Fell*, Biſhop of *Oxford*.

CHAP. XIX.

Of Curates and Lecturers.

No Prieſt or Deacon may ſerve another as Curate, *&c.* without Admittance and Subſcription, *&c.*

THUS having ſpoken of the general Ways or Means, both ordinary and extraordinary, by which a Title to an Eccleſiaſtical Benefice may be taken; I may here alſo not improperly add, that the Power of executing the Office of a Miniſter, may be had by thoſe that have not any Title

Title to an Eccleſiaſtical Benefice; and that is, either as a Curate to ſome beneficed Perſon, or as a Lecturer without Title; but no Parſon, whether Prieſt or Deacon, (for Deacons are capable of being Curates and Lecturers as aforeſaid) may ſerve another as his Curate, or preach as a Lecturer in any Place of publick Worſhip, by the Conſent only of thoſe that imploy them, but ought to be admitted by their reſpective Archbiſhop, Biſhop or Ordinary, and at their Admiſſion to ſubſcribe before ſuch their Archbiſhop or Ordinary, the Declaration or Acknowledgment, the Form of which is ſet down before, *Cap.* 15. And if they do not ſubſcribe as aforeſaid, they loſe and forfeit ſuch Curate's Place and Lecture; and after Subſcription made, ſuch Curate and Lecturer are to procure a Certificate under the Hand and Seal of their Archbiſhop, Biſhop or Ordinary, before whom they ſubſcribed, who upon Demand are bound to make and deliver the ſame, and publickly to read the ſame Certificate together with the Declaration aforeſaid, upon ſome Lord's Day within three Months next following, in the Pariſh Church where he is to officiate in the Preſence of the Congregation there aſſembled in the Time of Divine Service, upon the Pain aforeſaid.

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And to read the Certificate, *&c.* within three Months.

Sect. 19. And it is alſo enacted, **That no Perſon ſhall be, or be received as a Lecturer, or permitted, ſuffered or allowed to preach as a Lecturer, or to preach or read any Sermon or Lecture in any Church, Chapel or other Place of publick Worſhip within this Realm of** England, **or the Dominion of** Wales, **and Town of** Berwick upon Tweed, **unleſs he be firſt approved, and thereunto licenced by the Archbiſhop of the Province, or Biſhop of the Dioceſe, (or in Caſe the See be void) by the Guardian of the Spiritualties under the Seal, and ſhall in the Preſence of the ſame Archbiſhop or Biſhop, or Guardian read the Nine and Thirty Articles of Religion, mentioned in the Statute of the Thirteenth Year of the late Queen** Elizabeth, **with Declaration of his unfeigned Aſſent to the ſame. And that every Perſon and Perſons who now is, or hereafter ſhall be licenſed, aſſigned and appointed, or received as a Lecturer to preach upon any Day of the Week in any Church, Chapel or Place of publick Worſhip within this Realm of** England, **or Places aforeſaid, the firſt Time he preacheth, before his Sermon ſhall openly, publickly and ſolemnly read the Common Prayers and Service in and by the ſaid Book appointed to be read for that Time of the Day, and then and there publickly and openly declare his Aſſent unto and Approbation of the ſaid Book, and to the Uſe of all the Prayers, Rites and Ceremonies, Forms and Orders therein contained and preſcribed, according to the Form before appointed in this Act: And alſo ſhall upon the firſt Lecture Day of every Month afterwards, ſo long as he continues Lecturer or Preacher there, at the Place appointed for his ſaid Lecture or Sermon, before his ſaid Lecture or Sermon, openly, publickly and ſolemnly read the Common Prayers and Service, in and by the ſaid Book appointed to be read for that Time of the Day, at which the ſaid Lecture or Sermon is to be preached; and after ſuch Reading thereof ſhall openly and publickly, before the Congregation there aſſembled, declare his unfeigned Aſſent and Conſent unto, and Approbation of the ſaid Book, and to the Uſe of all the Prayers, Rites and Ceremonies, Forms and Orders therein contained and preſcribed according to the Form aforeſaid; And that all and every ſuch Perſon and Perſons, who ſhall neglect or refuſe to do the ſame, ſhall from thenceforth be diſabled to preach the**

13 & 14 *Car.* 2. *c.* 4. concerning Lecturers.

Reading the 39 Articles.

Declaring his Aſſent to the Common Prayers, *&c.*

The like upon the firſt Lecture Day in every Month.

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said or any other Lecture or Sermon in the said or any other Church, Chapel or Place of publick Worship, until such Time as he and they shall openly, publickly and solemnly read the Common Prayers and Service appointed by the said Book, and conform in all Points to the Things therein appointed and prescribed according to the Purport, true Intent and Meaning of this Act.

If the Lecture be in a Cathedral, &c.

Sect. 20. Provided always, That if the said Sermon or Lecture be to be preached or read in any Cathedral or Collegiate Church or Chapel, it shall be sufficient for the said Lecturer openly at the Time aforesaid to declare his Assent and Consent to all Things contained in the said Book according to the Form aforesaid.

Not to preach after Disability.

Sect. 21. And be it further enacted, That if any Person who is by this Act disabled to preach any Lecture or Sermon, shall, during the Time that he shall continue and remain so disabled, preach any Sermon or Lecture, that then for every such Offence, the Person and Persons so offending shall suffer three Months Imprisonment in the common Gaol without Bail or Mainprize; And that any two Justices of the Peace of any County of this Kingdom and Places aforesaid, and the Mayor or other Chief Magistrate of any City, Town Corporate within the same, upon Certificate from the Ordinary of the Place, made to him or them of the Offence committed, shall and are hereby required to commit the Person or Persons so offending to the Gaol of the same County, City or Town Corporate accordingly.

Punishment.

Lecturer to be present at the reading Common Prayers.

Sect. 22. Provided always, And be it further enacted, That at all and every Time and Times when any Sermon or Lecture is to be preached, the Common Prayers and Service in and by the said Book appointed to be read for that Time of the Day, shall be openly, publickly and solemnly read by some Priest or Deacon in the Church, Chapel or Place of publick Worship, where the said Sermon or Lecture is to be preached, before such Sermon or Lecture be preached, and that the Lecturer then to preach, shall be present at the reading thereof.

Not to extend to the Universities.

Sect. 23. Provided nevertheless, That this Act shall not extend to the University Churches in the Universities of this Realm, or either of them, when or at such Times as any Sermon or Lecture is preached or read in the said Churches or any of them, for or as the publick University Sermon or Lecture, but that the same Sermons and Lectures may be preached or read in such Sort or Manner, as the same have been heretofore preached or read; this Act or any thing herein contained to the contrary thereof in any wise notwithstanding.

15 *Car.* 2. *c.* 6. for punishing Persons prohibited.

And it hath been since enacted by 15 *Car.* 2. *c.* 6. That whereas some Doubt hath arisen, whether Parsons prohibited to preach by 14 Car. 2. c. 4. are in the same Plight as to Punishment with Persons disabled by the said Statute to preach: Be it declared and enacted, That the Penalties by the said Act, to be inflicted upon any Person disabled by the said Act to preach, for any Offence against the said Act, shall in like manner be inflicted upon every Person so offending, that is prohibited by the said Act to preach; any thing, Doubt or Ambiguity in the said Act to the contrary notwithstanding.

29 *Car.* 2. *cap.* 8.

Hither may be referred (with Regard to Curates and Curacies) the Stat. 29 *Car.* 2. *c.* 8. *for Augmentations to small Vicarages and Curacies* (which see hereafter *Chap.* 39.) See also *Gibson's Codex*, *pag.* 756, 757, *&c.*) as also the Stat. 12 *Annæ*, *Sess.* 2. *cap.* 12. for the better Maintenance of

Curates within the Church of *England*, and for preventing any Ecclesiastical Persons from Buying the next Avoidance of any Church Preferment, *viz.* Curates and Lecturers.

Whereas the Absence of Beneficed Ministers ought to be Supplied by Curates that are Sufficient and Licensed Preachers, and no Curates or Ministers ought to serve in any Place without the Examination and Admission of the Bishop of the Diocese, or Ordinary of the Place having Episcopal Jurisdiction: But nevertheless, for want of sufficient Maintenance and Incouragement for such Curates, the Cures within that Part of Great Britain called England have been in several Places meanly Supplied: For Remedy whereof, Be it Enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament Assembled, and by the Authority of the same, That if any Rector or Vicar having Cure of Souls, shall from and after the Nine and twentieth Day of September in the Year of our Lord One thousand seven hundred and fourteen, Nominate and Present any Curate to the Bishop or Ordinary, to be Licensed or Admitted to Serve the Cure of such Rector or Vicar in his Absence, the said Bishop or Ordinary, having regard to the Greatness of the Cure, and the Value of the Ecclesiastical Benefices of such Rector or Vicar, shall, on or before the Granting such Licence, Appoint by Writing under his Hand and Seal a sufficient certain Stipend or Allowance, not exceeding Fifty Pounds per Annum, nor less than Twenty Pounds per Annum, to be Paid or Answered, at such times as he shall think fit, by such Rector or Vicar, to such Curate for his Support and Maintenance; And if it shall appear to the Bishop or Ordinary, upon Complaint or otherwise, That any Curate of such Rector or Vicar, Licensed or Admitted before the said Nine and twentieth Day of September in the Year of our Lord One thousand seven hundred and fourteen, hath not a sufficient Maintenance, It shall be Lawful to and for the said Bishop or Ordinary to Appoint him a certain Stipend or Allowance, in like manner as before mentioned; and in Case any Difference shall arise between any Rector or Vicar and his Curate touching such Stipend or Allowance, or the Payment thereof, the Bishop or Ordinary, on Complaint to him made, shall summarily hear and Determine the same, and in Case of Neglect or Refusal to Pay such Stipend or Allowance, may Sequester the Profits of such Benefice, for or until Payment thereof. 12 *Annæ*, *Sess.* 2. *c.* 12.

And whereas some of the Clergy have Procured Preferments for themselves, by Buying Ecclesiastical Livings, and others have been thereby discouraged: Be it further Enacted by the Authority aforesaid, That if any Person, from and after the Twenty-ninth Day of September One thousand seven hundred and fourteen, shall or do for any Sum of Money, Reward, Gift, Profit or Advantage, directly or indirectly, or for or by reason of any Promise, Agreement, Grant, Bond, Covenant or other Assurance, of or for any Sum of Money, Reward, Gift, Profit or Benefit whatsoever, directly or indirectly in his own Name, or in the Name of any other Person or Persons, Take, Procure or Accept the next Avoidance of, or Presentation to any Benefice with Cure of Souls, Dignity, Prebend or Living Ecclesiastical, and shall be presented or Collated thereupon, that then every such Presentation or Collation, and every Admission,

Institution,

Admiſſion and Refuſal.

Inſtitution, Inveſtiture and Induction upon the ſame, ſhall be utterly Void, Fruſtrate, and of no Effect in Law, and ſuch Agreement ſhall be deemed and taken to be a Simoniacal Contract; and that it ſhall and may be Lawful to and for the Queen's Majeſty, her Heirs and Succeſſors, to Preſent or Collate unto, or Give or Beſtow every ſuch Benefice, Dignity, Prebend, and Living Eccleſiaſtical, for that One time or turn only; and the Perſon ſo corruptly Taking, Procuring, or Accepting any ſuch Benefice, Dignity, Prebend or Living, ſhall thereupon, and from thenceforth be Adjudged a diſabled Perſon in Law to have and injoy the ſame Benefice, Dignity, Prebend or Living Eccleſiaſtical, and ſhall alſo be ſubject to any Puniſhment, Pain or Penalty, Limited, Preſcribed or Inflicted by the Laws Eccleſiaſtical, in like manner as if ſuch corrupt Agreement hath been made after ſuch Benefice, Dignity, Prebend, or Living Eccleſiaſtical had become vacant; Any Law or Statute to the contrary in any wiſe notwithſtanding.

CHAP. XX.

Vide Chap. 15. ***Of Preſentations and Admiſſion of Clerks preſented; what Preſentations are good; and what are Cauſes ſufficient for the Biſhop to refuſe to admit; Of* Jure Patronatus, *and* Caveats.**

Remedies where a Clerk is hindred

HAving ſhewed both what are the Ordinary and Extraordinary Means, by which a Clerk muſt take a legal Title to an Eccleſiaſtical Benefice, it remains to be ſhewed what Remedies the Law doth afford the Clerk in caſe he be hindred in his Deſign of taking a Title by any of the aforeſaid Ordinary or Extraordinary Ways. If the Church be preſentable (a Preſentation being had) the Impediments to be removed in ſuch Caſes, are to be met with, either when the Clerk doth go to the Biſhop for Admiſſion and Inſtitution, or to the Archdeacon for Induction. As to the Biſhop, it muſt be remembred, that he, in admitting and inſtituting, is not to be looked upon as a mere Miniſter or Inſtrument, but as a Judge. 15 *H.* 7. 8. *a.* And therefore in many Caſes, he may refuſe to admit the Clerk that is preſented to him, and juſtify his Refuſal; wherefore it is meet, before I ſpecify the Remedies the Law hath provided in caſe a Clerk be unjuſtly refuſed, that I firſt declare what are and what are not the juſtifiable Cauſes of a Refuſal. The Cauſes of a Refuſal may ariſe either from the Perſon of the Clerk, the Preſentment he brings, or from the Condition of the Church to which he is preſented, *&c.*

in his Admiſſion or Induction.

Cauſes of Refuſal of Admiſſion ariſing from the Perſon of the Clerk.

Firſt, They may ariſe from his Perſon, for every one that is preſented to a Church ought to be duly qualified to perform the Duties of the Incumbent thereof; and this the Law of Reaſon doth render ſufficiently evident; therefore he ought to be ordained, or made a Miniſter accor-

Curates and Lecturers.

ſaid or any other Lecture or Sermon in the ſaid or any other Church, Chapel or Place of publick Worſhip, until ſuch Time as he and they ſhall openly, publickly and ſolemnly read the Common Prayers and Service appointed by the ſaid Book, and conform in all Points to the Things therein appointed and preſcribed according to the Purport, true Intent and Meaning of this Act.

If the Lecture be in a Cathedral, &c.

Sect. 20. Provided always, That if the ſaid Sermon or Lecture be to be preached or read in any Cathedral or Collegiate Church or Chapel, it ſhall be ſufficient for the ſaid Lecturer openly at the Time aforeſaid to declare his Aſſent and Conſent to all Things contained in the ſaid Book according to the Form aforeſaid.

Not to preach after Diſability.

Sect. 21. And be it further enacted, That if any Perſon who is by this Act diſabled to preach any Lecture or Sermon, ſhall, during the Time that he ſhall continue and remain ſo diſabled, preach any Sermon or Lecture, that then for every ſuch Offence, the Perſon and Perſons ſo offending ſhall ſuffer three Months Impriſonment in the common Gaol without Bail or Mainprize; And that any two Juſtices of the Peace of any County of this Kingdom and Places aforeſaid, and the Mayor or other Chief Magiſtrate of any City, Town Corporate within the ſame, upon Certificate from the Ordinary of the Place, made to him or them of the Offence committed, ſhall and are hereby required to commit the Perſon or Perſons ſo offending to the Gaol of the ſame County, City or Town Corporate accordingly.

Punishment.

Lecturer to be preſent at the reading Common Prayers.

Sect. 22. Provided always, And be it further enacted, That at all and every Time and Times when any Sermon or Lecture is to be preached, the Common Prayers and Service in and by the ſaid Book appointed to be read for that Time of the Day, ſhall be openly, publickly and ſolemnly read by ſome Prieſt or Deacon in the Church, Chapel or Place of publick Worſhip, where the ſaid Sermon or Lecture is to be preached, before ſuch Sermon or Lecture be preached, and that the Lecturer then to preach, ſhall be preſent at the reading thereof.

Not to extend to the Univerſities.

Sect. 23. Provided nevertheleſs, That this Act ſhall not extend to the Univerſity Churches in the Univerſities of this Realm, or either of them, when or at ſuch Times as any Sermon or Lecture is preached or read in the ſaid Churches or any of them, for or as the publick Univerſity Sermon or Lecture, but that the ſame Sermons and Lectures may be preached or read in ſuch Sort or Manner, as the ſame have been heretofore preached or read; this Act or any thing herein contained to the contrary thereof in any wiſe notwithſtanding.

15 *Car.* 2. *c.* 6. for puniſhing Perſons prohibited.

And it hath been ſince enacted by 15 *Car.* 2. *c.* 6. That whereas ſome Doubt hath ariſen, whether Parſons prohibited to preach by 14 Car. 2. c. 4. are in the ſame Plight as to Puniſhment with Perſons diſabled by the ſaid Statute to preach: Be it declared and enacted, That the Penalties by the ſaid Act, to be inflicted upon any Perſon diſabled by the ſaid Act to preach, for any Offence againſt the ſaid Act, ſhall in like manner be inflicted upon every Perſon ſo offending, that is prohibited by the ſaid Act to preach; any thing, Doubt or Ambiguity in the ſaid Act to the contrary notwithſtanding.

29 *Car.* 2. *cap.* 8.

Hither may be referred (with Regard to Curates and Curacies) the Stat. 29 *Car.* 2. *c.* 8. *for Augmentations to ſmall Vicarages and Curacies* (which ſee hereafter *Chap.* 39.) See alſo *Gibſon's Codex*, *pag.* 756, 757, *&c.*) as alſo the Stat. 12 *Annæ*, *Seſſ.* 2. *cap.* 12. for the better Maintenance of

Curates within the Church of *England*, and for preventing any Ecclesiastical Persons from Buying the next Avoidance of any Church Preferment, *viz.*

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Whereas the Absence of Beneficed Ministers ought to be Supplied by Curates that are Sufficient and Licensed Preachers, and no Curates or Ministers ought to serve in any Place without the Examination and Admission of the Bishop of the Diocese, or Ordinary of the Place having Episcopal Jurisdiction: But nevertheless, for want of sufficient Maintenance and Incouragement for such Curates, the Cures within that Part of Great Britain called England have been in several Places meanly Supplied: For Remedy whereof, Be it Enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament Assembled, and by the Authority of the same, That if any Rector or Vicar having Cure of Souls, shall from and after the Nine and twentieth Day of September in the Year of our Lord One thousand seven hundred and fourteen, Nominate and Present any Curate to the Bishop or Ordinary, to be Licensed or Admitted to Serve the Cure of such Rector or Vicar in his Absence, the said Bishop or Ordinary, having regard to the Greatness of the Cure, and the Value of the Ecclesiastical Benefices of such Rector or Vicar, shall, on or before the Granting such Licence, Appoint by Writing under his Hand and Seal a sufficient certain Stipend or Allowance, not exceeding Fifty Pounds per Annum, nor less than Twenty Pounds per Annum, to be Paid or Answered, at such times as he shall think fit, by such Rector or Vicar, to such Curate for his Support and Maintenance; And if it shall appear to the Bishop or Ordinary, upon Complaint or otherwise, That any Curate of such Rector or Vicar, Licensed or Admitted before the said Nine and twentieth Day of September in the Year of our Lord One thousand seven hundred and fourteen, hath not a sufficient Maintenance, It shall be Lawful to and for the said Bishop or Ordinary to Appoint him a certain Stipend or Allowance, in like manner as before mentioned; and in Case any Difference shall arise between any Rector or Vicar and his Curate touching such Stipend or Allowance, or the Payment thereof, the Bishop or Ordinary, on Complaint to him made, shall summarily Hear and Determine the same, and in Case of Neglect or Refusal to Pay such Stipend or Allowance, may Sequester the Profits of such Benefice, for or until Payment thereof.

And whereas some of the Clergy have Procured Preferments for themselves, by Buying Ecclesiastical Livings, and others have been thereby discouraged: Be it further Enacted by the Authority aforesaid, That if any Person, from and after the Twenty-ninth Day of September One thousand seven hundred and fourteen, shall or do for any Sum of Money, Reward, Gift, Profit or Advantage, directly or indirectly, or for or by reason of any Promise, Agreement, Grant, Bond, Covenant or other Assurance, of or for any Sum of Money, Reward, Gift, Profit or Benefit whatsoever, directly or indirectly in his own Name, or in the Name of any other Person or Persons, Take, Procure or Accept the next Avoidance of, or Presentation to any Benefice with Cure of Souls, Dignity, Prebend or Living Ecclesiastical, and shall be presented or Collated thereupon, that then every such Presentation or Collation, and every Admission, Institution,

Admiſſion and Refuſal.

Inſtitution, Inveſtiture and Induction upon the ſame, ſhall be utterly Void, Fruſtrate, and of no Effect in Law, and ſuch Agreement ſhall be deemed and taken to be a Simoniacal Contract; and that it ſhall and may be Lawful to and for the Queen's Majeſty, her Heirs and Succeſſors, to Preſent or Collate unto, or Give or Beſtow every ſuch Benefice, Dignity, Prebend, and Living Eccleſiaſtical, for that One time or turn only; and the Perſon ſo corruptly Taking, Procuring, or Accepting any ſuch Benefice, Dignity, Prebend or Living, ſhall thereupon, and from thenceforth be Adjudged a diſabled Perſon in Law to have and injoy the ſame Benefice, Dignity, Prebend or Living Eccleſiaſtical, and ſhall alſo be ſubject to any Puniſhment, Pain or Penalty, Limited, Preſcribed or Inflicted by the Laws Eccleſiaſtical, in like manner as if ſuch corrupt Agreement hath been made after ſuch Benefice, Dignity, Prebend, or Living Eccleſiaſtical had become vacant; Any Law or Statute to the contrary in any wiſe notwithſtanding.

CHAP. XX.

Of Preſentations and Admiſſion of Clerks preſented; what Preſentations are good; and what are Cauſes ſufficient for the Biſhop to refuſe to admit; Of Jure Patronatus, *and* Caveats.

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Remedies where a Clerk is hindred

HAving ſhewed both what are the Ordinary and Extraordinary Means, by which a Clerk muſt take a legal Title to an Eccleſiaſtical Benefice, it remains to be ſhewed what Remedies the Law doth afford the Clerk in caſe he be hindred in his Deſign of taking a Title by any of the aforeſaid Ordinary or Extraordinary Ways. If the Church be preſentable (a Preſentation being had) the Impediments to be removed in ſuch Caſes, are to be met with, either when the Clerk doth go to the Biſhop for Admiſſion and Inſtitution, or to the Archdeacon for Induction. As to the Biſhop, it muſt be remembred, that he, in admitting and inſtituting, is not to be looked upon as a mere Miniſter or Inſtrument, but as a Judge. 15 *H.* 7. 8. *a.* And therefore in many Caſes, he may refuſe to admit the Clerk that is preſented to him, and juſtify his Refuſal; wherefore it is meet, before I ſpecify the Remedies the Law hath provided in caſe a Clerk be unjuſtly refuſed, that I firſt declare what are and what are not the juſtifiable Cauſes of a Refuſal. The Cauſes of a Refuſal may ariſe either from the Perſon of the Clerk, the Preſentment he brings, or from the Condition of the Church to which he is preſented, *&c.*

in his Admiſſion or Induction.

Cauſes of Refuſal of Admiſſion ariſing from the Perſon of the Clerk.

Firſt, They may ariſe from his Perſon, for every one that is preſented to a Church ought to be duly qualified to perform the Duties of the Incumbent thereof; and this the Law of Reaſon doth render ſufficiently evident; therefore he ought to be ordained, or made a Miniſter accor-

Admiſſion and Refuſal.

ding to the Direction of the Laws. *Mich.* 12 & 13 *Eliz.* *Dyer* 292. For whatever the Law hath been as to Laymen, in reſpect of Deaneries, Prebends, and other Benefices without Cure, and as to Deacons in reſpect of Benefices with Cure; yet as the Law now ſtands, neither Laymen nor Deacon, but only a Prieſt according to the Form and Manner by the Book of Common Prayer preſcribed, or formerly by Epiſcopal Ordination, are capable to be admitted to any Parſonage, Vicarage, Benefice, or other Eccleſiaſtical Promotion or Dignity whatſoever, upon Pain to forfeit for every Offence One Hundred Pounds, except only the King's Profeſſor of the Law within the Univerſity of *Oxford*, who may hold the Prebend of *Shipton* in the Cathedral Church of *Saliſbury*, although he be but a Layman. *Stat.* 14 *Car.* 2. *c.* 4. But although no other than a Prieſt duly ordained, is capable of being admitted to an Eccleſiaſtical Preferment, yet if a Clerk doth go to the Biſhop with a Preſentation for Admiſſion and Inſtitution, not having with him Letters of Orders to teſtify that he is a Prieſt duly ordered, nor making any Proof thereof, for which Reaſon the Biſhop doth then refuſe to admit him, but the Biſhop at the Clerk's Requeſt doth give him a Week's Time to bring them, and the Clerk doth not return before the Patron's ſix Months paſs; yet it was held by *Periam* and *Anderſon*, that the Cauſe of the Biſhop's Refuſal to admit was not ſufficient, and that he ſhould not have the Turn by Lapſe, for that the Clerk is not bound to ſhew his Letters of Orders; but it was urged, that the Clerk that is preſented ought to make Proof to the Biſhop that he is Deacon, and that he hath Orders, otherwiſe by the Statute 13 *Eliz.* the Biſhop is not bound to admit him (for as the Law was then, a Deacon was admittable): To which it was ſaid, that the Statute doth not compel the Clerk to ſhew his Orders, for perhaps he hath loſt them; but then it was a Queſtion how the Clerk ſhould make Proof that he was in Orders; for, that he ought to do that, ſeems to be granted; to which *Anderſon* ſaid, that the Biſhop may examine him upon Oath if he hath Orders or not: However, Judgment was given againſt the Biſhop, *Paſch.* 33 *Eliz. C. B. Palmes* and *Biſhop of Peterborough*'s Caſe, 1 *Leonard* 230. ſame Caſe, 3 *Cro.* 241. which ſeems to be a hard Caſe, unleſs the Biſhop hath not only Authority to examine him, as *Anderſon* ſays, upon Oath, but be alſo bound to do it of Office upon the Clerk's Refuſal to ſhew his Orders. And in this Caſe it was alſo ſaid, that although a Clerk doth not exhibit to the Biſhop Letters Miſſive or Teſtimonial, teſtifying his Ability and good Behaviour, yet the Biſhop ought not to refuſe the Clerk, or to defer the Admiſſion of him upon the Account of giving the Clerk a Day to bring the ſame, becauſe the Biſhop is by Examination to try the Ability of the Clerk, and may alſo make Inquiry concerning his Behaviour, for which the Law allows him Time convenient; yet although a Clerk doth bring to the Biſhop Letters Teſtimonial, which do report him to be ſufficient to ſerve the Cure, and to be of honeſt Behaviour; yet the Biſhop may notwithſtanding proceed to the Examining of him as to his Ability, and may take Time to inquire of him as to his Behaviour; and it is ſaid that twenty-eight Days are allowed by the Law for that Purpoſe. 1 *Roll*'s *Abr. p.* 354, and 355. And ſhould the Biſhop be ſatisfied both as to the Clerk's Ability and Honeſty, yet he is not bound inſtantly to admit him; for if a Clerk coming to the Biſhop for Admiſſion, be commanded by him to come to him again afterwards to be examined, for that then he hath other Buſineſs, this is no Refuſal of the Clerk; ſo that if the Clerk return not again for the Admiſſion, and the ſix Months paſs, and the Biſhop collate by Lapſe, this

A Prieſt only capable to be admitted.

Refuſal for not having his Orders.

He need not ſhew his Orders.

Biſhop may examine his Ability, &c.

In 28 Days Time.

What if the Biſhop be buſy.

Cauſes of Refuſal.

Refuſal upon Inſufficiency.

will be a good Plea for the Biſhop, if he be ſued for collating. 14 *H.* 7. 21. and 15 *H.* 7. 21. Quoted by *Dyer Mich.* 15 *Eliz.* 3. *Leonard* 46.

If the Biſhop upon Examination doth find the Clerk preſented inſufficient to ſerve the Cure that is to be committed to him, he may refuſe to admit him. *Stat. de Art. Cleri. c.* 13. *Dr.* and *Stud. lib.* 2. *c.* 26. And though the Clerk be otherwiſe learned, yet if he be preſented to a Church in *Wales*, where the Pariſhioners are to have Divine Service in the *Welſh* Tongue, for that they underſtand not *Engliſh*, and the Clerk is not able to ſpeak *Welſh*, the Ordinary may refuſe him as uncapable of the Cure. *Mich.* 30 & 31 *Eliz. Albany* v. *Biſhop of St. Aſaph*, 3 *Cro.* 119. And the Reaſon why the Want of *Welſh* in ſuch Caſe is at this Day a juſtifiable Cauſe of Refuſal, is, becauſe of a private Act made the 5 *Eliz.* intituled, **An Act made for the tranſlating of the Bible, and of the Divine Service, into the** Welſh **Tongue.** And now it may be further ſaid, I conceive, by Reaſon of a Clauſe in the Statute of 14 *Car.* 2. by which it is enacted, That the now Common-Prayers ſhall be tranſlated into the *Welſh* Tongue, and being ſo tranſlated, ſhall be uſed by all Miniſters and Curates in *Wales*; for at the Common Law, before it was thus enacted, Ignorance of the *Welſh* Tongue in a Perſon preſented to a Church in *Wales*, was not a Cauſe of Refuſal of any Perſon preſented to ſuch Church; and becauſe the Act of 5 *Eliz.* making this Alteration in the Common Law was but a private Act, it was ſaid by *Anderſon*, the ſaid Act not being pleaded by the Biſhop, that they could not take notice of it, but would adjudge according to the Common Law, and therefore it concerns the Biſhop in the like Caſe to plead it ſpecially. *Trin.* 27 *El. Albany* and *The Biſhop of St. Aſaph*'s Caſe, 1 *Leon.* 31. ſame Caſe, 3 *Cro.* 119. Or if a Perſon that doth not underſtand the *Engliſh* Tongue be preſented to a Cure in *England*, the Biſhop may refuſe him for ſuch Incapacity. *Colt* and *Glover*'s Caſe, *Hobart* 147. But if he doth underſtand our Language, altho' he be an Alien born, he is not to be refuſed. *Mich.* 8 *Jac. C. B.* Dr. *Senton*'s Caſe in *Parſon's Laws*, *c.* 10. See *Stat.* 7 *H.* 4. and 14 *H.* 6. Although by the Statute of 13 *R.* 2. and 1 *H.* 5. *c.* 7. *Frenchmen* be diſabled to have Benefices in *England*; for it is thought that theſe Statutes are not in Force at this Day. *Roll's Abr.* 2. *p.* 348. Yet *Coke* ſaid, That if the King will preſent a *Frenchman* or *Spaniard*, they ſhall not hold the Benefice within this Realm. *Mich.* 8 *Jac. C. B. Walter*'s Caſe, *Godbolt*. And *Coke* ſaith alſo generally, That if any Alien or Stranger be preſented to a Benefice, the Biſhop ought not to admit him, but may lawfully refuſe him. 4 *Inſt. f.* 338. And this Opinion of *Coke*'s is given on Conſideration had of all the Statutes. And the Statute 3 *R.* 2. *c.* 3. doth expreſly prohibit all Aliens generally from having any Eccleſiaſtical Benefices: 'Tis true, that *Rolle* in the ſame Place ſays, that an Alien may be preſented to a Benefice, altho' other Aliens cannot have Freeholds here, becauſe by Intendment they will favour their own Country, and be againſt us in Time of War, and will tranſport our Treaſure out of the Realm; yet there is not any ſuch Intendment, he ſays, as to Spiritual Men, and for that Reaſon it was uſual anciently for Aliens to have Promotions here: From whence *Rolle* took this Notion, that Spiritual Men Aliens would not tranſport the Nation's Treaſure, nor favour their own Country in Time of War; that it was only the Laity that were to be intended guilty of ſuch Practices, I know not; but as ancient as *E.* 1.'s Time and down onwards, the Fact was notoriouſly taken Notice of to be otherwiſe, as appears by the Statute of *Carliſle* made 35 *Ed.* 1.

See the c. of the biſhop of Exeter p. 0 mag. Hole. Show. Parl. cas. 8.

Welſh Tongue.

5 *Eliz.* to be pleaded ſpecially.

Alien born underſtanding *Engliſh*.

Alien or Stranger.

Miſchiefs done by Aliens, Spiritual Men.

Statute of Proviſors, 35 *Ed.* 3. 3 *R.* 2. and in the Petition of the Commons made to the King 18 *Ed.* 3. complaining that Strangers were enabled by the Pope's Proviſions to enjoy Spiritual Preferments, among other Inconveniencies the tranſporting of the Treaſure to nouriſh the King's Enemies, and Diſcovery of the Secrets of the Realm, were particularly named. *Cotton's Records* 41. And as appears by ſeveral Places in the ſame Book, thoſe Miſchiefs were chiefly taxed upon the Aliens, who were Spiritual Men, as *Cotton* records, 49, 50, 61, 64, 65, 128, 179, *&c.* And as to what *Rolle* ſays, that the ſuppoſed Innocence of Spiritual Aliens from the intended Inconveniencies might come to the Nation by other Aliens, if they were allowed to enjoy Eſtates here, was the Reaſon they were ſuffered to enjoy Eccleſiaſtical Benefices here, could not ſure be the Reaſon, but rather the Pope's Uſurpation, and a Submiſſion to his pretended Authority in Church Matters, and his providing many Eccleſiaſtical Preferments here to Aliens, his Friends and Creatures, was the chief Reaſon Aliens enjoyed Benefices in *England*, though other Reaſons probably might be fancied to diſtinguiſh it from the Caſe of Laymen who had a Freehold in their own Right; but the Practice I believe has always continued to allow Aliens to enjoy Eccleſiaſtical Benefices here.

Cauſes of Refuſal.

When a Biſhop doth refuſe a Clerk becauſe he is inſufficient, whereupon the Patron doth preſent another; if the Biſhop doth admit the Clerk that was firſt preſented, and within the ſix Months, the Biſhop is thereby a Diſturber, for that having once refuſed him for Inſufficiency, he cannot afterwards accept him. *Paſch.* 26 *Eliz. C. B.* Biſhop of *Hereford*'s Caſe, 3 *Cro.* 27.

Once refuſed may not be accepted.

So a Clerk preſented may be refuſed, if he be perjured before a lawful Judge. 38 *Ed.* 3. *f.* 2. *Quare Impedit* 134. And if by his own Confeſſion he be perjured, he may be refuſed although no Conviction be thereof. 13 *Eliz. Dyer* 293. *b.* 38 *Ed.* 3. 2. *b.* Or if he be an Heretick or Schiſmatick, 5 *H.* 7. 20. Irreligious, 5 *R.* 2. *Trial* 54. Baſtard, and not diſpenſed with, *Mich.* 7 *H.* 6. *Rot.* 523. *Villain*, 14 *H.* 7. 28. *b.* within Age, or if he or his Patron be excommunicated, if by the Space of forty Days, 15 *H.* 7. 7. *b.* contrary 1 *E.* 2. vouched by *Frowick*, *Mich.* 21. *H.* 7. *Keble* 71. *b.* Or if he be outlawed, guilty of Forgery, or hath committed Simony in the procuring of the Preſentment he brings; or of another Preſentment to a former Benefice, *Trin.* 16 *Jac. Boughton* and *The Biſhop of Rocheſter*'s Caſe, *Roll. Abr.* 2. *p.* 356. or hath committed Manſlaughter, 38 *Ed.* 3. 2. that is, if he be attainted thereof, and not pardoned. *Serll*'s Caſe, *Hobart* 293. ſame Caſe 2 *Cro.* 430. And it is ſaid, That the Ordinary may refuſe a Clerk upon his Knowledge for an Offence committed by him, which is a good Cauſe of a Refuſal, although that he be not convicted thereof by the Law, and this ſhall be tried by Iſſue, whether it be true or not, 38 *Ed.* 3. 2. *b.* and generally all ſuch as are ſufficient Cauſes of Deprivation, are alſo ſufficient Cauſes of Refuſal. *Hill.* 32. *Eliz.* in *Specott*'s Caſe, 5 *Coke* 58. the ſame Caſe, *Gouldſborough* 35. *Jenkins p.* 258. and in 3 *Leon.* 199. 1 *Anderſon* 190. But altho' a Clerk be a Haunter of Taverns, and a Player at unlawful Games, yet the Biſhop may not refuſe him, becauſe theſe Faults are not evil in their own Nature, but only by Prohibition of Law. 8 & 9 *Eliz. Dyer f.* 154. *b.* But this Caſe was denied to be Law by Juſtice *Barkly*, and ſo agreed by *Jones*, *Paſch.* 15 *Car. March*'s Caſe 11. Nor is it ſafe for the Ordinary to refuſe a Clerk becauſe he is the Son of the laſt Incumbent of the Church, although he ſhould not bring any Diſpenſation upon the Account of the Canon Law, which ſaith, *Filius Patri non poteſt ſuccedere in Eccleſia*; becauſe

Refuſal for Perjury.

Heretick.

Baſtard.

Excommunicated.

Outlawed, *&c.*

Attainted of Manſlaughter, *&c.*

General Cauſes.

Gameſter, *&c.*

Filius Patri non poteſt ſuccedere, &c.

Cauſes of Refuſal.

becauſe, as was held, the Canon Law in this Caſe doth not take Place in the Church of *England*, (but *Quære*) for that the Archbiſhop of *Canterbury* doth uſually grant Diſpenſations at the Requeſt of ſuch Clerks; but if the Ordinary doth refuſe for ſuch Cauſe, and the Patron doth preſent another, who is inſtituted and inducted, the firſt Clerk is without Remedy; and if he doth ſue the ſecond Clerk in the Spiritual Court, he may be ſtopped by a Prohibition to proceed in ſuch Suit. *Mich.* 2 *Car. B. R. Stoke* v. *Sikes*, *Noy* 91. ſame Caſe, *Latch* 191, 253. Neither may a Biſhop refuſe a Clerk, upon the Reaſon that he hath another Benefice at the Time he brings his Preſentation, although it be under the yearly Value of Eight Pounds, and will not be voided by the taking of the ſecond Benefice as to the Patron, ſo that he be bound to preſent; nor perhaps as to the Clerk and Pariſhioners, ſo that he may not recover and receive the Profis of the firſt Benefice, until ſuch Time as he be actually deprived, (for this is at the Peril of the Clerk) for that if he be therein two Months, both ſhall be void by the Canon Law. 17 *H.* 7. 28. *b.*

Dr. *Owen* moved for a *Mandamus* to admit him a Prebendary of *St. David's*, and ſet forth a Cuſtom, that they uſed to chuſe a Supernumerary (all the Places being full), who is admitted upon the Death of the next Prebendary; and ſays, that he was choſen a Supernumerary in 1658, and that *A.* died, and that Dr. *Stainoe* was admitted. The Court refuſed to grant a *Mandamus*, and held the Cuſtom to be void, and fooliſh, for that there cannot be an Election but to a void Place. *Skin* 45. *Dr. Owen* and *Dr. Stainoe*.

Notice of Refuſal to the Patron.

When a Biſhop doth refuſe a Clerk, he is, generally ſpeaking, to give Notice to the Patron of ſuch Refuſal, and to ſignify to him the Cauſe thereof; that is, unleſs he refuſe a Spiritual Perſon's Clerk, for of ſuch Refuſal he is not bound to give Notice, unleſs he refuſe him for that he is a Villain, *&c.* 14 *H.* 7. 28. 18 *H.* 7. *Kell.* 49. *b.* 24 *H.* 7. 21. Accordingly, if a Biſhop doth refuſe the Clerk of a Lay Patron, for that he is not a Prieſt by Epiſcopal Ordination, he ought to give Notice to the Patron of ſuch Uncapacity. *Mich.* 12 *&* 13 *Eliz. C. B. Dyer* 292. ſo if he refuſe him becauſe illiterate. 18 *H.* 7 *Kel.* 49. *b.* 15 *Eliz. C. B. Dyer* 327. or becauſe he doth not underſtand the Language ſpoken by thoſe of whom he ſhould have the Cure, *Trin.* 27 *Eliz. C. B. Albany* v. *Biſhop of St. Aſaph*, 1 *Leonard* 31. ſame Caſe, 3 *Cro.* 119. or if he refuſe him for any Crime, as Simony or Adultery, *&c.* Yet *Frowick* ſaith, That if the Ordinary doth refuſe a Clerk for any notorious Crime, as becauſe he is a common Whoremonger, or be commonly known to be guilty of Murder, the Patron is bound to take Notice of ſuch Refuſal at his Peril, *Trin.* 18 *H.* 7. *Kel. p.* 50. but others hold the contrary, 7 *Ed.* 4. 20. *Roll's Abr.* 2. *p.* 364. And it is ſaid generally, That if the Preſentee be criminous, the Ordinary ought to give the Patron Notice of his Refuſal if he be Lay; but Spiritual Patrons are to take Notice at their Peril, that their Clerks be rightly qualified. 24 *H.* 7. 21. 14 *H.* 7. 21. *Bro. Notice* 6.

The Cauſes to be ſignified ſpeedily.

In Caſes when the Biſhop is to give Notice of the Refuſal, he is not only to ſignify his Refuſal of the Preſentee, but alſo the Cauſe or Cauſes thereof. 29 *Eliz. Specott* v. *Biſhop of Exeter*, *Gouldsborough* 35. And ſuch Signification ought to be made with as much Speed as conveniently it may; and therefore, where the Ordinary delayed to give Notice to the Patron for the Space of twenty-two Days, it was held that the Notice was inſufficient, and that therefore the Biſhop ſhould have no Advantage

vantage by Lapſe, *Trin. 27 Eliz. C. B. Albany* v. *Biſhop of St. Aſaph*, 1 *Leonard* 32. ſame Caſe, 3 *Cro.* 119. and Notice is to be given in ſuch Caſes to the Perſon of the Patron, 15 *Eliz. C. B.* 3 *Leonard* 47, that is, if he be within the County where the Church is at the Time of the Giving thereof; otherwiſe it is to be given to him by an Inſtrument in Writing, affixed to the Door of the Church to which the Clerk was preſented; but if Notice be given by ſuch Inſtrument as aforeſaid before the Patron be inquired after, and a Return made that he is not to be found within the County, ſuch Notice is not good. *Trin.* 10 *Eliz. Dyer* 327. *b. Mich.* 30 & 31 *Eliz. B. R. Albany* v. *The Biſhop of St. Aſaph*, 3 *Cro.* 119. ſame Caſe, 1 *Leonard* 33. Cauſes of Refuſal.

When the Biſhop hath given Notice of his Refuſal of a Clerk, this doth not give the Patron a longer Time to preſent in than he had before; by *Manwood* Juſtice. *Mich.* 15 *Eliz. C. B.* 3 *Leonard* 46. For if the Church be ſo void, that the Biſhop is not bound to give the Patron Notice of the Avoidance, the Patron muſt preſent his ſecond Clerk (if he think his firſt Preſentee to be juſtly refuſed) within the ſix Months, accounting from the Time the Avoidance happened. But if the Church be void by ſuch Means, as that the ſix Months do not run without due Notice to the Patron of the Avoidance, and the Patron doth preſent his Clerk before the Ordinary hath given him any Notice thereof; if the Ordinary doth refuſe his Clerk, and give Notice of his Refuſal, yet the Patron (I conceive) hath ſix Months, accounting from the Notice of the Biſhop's Refuſal, to make his ſecond Preſentment in, before Lapſe can incur, and ſo it ſeems to be held. *Mich.* 15 & 16 *Eliz. C. B. Dyer* 327. But if the Biſhop had given Notice of the Avoidance before the Patron preſented, and then he refuſes the Patron's Clerk for juſt Cauſe, and doth give Notice thereof, the Patron's ſix Months are to be accounted from the firſt Notice. Whether the Patron's Time ſhall be prolonged or not.

Though the Perſon of a Preſentee be altogether without Exception, yet the Biſhop may juſtly refuſe to admit and inſtitute him upon the Account of his Preſentment; that is, in caſe he doth find his Preſentment to be void. *Grendon*'s Caſe, *Plowden* 502. For a void Preſentment is as no Preſentment, and the Clerk in ſuch Caſe is without Remedy; and if the Biſhop ſhould admit and inſtitute upon ſuch Preſentment, he is a Diſturber, and not the Perſon that preſented. *Mich.* 8 *Jac. Dr. Ayry* v. *Sir Richard Lovelace*, 1 *Bulſtrode* 91. That is, where the void Preſentment is made to a Church of another's Right; and yet by *Croke* 'tis ſaid, that the Uſurpation is only in the Incumbent procuring himſelf to be inſtituted, and that he is the wrong Doer, eſpecially in the Caſe of the King, who can do no Wrong, but in ſuch Caſes is ſuppoſed to be deceived. *Mich.* 16 *Car. B. R. Yates* v. *Sir John Dryden*, 1 *Croke* 592. If the Biſhop find the Preſentment to be void.

A Preſentment may be ſaid to be void in ſeveral Reſpects, although it be good as to the Form, and duly tendered to the Biſhop; for firſt, a Preſentment is void, if it be made to a Church when it is full of an Incumbent, for at ſuch Time the Patron hath no Title to preſent. 17 *Ed.* 3. 59. *Small*'s Caſe. *Stat.* 13 *Rich.* 2. *c.* 1. and *Rud* v. *Biſhop of Lincoln*, *Hutton* 66, and in *Grendon*'s Caſe, *Plowden* 500. *b.* And ſo if the Incumbent be inſtituted only, for thereby the Church is full againſt all but the King, *Mich.* 15 *Jac. Rone*'s Caſe, *Popham* 133. and againſt the King too, ſo that he cannot revoke his own Preſentment and preſent another. Yet note, That although a Church, generally ſpeaking, be filled by Inſtitution alone, and in the King's Caſe, however, by Induction, ſo that a Preſentation made to ſuch Church is void; yet this Rule fails in ſome Caſes, for Preſentment to a full Church is void.

Cauſes of Refuſal.

if the Church be filled by the Preſentation of a Stranger by Uſurpation, that is, if the Clerk of the Uſurper be but inſtituted to a common Perſon's Church, or be inducted to a Church of the King's, the Church is thereby ſo full of the Uſurper's Clerk, that if the Biſhop inſtitute the Clerk of the true Patron, before the Uſurper's Title be avoided by Recovery or otherwiſe, and his Clerk removed, it will be a Super-inſtitution, and void. *Mich.* 15 *Jac. B. R. King* and *Saher's* Caſe, *Roll's Abr.* 2. *p.* 349. ſame Caſe, 3 *Bulſtrode* 89. and *Roll's* 1 *Rep.* 235. *Co.* 6. 29, 49. *b. Fitz. Nat. Brev.* 36. *K.* 1 *H.* 7. 19. Yet if the true Patron, before the Church hath been filled of the Uſurper's Clerk by ſix Months, doth make Letters of Preſentation, although the Biſhop may and ought to refuſe his Clerk if preſented, until ſuch Time as he hath recovered, yet the Preſentment then made is good, be it exhibited to the Biſhop or not; for if the true Patron doth recover upon his Writ brought, and then his Clerk doth exhibit the ſame Preſentment, 'tis good, and the Inſtitution thereupon valid, *Grendon's* Caſe, *Plowden* 500, yea although it be exhibited, and the Clerk inſtituted before any Writ is awarded to the Biſhop to remove the Uſurper's Clerk, and to admit him; by *Coke, Mich.* 12 *Jac. Whiſtler* and *Singleton's* Caſe, *Roll's Abr.* 2. *p.* 356. *Trin.* 13 *Jac. Harris* v. *Auſtin*, 3 *Bulſtrode* 41. *Rudd* v. *The Biſhop of Lincoln*, *Hutton* 66. *Grendon's* Caſe, *Plowden* 500. But I conceive, that the Biſhop is not bound to admit (though he may if he will) before the ſaid Writ is awarded. However, the Uſurper's Clerk doth continue Incumbent until the Recoverer's Clerk is inſtituted, and till then the Church is ſo full of him, that though, as is ſaid after the Recovery, he that recovered may preſent, and his Clerk be inſtituted, *&c.* yet if a Stranger to the Recovery (though his Title be beſt) ſhould preſent to the Church, his Preſentment ſhould be void, as being made to a Church that is full. *Mich.* 13 *Jac. B. R. Fairbank* and *Durham's* Caſe, *Roll's Abr.* 2. *p.* 350.

Writ to remove an Uſurper's Clerk.

Recoverer's Clerk inſtituted.

Where one Tenant in Common is a Stranger to the Recovery.

So if *A.* and *B.* be Tenants in Common of an Advowſon, and the Church being void, a Stranger's Clerk is inducted, upon which *A.* and *B.* bringing their *Quare Impedit*, *B.* is ſummoned and ſevered, and after *A.* recovers, *B.* may not preſent before other Removal of the Uſurper's Clerk, becauſe a Stranger to the Recovery; nor may he preſent the Uſurper's Clerk, becauſe the Clerk's Acceptance of his Preſentment doth not make the Church void to him. *Dubitatur Mich.* 13 *Jac. B. R. Fairbank* and *Durham's* Caſe, *Roll's Abr.* 2. *p.* 350.

Rule of Inſtitution and Induction fails.

By Simony.

Alſo the aforeſaid Rule, That Inſtitution and Induction fills the Church, ſo that a Preſentation made to ſuch Church is void, fails, if the Inſtitution and Induction be made upon a void Preſentment; therefore if when a Church is void, a Stranger doth preſent thereto by Simony, though Inſtitution and Induction be had thereupon, yet the Church remains void to the rightful Patron, and if he preſent, his Preſentation is good; and the Reaſon is, becauſe the Preſentation, Inſtitution and Induction of him that came in by Simony are merely void. *Stat.* 31 *Eliz. c.* 6. *Co. Litt.* 120. So if the true Patron doth preſent by Simony, and his Clerk is inſtituted and inducted, yet the Church remains open to the Preſentment of the King to whom the Turn is forfeited, and to the Pariſhioners, who may therefore detain their Tithes, but not to the Preſentment of a Stranger, for if he that hath no Right doth preſent thereto, his Preſentment is void. *Hobart* 227. *Winchcomb's* Caſe. And ſo I conceive that the Preſentment of another Stranger will be void, if made to a Church filled by the Simony of a Stranger, as in the other Caſe.

Tithes detained.

The aforeſaid Rule fails, if the Church be filled only by a wrongful Collation; that is, if the Ordinary doth collate upon the King's Lapſe, or without Title of Lapſe to a Church, the Right of preſenting to which is in a common Perſon. *Trin.* 44 *Eliz. Green's* Caſe, 6 *Coke* 29. *b.* But if a Church be by Lapſe come to the Metropolitan, and after the Ordinary that had paſſed his Time doth collate his Clerk within the ſix Months of the Metropolitan, the Church is thereby ſo filled, that if the Metropolitan ſhould collate his Clerk, it would be void; by *Finch* in Sir *Francis Popham* and the Biſhop of *Bath* and *Well's* Caſe, *Roll's Abr.* 2. *p.* 350. It is alſo there ſaid, that the Church is thereby full againſt the Preſentation of the Patron, but that ſeems to be contrary to *Boſwell's* Caſe, *Mich.* 3 *Jac.* 6 *Coke* 50. *Jenkins, Cent.* 7. *Caſe* 62. becauſe the Biſhop's Uſurpation is only upon the Archbiſhop, and not the Patron. And in all Caſes, when the Church is not otherwiſe filled than by Inſtitution and Induction upon a void Preſentment, or by wrongful Collation (except the Collation be made upon him that hath Right to collate) although the Clerk, by whom the Church is filled, hath remained as Incumbent ſome Years, yet if after the Patron doth preſent his Clerk to the Biſhop, his Preſentment is not void; but the Biſhop may, and ought to inſtitute him thereupon, and the Inſtitution ſhall be good to the outing of the other Incumbent; and if the Biſhop refuſe, the Patron may by Suit recover his Preſentment. *Green's* Caſe, 6 *Co.* 29. and *Boſwell's* Caſe, 6 *Coke* 50. *Co. Litt.* 344. But if a Church be once duly filled of a Clerk, although the Clerk be after deprivable, yet until ſuch Time as he is actually deprived, the Patron may not preſent; ſo if a Viſitor by Commiſſion from the King doth return into the Chancery good Matter of Deprivation of the Clerk of the King; yet if the King doth preſent before the Clerk is actually deprived, his Preſentation is void, and the Biſhop may refuſe in both Caſes. *Roll's Abr.* 2. *p.* 342. *Contra*, 17 *Ed.* 3. 59. *b.* But otherwiſe it is where the Church is, for ſome Fault or Defect in the Clerk, declared by the Law to be actually void.

Collation by wrong.

It fails by a wrongful Collation.

General Obſervation upon a void Preſentment, &c.

But if the Church be duly filled, &c.

And here we may take Notice that it hath been enacted, that, **Whereas before this Time our Lord the King hath taken Title to preſent to Benefices at the Suggeſtion of many Clerks, where the Title hath not been true, and by ſuch Preſentments and Judgments thereupon given, the Clerks have been received by the Ordinaries of the Place, againſt God and good Faith, and in Depreſſion of them which had good and true Title to the ſaid Benefices; now the King will and granteth, That at what Time he ſhall make Collation or Preſentment from henceforth to any Benefice in another's Right, that the Title whereupon he groundeth himſelf ſhall be well examined that it be true: And at what Time before Judgment the Title be found by good Information untrue or unjuſt, the Collation or Preſentment thereof made ſhall be repealed. And the Patron or the Poſſeſſor, which ſhall ſhew and prove the falſe Title, ſhall have thereupon Writs out of the Chancery, as many as to him ſhall be needful.** Statute for the Clergy, 25 Ed. 3. 3. 25 *Ed.* 3. 3.

And afterwards it was enacted, **Whereas it was ordained by a Statute, made the Twenty-Fifth Year of the Reign of King** Edward, **the Grandfather of our Lord the King that now is, that at what Time that the King ſhall make Collation or Preſentment to any Benefice in another's Right, that the Title upon which he groundeth himſelf ſhall be well examined that it be true; and at what Time before Judgment given, the Title be found by good Information untrue and not juſt,** 13 *Rich.* 2. c. 1.

King's Presentation void.

just, the Collation or Presentment thereupon made shall be repealed; and notwithstanding the same Statute, some of the King's Presentees by Favour of the Ordinaries be instituted and inducted in Benefices of Holy Church without due Process, the Parties not warned nor called, and sometimes taken by false Enquests favourably, and the Incumbent in such Manner put out; it is ordained and assented, That the said Statute be firmly holden and kept: And moreover our Lord the King, for the Reverence of God and Holy Church, doth Will and Grant, That if he present to any Benefice that is full of any Incumbent, that the Presentee of the King shall not be received by the Ordinary to the Benefice, till the King hath recovered his Presentment by Process of the Law in his own Court; and if any Presentee of the King be otherwise received, and the Incumbent put out without due Process, as afore is said, the said Incumbent shall begin his Suit within a Year after the Induction of the King's Presentee at the least. Stat. 13 R. 2. cap. 1.

4 *H.* 4. 22. And lastly, with respect to the former Statute, it was enacted; Whereas it is ordained by the Statute made the Twenty-Fifth Year of King Edward, Grandfather to our Lord the King, that if the King make Collation or Presentment to any Benefice in another's Right, that the Title whereupon he groundeth him should be well examined that it be true, and at what Time, before Judgment given, the Title be found by good Information untrue and unjust, the Collation or Presentment thereof made shall be repealed and annulled. And moreover, in a Statute made after, in the Time of King Richard, it was ordained and established, that if the King present to any Benefice that is full of any Incumbent, that the King's Presentee shall not be received by the Ordinary till the King hath recovered his Presentment by Process of the Law in his own Court; and if any Presentee of the King be otherwise received, and the Incumbent put out without due Process as afore is said, the same Incumbent shall commence his Suit within a Year after Induction of the Presentee. Our Lord the King considering the great Mischief of the Incumbent in this behalf, hath ordained and established by the Assent aforesaid, that if any such Incumbent be put out of his Benefice without due Process in the Manner aforesaid, that the said Incumbent so put out without Process may be at large, and sue for his Remedy by the said Statute, and begin his Suit in this Case at what Time shall please him within the Year, or after at his Will, and that as well for the Time past, as for the Time to come, notwithstanding the Term so limited by the said Statute. 4 H. 4. 22.

Where the King presents, having Colour of Right.

If the Church be open to the Patron's Presentation, yet in some Cases the Presentation, by supposing a Right where there is none, will be void, as in the Case of the King. If the King doth present *ratione Lapsus*, or in these Words, *Ad nostram Præsentationem sive ex pleno Jure, sive per Lapsum temporis, sive alio quocunque modo spectant'*, and hath no Colour of Right, the Presentment is void, *Trin.* 44 *Eliz. Greendit* v. *Baker*, *Yelverton* 7. *Jenkins Cent.* 6. *Case* 28. *Mich.* 16 *Car. B. R. Yates* v. Sir *John Dryden*, 3 *Cro.* 592. *Trin.* 44 *El. B. R. Green's* Case, 6 *Co.* 29. *b.* and will not make any Usurpation; for where the King's Presentation without Right amounts to make an Usurpation, it is not to report or express any Right in the King, because the King hath no Right, but is to be made to the Church generally: But if the King in such Case hath Title to present upon any Account whatsoever, the Presentment is good,

King's Presentation general, safest.

but it is a ſafe way to make the King's Preſentation general. *Hill.* 17 *Jac. Gawdy* v. *The Biſhop of Canterbury*, &c. *Hobart* 302. The Caſe of Sir *John Tufton* and Sir *Richard Temple* and others, *Hill.* 17 & 18 *Car.* 2. *C. B. Vaughan* 14. *The King* v. *Thorneborough* and *Studley*, *Trin.* 29 *Car.* 2. *C. B.* 1 *Mod. Rep.* 254. However, Inſtitution being granted upon ſuch void Preſentment, the Inſtitution is not alſo void, but is ſaid to be as a Collation of the Biſhop's, and the Clerk is Incumbent as to all Eccleſiaſtical Matters, to have Offerings, Tithes, *&c.* againſt all but the Patron, who may preſent at any Time, or he may bring his Writ of *Quare Impedit* when he pleaſeth, and remove the Incumbent if named in the Writ, otherwiſe not, as the Chief Juſtice *Hobart* ſaid; or may grant the Advowſon before he hath done either, as not being put out of Poſſeſſion, by Inſtitution and Induction, upon ſuch void Preſentment. *Hill.* 27 *Jac. Gawdy* v. *The Biſhop of Canterbury*, &c. *Hobart* 302. *Rudd* v. *The Biſhop of Lincoln*, *Hutton* 66.

King's Preſentation void.

Upon a void Preſentment and Inſtitution, *&c.* Patron's Right ſaved.

So if a Clerk be preſented by the King to a Church, the Right of preſenting to which doth belong to him, and the Preſentment doth miſreport the King's Right, as for the Purpoſe doth mention it to be *ratione Lapſus*, when in Truth it is *Jure Coronæ*, *&c.* the King is deceived, and the Preſentment is void, and ſo are the Admiſſion, Inſtitution and Induction thereupon, they being made without any Preſentment, *Mich.* 8 *Jac. Humſton* v. *Cockitt* in *B. R.* 2 *Cro.* 252. *Trin.* 44 *Eliz. Green*'s Caſe, 6 *Co.* 29. that is void only *eis quorum intereſt.* See the Opinion of *Allen* in his Argument of *Knight* v. *Dauncer*, *Trin.* 11 *Car.* 2. 1 *Keble* 312. and *Paſch.* 15 *Car.* 2. *Brown* v. *Spence*, 1 *Keble* 503.

King's Right miſreported.

If one doth preſent Simoniacally to a Church, of the which the Advowſon is in the King, and if the King doth after preſent thereto, upon a Title of Simony, the King hath thereby miſtaken his Title, and his Preſentment is void, becauſe in ſuch Caſe he ought to preſent *Jure Patronatus*, as having a ſuperior Title; and the Simony gives him no new Right, for it gives him but the Turn which was before in him with the Inheritance. *Green*'s Caſe, vouched in *The King* and *Zaker*'s Caſe, *Mich.* 13 *Jac. B.* 3. *Bulſtr.* 89. But if the King having Right to preſent to a Church, being ſeiſed of the Advowſon thereof in Right of his Duchy of *Lancaſter*, doth preſent *pleno jure* under the broad Seal, and not by the Seal of the Duchy; or if the Lord Chancellor, or Lord Keeper, had preſented to any Church belonging to a Ward, the ſame being under Value, the Title is not miſtaken, but the Preſentment is good; becauſe a Preſentment may be made by Word only, as being but a Commendation of a fit Clerk to the Ordinary, and a Preſentation belonging to the King upon the Account of his Duchy, *&c.* is his, *pleno jure*, as well as thoſe that do belong to him in the Right of his Crown. *Mich.* 11 *Jac. The King* v. *The Biſhop of Lincoln* and *King*, *Moor* 874. 2 *Cro.* 248.

Where the Advowſon is in the King, and he preſents upon a Title of Simony.

Duchy of *Lancaſter.*

If the King himſelf ſhould preſent any one upon an Avoidance contrary to an expreſs Act of Parliament, his Preſentation is meerly void. *Mich.* 8 *Jac. C. B. Waller*'s Caſe, *Parſon's Law*, *c.* 10. And if the King ſhould preſent, upon a Title accrued to him by Simony, the Clerk that was guilty of the Simoniacal Contract, as being Party or Privy thereunto, ſuch Preſentation would be void, that Clerk being for ever diſabled to hold the ſame Benefice by Act of Parliament, *viz. Stat.* 31 *Eliz. c.* 6. 3 *Inſt.* 154. *Hob.* 75. And ſuch Preſentation would not ſerve for the King's Turn.

King preſents contrary to Act of Parliament.

When the King miſtakes his Title, his Preſentment, as hath been ſhewed, is void; ſo if the Lord Chancellor of *England*, or the Lord Keeper

By the Chancellor, *&c.* reciting the Preſentment to be of under Value.

King's Preſentation void.

Keeper of the broad Seal, who (by Virtue of their Office) preſent to Benefices of the King's Gift that are under the Value of Twenty Pounds in the King's Books of Firſt-Fruits, do preſent to any of the King's Benefices which are above the ſaid Value under the broad Seal, and in the Preſentment itſelf it be recited, that the Benefice, to which the Preſentment is made, is under the Value of Twenty Pounds, the Preſentment is void, becauſe the Deceit doth appear upon Record: But if the Chancellor or Keeper do in Fact make a Preſentment generally under the broad Seal, without ſuch Recital, unto a Benefice of the King's Gift, valued at Twenty Pounds or above, in the King's Books of Firſt-Fruits, ſuch Preſentation is good, and the Clerk ſhall enjoy the Benefice without Remedy; becauſe Preſentations made by the Chancellors or Keepers are ſuppoſed in Law to be made by the King, they being in his Name; and there is no Difference in the Form when it is made by the King, and when by the Lord Chancellor, ſaving that for the moſt part the one is *Mandantes*, the other *Rogantes*. *Lord Chancellor*'s Caſe, *Hobart* 214. But where 'tis ſaid, that the Chancellor's or Keeper's Clerk ſhall enjoy ſuch Benefice without Remedy, it is to be ſuppoſed that the Clerk is as well inducted as inſtituted, for otherwiſe the King may revoke his Preſentment, and preſent another, for ſo it is ſaid in that Caſe. See 38 *E.* 3. 4.

Revocation by the King.

Name of Foundation miſtaken.

If a Corporation in preſenting doth miſtake the Name of their Foundation, the Preſentation is void; therefore when a Provoſt did preſent by the Name of the Provoſt of the College of the Queen in *Oxon*, whereas it ſhould have been *Aulæ Scholarium Reginæ de Oxon*, according to the Foundation; it was adjudged, that by Reaſon of the Omiſſion of the Word *Scholarium*, ſeveral Preſentations did not make an Uſurpation, becauſe the Preſentments were void. *Mich.* 8 *Jac.* Doctor *Ayry* v. Sir *Richard Lovelace*, 1 *Bulſtr.* 91. And yet it is ſaid, *Trin.* 8 *Jac. C. B. King* v. ——2 *Cro.* 248. to be ruled in the Caſe of the Dean of *Norwich* (where the Preſentation was by the wrong Name of a Corporation) yet that the Preſentment was good; *Quære*. If a Corporation do preſent their Head, as if the Dean and Chapter do preſent their Dean; or if a Maſter of an Hoſpital doth preſent himſelf to a Church, the Advowſon of which doth belong to the ſaid Hoſpital, although the Preſentation be by the perſonal Name of the Dean and Maſter, and not by the Name of Dean or Maſter, and Inſtitution and Induction be made thereupon, yet the Preſentation is meerly void, and no Plenarty gained thereby; nor is ſuch Clerk enabled by the Statute of 25 *E.* 3. to plead in Bar, 12 *H.* 8. 12. *Br. tit. Abby* and *Prior*, *nu.* 23. 14 *H.* 8. 2. *Quare Impedit.* See *Jenk. Cent.* 5. *Caſe* 18. *Davis* 76. And ſo it is, if any private Perſon doth preſent himſelf; but *Quære*, whether the Inſtitution and Induction in ſuch Caſes be meerly void, ſo that Lapſe may run from the Time that the Church became firſt void? But I conceive they are not ſo, but the Dean and Chapter may well preſent one of their Chapter, or any Corporation one of their Members, in *Harris*'s Caſe *v. Auſtin*, *Trin.* 13 *Jac.* 3 *Bulſtr.* 43. Or if there be two Joint-tenants of the next Avoidance, the one may preſent the other. *Trin.* 31 *H.* 8. Sir *Godfrey Fuliamb*'s Caſe, *Moor* 4, 5. *Dyer* 305. Or they may preſent their Grantor. *Palm.* 300.

Where a Perſon, &c. preſents himſelf.

In Time of War.

Laſtly, if a Stranger doth preſent upon a true Patron in Time of War, though his Clerk be inſtituted in Time of Peace, yet the Preſentment is void, and all that followed thereupon, ſo that the Biſhop may admit the rightful Patron's Clerk. 6 *E.* 3. 41. *Co.* 6. 30. *Green*'s Caſe. *Trin.* 33 *El. Bingham*'s Caſe, 2 *Co.* 93.

A Preſentation every way good may become void by Revocation, *Mich.* 15 & 16 *El.* 1 *And. Caſe* 99. and then the Biſhop may not only refuſe, but is bound not to admit; for if the Biſhop doth inſtitute the Clerk firſt preſented after his Preſentation is revoked, a *Quare Impedit* lies againſt him, as a Diſturber; by *Dodderidge* in *Evans* and *Aſcouth*'s Caſe, *Latch* 248. And ſuch is the King's Prerogative, that he may revoke or repeal a Preſentation made by him at any Time before Inſtitution. 14 *E.* 3. *Quare Impedit* 5. 28 *E.* 1. *Rot. Patentium Membrana* 24. 2 *E.* 2 *Rot. Patentium Membrana* 3. *Fitz. Nat.* 34. *cap.* 27. *d. Trin.* 12 *Eliz. Dyer* 292. 70. 7 *H.* 4. 32. *Trin.* 45 *El. Green*'s *Caſe*, 6 *Co.* 29. *b.* He may revoke after Letters obtained for Admiſſion, Inſtitution and Induction, before the ſame be executed. 14 *E.* 3. *Quare Impedit* 5. But if the Preſentee of the King be inſtituted, the King cannot after that revoke his Preſentation according to 2 *Roll's Abr. p.* 353. *Dubitatur*, 18 *Eliz. Dyer* 348. 25 *E.* 3. 47. And in *Dyer* 360. *b.* there it ſeems to be admitted that the King may revoke before Induction; ſo alſo it is ſaid in the Caſe of *Kitchin* and *Calvert*, *Lane* 104. And 'tis commonly held that a Church is not full againſt the King, but by Induction; ſo that if the Preſentee of the King doth die after Inſtitution, and before Induction, this is a Revocation in Law, and the King ſhall preſent again, though it be in the Caſe where he hath but one Turn, becauſe the King had not the Effect of his Preſentment, 20 *El. Dyer* 363. but about this Point the Court was divided. 18 *El. Dyer* 348. 12 *Co.* 2 *Hobart* 339. So if the King dies before his Clerk be inſtituted and inducted, his Death is as a Revocation in Law of the Preſentment made by him, and it is ſaid by ſome to be an expreſs Revocation. *Mich.* 8 *Jac. Scaccario*, and *Hill.* 8 *Jac. Scaccario*, *Calvert* and *Kitchin*'s Caſe, 2 *Roll's Abr. p.* 354. ſame Caſe, *Lane* 71, 102. So if the King hath preſented his Clerk, and the Clerk hath gained Inſtitution, and then the King dies (although the Death of the King had been a Repeal of the Preſentment, ſo that his Succeſſor needed not have made any expreſs Repeal of it, if no Inſtitution had been): Yet *Tanfield* Baron ſaid, that peradventure in ſuch Caſe there ought to be an expreſs Repeal, becauſe here is not only the King's Act, but the Act of the Ordinary hath alſo interpoſed, *viz.* his Inſtitution, which is a judicial Act. *Kitchin* and *Calvert*'s Caſe, *Lane* 104. In which Caſe it was alſo held, that as to the Statute of 6 *H.* 8. *c.* 15. that a Preſentation is not comprehended therein, and ſo the King not obliged thereby to a Recital of his firſt Preſentment, if he make a Second, or to an expreſs Repeal of the ſame; and that in an Action of Treſpaſs brought by the latter Preſentee, it being an Action Poſſeſſory for the Profit, it is not examinable whether in the ſecond Preſentment there ought to be a Repeal of the firſt, but that it may be examinable in a *Quare Impedit*.

Cauſe of Refuſal.

Revocation.

When by the King.

Revocation in Law.

If the Lord Chancellor, or Keeper of the broad Seal, do preſent to a Benefice of the King's, under the broad Seal, ſuppoſing it to be under the Value of Twenty Marks in the King's Boeks of Firſt-Fruits, when in Truth it is above that Value, and the Clerk is admitted and inſtituted; yet before Induction the King may repeal ſuch Preſentation and preſent in his own Name, becauſe the King had a Right precedent. 38 *E.* 3. 3. *b.* 9. This Caſe is, I conceive, to be underſtood, that the Living is not recited in the Preſentation to be under Value, elſe according to the *Lord Chancellor*'s Caſe, in *Hobart* 214. before-mentioned, the Preſentation will be void, and if ſo, it can be no Queſtion in the King's Caſe, at what Time it may be revoked. If the Ordinary in this Caſe hath admitted and inſtituted the Preſentee of the Chancellor, but before he hath made a Warrant to the Archdeacon for

Where the Chancellor miſtakes the Value.

King's Repeal.

King's Inhibition before Induction.

for Induction, the King doth ſend to him an Inhibition, reciting that the Church is of the Value of Twenty Marks *per Annum*, or above, and ſo doth not appertain to the Chancellor to preſent, commanding the Ordinary to receive another Clerk; if after ſuch Inhibition the Ordinary doth make a Warrant to the Archdeacon to give Induction, and the Archdeacon doth thereupon induct, the Ordinary ſhall be a Diſturber, but the Induction is good till it be avoided. By *Coke* in *Hitching* and *Glover*'s Caſe, *Roll's* 1 *Rep.* 191. But if the Ordinary had ſent his Warrant to the Archdeacon to give Induction before the King's Inhibition came to him, although the Ordinary after the Inhibition did not ſend to the Archdeacon to ſtop making of the Induction, (as he may if he pleaſe repeal his Mandate at any Time before the Execution of it, the Archdeacon being but his Miniſter,) but ſuffered the Induction to be given a Month after, he ſhall not be adjudged a Diſturber, for that there was no Default in him. 38 *Ed.* 3. 3, 4, 9, 10. but *Quære* if the Ordinary be not in this Caſe bound to ſend to the Archdeacon to countermand his making the Induction, for to that purpoſe is this Caſe cited in *Hale* and *Buckley*'s Caſe, *Plowden* 528. *b.*

King's Repeal effectual before Notice.

After the King hath repealed his Preſentation, if the Clerk preſented doth get to be inſtituted and inducted, altho' no Notice of the Repeal was given to the Ordinary, the King may preſent another Clerk, and the Ordinary cannot refuſe him without being a Diſturber; for by the Revocation of the firſt Clerk's Preſentment without Notice, the Preſentment is ſo abſolutely void, that if after he had got Inſtitution and Induction thereupon, the King would confirm his Title, his Confirmation would be alſo void, and the Church ſtill remain open to his Preſentment, 12 *El. Dyer* 292. 25 *E.* 3. 47. *Co.* 6. *Green's Caſe*, 29. *b. Dubitatur*, 16 *El. Dyer* 328. *b.* for the Repeal is effectual before Notice, and the giving Notice to the Ordinary thereof, is only to make the Ordinary chargeable as a Diſturber, if he proceed afterwards. *Roll's Abr. p.* 2. *p.* 351. But if the firſt Preſentee doth inſiſt upon his Title, and an Action is brought againſt him, the Repeal muſt be made to appear to the Court where 'tis pleaded, elſe the Pleading of it only without being produced will avail nothing, 14 *E.* 3. *Quare Impedit*, *Fitz. Tit. Quare Impedit* 5. 7 *H.* 4. 13. but if the King before the due Execution of the firſt Preſentation doth preſent another by a ſecond Preſentment, though it be without any Mention of the firſt Preſentment, or other Revocation, the ſecond Preſentation is good. *Mich.* 15 *&* 16 *Eliz. Anderſon* 1. *Caſe* 99. *Mich.* 4 *Jac. Biſhop of Bangor* and *William*'s Caſe, *Parſon's Law, cap.* 12. and vouched by *Bromly*, *Hill.* 8 *Jac. Kitchin* and *Calvert*'s Caſe, *Lane* 103. 38 *Ed.* 3. 3, 4. 7 *H.* 4. 32. that is, unleſs the ſecond Preſentment was obtained by Fraud, and in Deceit of the King. *Hill.* 17 *El. Dyer* 339. *Roll's* 206, 190. For if the King doth preſent *A.* who being refuſed by the Ordinary brings *Quare Impedit*, and *pendant* the ſame, *B.* doth get another Preſentation by Fraud in Deceit of the King, without any Mention therein of the King's Pleaſure to revoke or repeal the firſt, although the Ordinary doth inſtitute *B.* and cauſe him to be inducted, the Preſentment of *A.* ſhall not be void, nor the Church ſo full of the Perſon of *B.* but that *A.* may be admitted; for if the ſecond Preſentation ſhould in this Caſe be good, it ſhould enure to a double Intent, *viz.* to take away the Action attached, and alſo as a Preſentation, which the Law will not tolerate without expreſs Words purporting ſo much; but eſpecially, the King being deceived, and certifying ſo much to the Judges before whom the Suit is depending, betwixt the Preſentees, that he was deceived, as was done in this Caſe, *Hill.* 17 *El. Dyer* 339. *b. Trin.* 44 *El. Green*'s Caſe,

Second Preſentation how good.

May not enure to a double Intent.

6 *Co.* 29. *B.* But if there be an expreſs Revocation in the ſecond Preſentment, it is otherwiſe. *Hill.* 8 *Jac.* in *Kitchin* and *Calvert*'s Caſe, *Lane* 103. Preſentation revoked.

Though the King may revoke his Preſentment, yet it is a Queſtion whether a common Lay Patron hath that Liberty by Law, for the *Civilians* are ſaid by *Dodderidge* to affirm, that he cannot revoke, but only vary, *cumulando*, *Hill.* 2 *Car. Stoke* v. *Sykes*, *Latch* 254. and ſo *Rolle*, in his *Abr. Part* 2. *p.* 354. ſaith, That by the Common Law, a common Lay Patron cannot revoke his Preſentation, quoting only *Dyer*, 18 *El. f.* 348. where it is ſaid, That the Preſentment of the Queen before Induction is revocable by her Prerogative, which is not ſo of a Preſentation made by a Subject; but this may be ſaid only, becauſe 'tis paſt Doubt that a Subject cannot revoke after Inſtitution, as the King may. However, *Dyer f.* 392. 'tis ſaid that a Lay Patron can no more change his Preſentation, than a Spiritual Patron may. *Vide Quare Impedit*, *Fitz. Tit.* 31 *Ed.* 1. 185. 38 *Ed.* 3. 35. And it is declared in *Anderſon*'s Caſe, That if a rightful Patron doth preſent after an Uſurper hath filled the Church, and his Clerk be refuſed as he ought to be, after he hath recovered, he that had this Preſentment may exhibit it to the Biſhop, and the Patron cannot revoke or give him a new Preſentment. But on the other Side, *Dodderidge* ſaid, that by the Common Law, without Queſtion, a Patron before Inſtitution may revoke his Preſentment. *Hill.* 2 *Car. Stoke* v. *Sykes*, *Latch* 254, 192. and by *Dodderidge* in *Evans* and *Aſcouth*'s Caſe, *Hill.* 22 *Jac. Latch* 248. However, a common Perſon cannot change his Preſentment after Admiſſion; by *Gawdy*, in *Robbins* and *Prince*'s Caſe, *Hill.* 42 *Eliz. Gouldſborough* 163. but the aforeſaid Authorities are more to be regarded; and this is to be noted, that a common Lay Patron, if he any way revoke his Preſentation (as I think he may not) but only vary, yet he cannot revoke it, after his Clerk is inſtituted thereupon, becauſe Inſtitution doth fill the Church againſt the common Patron; in all which Caſes aforeſaid where a Preſentation is ſaid to be void, the Biſhop may refuſe to admit the Clerk preſented, and not be charged in any ſort as a Diſturber. Whether a Common Lay Patron may revoke. Not after Inſtitution.

Although a good Preſentation be made by the true Patron to his void Church, yet the Biſhop may either admit or refuſe his Clerk, and be no Diſturber, for after the Patron hath preſented one Clerk to a void Church, if he be a Layman he may (as hath been ſaid) vary, that is, preſent another Clerk, before the Biſhop hath received his firſt, 38 *Ed.* 3. 36. *b. Skene Regiæ Majeſtat.* 10. *b.* v. 3. 31 *Ed.* 1. *Quare Impedit* 185. 38 *Ed.* 3. 36. *b.* 14 *Ed.* 3. 2. *b.* and then the Ordinary may admit or refuſe which of the Clerks he pleaſeth. *Roll's Abr.* 2. *p.* 353, 354. *Hill.* 2 *Car. Stoke* v. *Sykes*, *Latch* 191, 154. And if a Church being void, the Patron doth preſent, and then doth die before his Clerk is admitted, this is no Revocation in Law of the Preſentment, 24 *Ed.* 3. 30. for if his Executor doth preſent another Clerk, this ſecond Preſentment is alſo good, and the Biſhop is at his Liberty which Clerk to receive. *Trin.* 21 *Eliz. Smallwood*, &c. *v. Biſhop of Litchfield*, &c. 1 *Leonard* 205. But otherwiſe it is in the Caſe of the King, for his Death revokes and voids his Preſentment. *Mich.* and *Hill.* 8 *Jac.* in *Calvert* and *Kitchin*'s Caſe, *per Cur. Lane* 103. The Lay Patrons Privilege of varying is to be extended ſo far, as that if a Patron hath made Letters of Preſentation to one Clerk, who exhibiting them to the Biſhop, is by him unjuſtly refuſed, and during the Clerk's Endeavour at Law to get Inſtitution, his Patron doth preſent another, who is inſtituted and inducted; the firſt Clerk is without Remedy; and if the firſt Preſentee doth ſue the ſecond and the Ordinary A Patron may vary, *i. e.* preſent another Clerk. Patron dies. Executor preſents another.

Death of the Biſhop, &c.

in the Spiritual Court, he may be ſtopped by a Prohibition. *Hill.* 2 *Car. Stoke* v. *Sykes*, *Latch* 191, 254, and ſame Caſe *Noy* 91.

King's ſecond Preſentation is an abſolute Repeal.

In the Caſe of the King, the King only (as hath been ſaid before) by making a ſecond Preſentation before his firſt Preſentee be inducted, or at leaſt inſtituted, and without any expreſs Revocation of the firſt, or any Mention thereof, doth repeal and abſolutely make void his former Preſentation. *Mich.* 8 *Jac. Scaccario*, *Hill.* 8 *Jac. Scaccario*, *Calvert* and *Kitchin*'s Caſe, *Roll's Abr.* 2. *p.* 354. *Lane* 103. Yea, though the firſt Preſentee bring a *Quare Impedit* for being refuſed by the Biſhop, or be admitted and inſtituted after the ſecond Preſentment is made, and before any Admiſſion thereupon is had, and though he doth recover in the *Quare Impedit*, and hath Induction, yet all this will not mend his Title, and make his Preſentation good; *Mich.* 15 & 16 *Eliz. Anderſon*'s Caſe 99. *Lane* 104. from which it follows, that the Biſhop hath not the Liberty of accepting which Clerk he pleaſeth in the Caſe of the King, as he hath in the Caſe of a common Perſon. And it was agreed by *Coke*, *Warburton* and *Foſter*, that the King may vary in his Preſentation, without reciting the former, notwithſtanding the Statute of 6 *H.* 8. 15. *Trin.* 8 *Jac. King* v. ———, 2 *Cro.* 248. See *Calvert* and *Kitchin*'s Caſe, *Lane* 104. And I ſuppoſe, what hath been ſaid of Preſentations made by the King, will hold alſo as to Preſentations made by the Lord Chancellor, or Lord Keeper; that is, that the Lord Chancellor or Lord Keeper may revoke their Preſentations to Livings under Value at any Time before Induction, at leaſt before Inſtitution, for that ſuch Preſentations are in the King's Name, and by Law made by the King himſelf. See *Hobart* 214.

Agreed that the King may vary.

So may the Lord Chancellor, &c.

Though the King may revoke and void his Preſentment, and any common Lay Perſon may vary, yet a Biſhop or other Eccleſiaſtical Perſon can neither revoke his Preſentment, nor vary in preſenting. *Hill.* 2 *Car. Stoke* v. *Sykes*, *Latch* 191, 254. and if ſuch Eccleſiaſtical Patron doth preſent one that is not ſufficiently learned, he cannot preſent another; if he do, the Biſhop may refuſe or admit him at his Pleaſure, *Mich.* 1 *H.* 8. *Keilway* 154. and the Reaſon is, becauſe every Spiritual Perſon is in Law ſuppoſed to be able to judge of the Sufficiency of his Clerk, and becauſe a Preſentation made by a Spiritual Patron hath the Force of an Election, and he that elects an unfit Perſon, is, *ipſo Jure*, deprived of his Power of Electing, *Skean Majeſtatem* 10. *b.* v. 3. 31 *Ed.* 1. *Quare Impedit* 185. Yet it is ſaid, That if a Man preſents his Clerk to the Biſhop, who dies before that he is received, he may preſent another, 38 *Ed.* 3. 36. *b.* and this holds good (I ſuppoſe) in the Caſe of an Eccleſiaſtical Patron.

Eccleſiaſtical Perſon can neither revoke nor vary.

The Reaſon.

Biſhop's Death.

As when a common Lay Patron doth vary, the Biſhop is at Liberty which Clerk to receive, and if a Spiritual Patron doth preſent an unſufficient Clerk, the Biſhop may alſo chuſe whether he will receive another better qualified; ſo though the true Patron doth preſent but one Clerk to his void Church, the Biſhop may ſafely in ſome Caſes refuſe to admit him, though he be ſufficient; for if three Jointenants be of an Advowſon, or next Avoidance, and one or two of them do preſent alone, the Biſhop is not any Diſturber if he refuſe ſuch Clerk, though he may admit if he pleaſe, and good, 1 *Inſt.* 186. *b.* for he is not bound to admit the Clerk, if all the Jointenants do not join in a Preſentment, 6 *Ed.* 4. 10. 14 *Eliz. Dyer* 304, 54, or if two Jointenants be ſeiſed of an Advowſon, and the one doth preſent alone, the Ordinary may refuſe his Clerk, becauſe of their Joint Title. 1 *Inſt.* 186. *b.* So it is if a Tenant in common doth preſent alone; for that one Tenant in common or Jointenant cannot put the other out of Poſſeſſion, *Quare Impedit* 12.

Doctor and Student cap. 30. *L.* 2. 1 *Inſt.* 186. *b. Paſch.* 17 *Jac. Rite* and *The Biſhop of Briſtol's* Caſe, *Roll's Abr. part* 2. *p.* 372. and they are ſaid to be but as one Patron, 5 *H.* 7. 8. 6 *Ed.* 4. and ought to agree in a Preſentment. 13 *Eliz. Dyer* 304. So if four Copartners be of an Advowſon, and the two Eldeſt, or the eldeſt and the Third preſent one, and the other do preſent another, and not altogether, for that the Eldeſt, or ſhe whoſe Turn it was to preſent, did not preſent alone, the Ordinary may refuſe all their Clerks, the Eldeſt Siſter having no Privilege, but where ſhe preſents alone. *Co. Lit.* 186. *b. Doctor and Student L.* 2. *cap.* 30. *Parſon's Counſellor* 21. But if a Grant of a next Avoidance be made to three, and after the Church doth void, and two of the three do preſent the third Grantee being a Clerk, this is a good Preſentment, and the Biſhop cannot refuſe him, although all three were Jointenants thereof by the Grant, and only two of them joined in the Preſentment; becauſe the third Perſon could not preſent himſelf, and he may relinquiſh his Title, and accept of a Preſentment from the others. *Dyer* 13 & 14 *Eliz.* 304. So if one that is ſeiſed of an Advowſon doth grant to three or more Perſons, & *eorum cuilibet conjunctim & diviſim, Hæredibus, Executoribus & Aſſignatis ſuis primam & proximam Advocationem*, and one of the ſaid Grantees without the reſt doth preſent another of them to the Avoidance granted, this is a good Preſentment. *Trin.* 31 *H.* 8. Sir *Godfrey Fuliamb's* Caſe, *Moore* 4. *Bendloe p.* 34. and 1 *Anderſon* 2. 21 *Ed.* 4. *fol.* 66. 13 *H.* 8. *fol.* 12. 35 *H.* 6. *fol.* 62. But if the Grant had been to three or more, *Habendum eis conjunctim & diviſim*, and if one of the Grantees being preſented by another of them alone without the reſt, and the Biſhop had refuſed, Peradventure, ſaith *Dyer*, a *Quare Impedit* by him would have failed, for the Severance in the *Habendum* in this Caſe ſeems void in Law. *Mich.* 13 & 14 *Eliz. Dyer* 304. See 21 *Ed.* 4. 66. And in all theſe Caſes of divers that have Right jointly, preſenting ſeverally, in which Caſes the Ordinary is not bound to admit, no more is he bound to award a *Jure Patronatus*, but may ſuffer Lapſe to incur; yet the Ordinary cannot collate until the ſix Months be paſſed; for if he do, they may after agree, and bring a *Quare Impedit* againſt him, and remove his Clerk. *Doctor and Student, L.* 2. *cap.* 20. In like manner, if one being ſeiſed of an Advowſon doth make his Will, and therein doth conſtitute three Executors, and appoints that they or any of them ſhall preſent *A.* one of the Executors, or any other of them, upon the next Avoidance, though the Perſon appointed to be preſented doth not refuſe the Executorſhip, and could not have preſented himſelf, and though the Deviſor were the Incumbent, and ſo the Church did become void by his Death; yet the Preſentation made of him by the other Executors is good. *Trin.* 13 *Jac. Harris* v. *Auſtin*, 3 *Bulſtrode* 43. But though a Patron cannot preſent himſelf, yet he may pray to be admitted by the Ordinary, and good; but if he preſent himſelf, though by a ſtrange Name, he may be put out. 35 *H.* 6. 55. *Br. Quare Impedit* 1.

The Church litigious.

Refuſal upon Preſentation of Coparceners.

Aliter by two of the three Grantees.

By one Grantee.

Habendum void.

Though an Incumbent cannot preſent himſelf, yet may pray to be admitted.

Laſtly, The Biſhop may refuſe a Preſentee upon the Account of the Church's being (as 'tis termed) litigious; which is, when two ſeveral Perſons do preſent their ſeveral Clerks to the Biſhop, to be admitted by him. *Paſch.* 26 *Eliz. C. B. Gerrard's* Caſe, 3 *Leonard* 98. In which Caſe the Biſhop may and ought to refuſe both Clerks until the Right be inquired of; and if he doth admit either Clerk (unleſs the Clerk admitted upon Trial be found to be preſented by the rightful Patron) he will be puniſhed as a Diſturber; by *Hobart, Mich.* 15 *Jac. Brickhead* v. *Archbiſhop of York, Hobart* 197.

Refuſal, the Church being litigious.

Where one Patron doth preſent his Clerk before any other hath preſented, the Church is not yet litigious, therefore if the Biſhop doth refuſe him,

Jure Patronatus, Lapſe, &c.

him, he is a Diſturber; and though another ſhould after preſent, whereby the Church then doth become litigious, yet that will not excuſe the Biſhop from being a Diſturber, if the firſt Patron be upon Trial found to have the better Title; nor can he have the Benefit of Lapſe, though no Action be brought againſt him; which makes it ſafe for the Biſhop to receive him that comes firſt; but then a Queſtion may be made, How can a Church (the Biſhop acting thus ſafely for himſelf) ever become litigious? And how can it be truly ſaid, that the Biſhop may juſtly refuſe both Clerks upon Account of two ſeveral Patrons making their ſeveral Preſentments to him, unleſs the Preſentees ſhould happen to tender their Preſentments at one and the ſame Time, which is not to be ſuppoſed?

Where one preſents before the other, the Biſhop ought not to refuſe.

In anſwer to which, 'Tis true, that if the Biſhop doth unjuſtly refuſe the Clerk of the true Patron before any other Preſentment is made, although the Church, by another Perſon's Preſenting after, doth become litigious, he will not be excuſed (the true Patron prevailing at Law) from being a Diſturber; but there is a great Difference betwixt the Biſhop's ſuſpending the Admiſſion and Inſtitution of a Clerk, and his abſolute Refuſal of him: A Biſhop is not bound inſtantly upon a Preſentment tendered to admit, if he hath other Buſineſs in Hand, but may appoint the Clerk to repair to him at another Time to receive Admiſſion and Inſtitution, as hath been ſhewed. And when a Perſon is preſented to him, he may take competent Time to examine his Sufficiency, and inquire and inform himſelf of his Converſation, as hath alſo been ſhewed. *Mich.* 18 *Jac. Hellways* and *The Archbiſhop of York*'s Caſe, *Jones* 4. and ſo ſaith *Hobart* in the ſame Caſe, as reported by himſelf, *Hobart* 317. or he may take Time by awarding a *Jure Patronatus*, to inquire of the Patron's Title, although only one Perſon hath preſented, *Jones* 4, within which Time another may preſent, and then the Biſhop may ſafely refuſe both, and if they do not proſecute their Rights, may have the Turn by Lapſe. *Br. Quare Impedit* 80.

Difference between Biſhop's ſuſpending the Admiſſion, and of an abſolute Refuſal.

Jure Patronatus.

Lapſe.

Alſo a Church is become litigious, if two ſeveral Patrons, claiming by ſeveral Titles, ſhall preſent one and the ſame Perſon ſeverally to a Church; for in this Caſe the Biſhop cannot admit the Preſentee generally, but muſt admit him of the Preſentation of one of them only, *Parſon's Law, cap.* 13. *fol.* 100. and therefore may award a *Jure Patronatus*, whereby to inform himſelf in whom the Right is; but this he is not bound to do, but at the Requeſt of the Parties. See before, *Chap.* 12. But if no Requeſt is made to have a *Jure Patronatus* awarded, and the Patrons do not proſecute their Rights at Common Law, the Biſhop may, I conceive, after the ſix Months expired collate for Lapſe.

Where two ſeveral Patrons preſent the ſame Perſon.

Lapſe.

Alſo a Church may become litigious, if after a *Jure Patronatus* is awarded, and Verdict given thereupon, another Cerk is preſented by a Patron whoſe Right was not diſcuſſed in the *Jure Patronatus*, before Admiſſion is requeſted of any Clerk by him for whom the Verdict was found; and in this Caſe a new *Jure Patronatus* upon Requeſt is to be awarded. *Degge's Parſon's Counſellor, fol.* 14, 15. But if one hath preſented, and his Title is found upon a *Jure Patronatus*, and then requeſts the Biſhop to have his Clerk admitted, and after another preſents; in this Caſe the Biſhop ſhould for his Safety admit the Clerk of him for whom the Verdict is found, becauſe elſe the Church becomes litigious by his Delay, which will make him a Diſturber; and if he doth not admit, but ſuffers Lapſe to come to himſelf, and then collates, 'tis ſaid he is a Diſturber againſt both Preſenters. And in this Caſe, in an Action brought againſt the Biſhop, and the ſpecial Matter being made appear by the Pleading, the Iſſue ſhall be, whether he, for whom the Title was found, did ſue to have his Clerk admitted, and

Where a new *Jure Patronatus* muſt be.

Biſhop a Diſturber by Delay.

Action againſt the Biſhop and Iſſue.

whether the Second preſented ſo haſtily to the Biſhop, that he could not admit the Clerk of the firſt before the ſecond Preſentation was made. 21 *H.* 6. *p.* 44. If two Patrons preſent their ſeveral Clerks, and each of them hath at his Requeſt a *Jure Patronatus* awarded ſingly, (as they may) and the Verdict of the one Jury is contrary to the Verdict of the other; in this Caſe the Church remains ſtill litigious, and the Biſhop need not admit the Clerk of either Patron, but ſuffer the Church to lapſe to himſelf, as is held, 21 *H.* 6. 44. *Br. Quare Impedit* 80. But Sir *Simon Degge* makes a *Quære*, Whether Biſhop in this Caſe may let the Church lapſe, and ſo collate? Or, Whether he be not bound to admit one of the Clerks at his Election? *Parſon's Counſellor* 14. But if two Coparceners be of an Advowſon, and the Church doth void, whereupon they do ſeverally preſent to the Ordinary, this doth not make the Church to be litigious, becauſe they claim but by one Title. *Parſon's Law, cap.* 13. And ſo it is, I ſuppoſe, where Tenants in Common, or others that have a joint Title, preſent ſeverally.

Jure Patronatus, Lapſe, &c.

Where two Verdicts are had, and differ.

Lapſe.

Two claiming by one Title.

Although the Biſhop, by receiving the Clerk of him that firſt tenders his Preſentation to him, doth thereby quit himſelf of all Dangers of being found a Diſturber, becauſe he hath done nothing but as Ordinary; yet it is highly reaſonable upon an Avoidance, (though it happen to be by ſuch Means that he is not obliged to give the Patron Notice thereof) that the Biſhop doth not too haſtily admit any Perſon's Clerk, but that he give what Time he may to all Perſons intereſted to take Knowledge of the Avoidance, eſpecially if a Preſentation be made within a ſhort Time after the Church falls void, or if a Caveat hath been entred, whether it be entred before or after the Church is void, although it be ſaid, that the Biſhop need not regard a Caveat entred before the Avoidance of the Church. *Mich.* 15 *Jac. B. R. Rone*'s Caſe, *Popham* 133. and by *Mountague, Hill.* 15 *Jac. B. R. Hutching* v. *Glover*, 2 *Croke* 463. and *Roll's* 1 *Rep.* 191, 227. For a Biſhop in theſe Matters is a Judge, and not only ſo, but alſo the great Paſtor of his Dioceſe, and ought ſo to bear himſelf, as to manifeſt that he hath a due Reſpect as well to Equity as Juſtice, and therefore to do what he lawfully may, that no Perſon by his Haſte be ſo ſurprized, but may have Time and Opportunity to ſet up his Intereſt without Diſadvantage thereto. *Parſon's Counſellor* 16. But it is not adviſeable that the Biſhop doth refuſe to admit and inſtitute a Clerk only, becauſe a Caveat was entred before the Church was void, but that he do only ſuſpend the Admiſſion of him to inquire about the Clerk's Converſation, or the like; otherwiſe, (ſuppoſing the Caveat, becauſe entred too ſoon, not to be void) the Biſhop may be found to be a Diſturber for that Cauſe in a *Quare Impedit*; and by this Means, the ſame Perſon, or other that hath Intereſt, may enter a new Caveat after the Church is void, or preſent, and then the Biſhop will not be found a Diſturber, if ſued in a *Quare Impedit*, according to *Coke* and *Dodderidge*, *Paſch.* 13 *Jac. B. R.* in *Hitching* and *Glover*'s Caſe, *Roll's* 1 *Rep.* 191, 227.

Caution againſt haſty Admittance.

Caveat.

Biſhop a Judge.

Yet adviſeable to ſuſpend the Admiſſion.

But if a Perſon doth, before his Church is void, ſuſpect that the Title to his Advowſon will be drawn into Queſtion by any Pretender thereto, it is beſt for his Security, that he enter a Caveat with the Biſhop before the Church doth void, leſt he ſhould not have Notice of an Avoidance ſo ſoon as it happens, which Caveat (although void as is ſaid before, becauſe made too ſoon) may ſerve his Turn, with a prudent and careful Ordinary, until ſuch Time as he may upon Notice enter another, which he had beſt do with Speed; for then the Biſhop may ſtop any Proceedings to inſtitute another Clerk, and ſhall not be found to be a Diſturber in a *Quare*

Caveat to enter before Avoidance may be neceſſary.

Caveat entred. Advantage of a regular Caveat.

Impedit; by *Coke* and *Dodderidge*, in *Hitchin* and *Glover*'s Caſe, *Roll's* 1 *Rep.* 191. For a Caveat being regularly entred, if another doth preſent, and the Biſhop doth inſtitute his Clerk before he that entred the Caveat is called and acquainted therewith, by the Canon Law the Inſtitution is void, and this ſeems to be granted at the Common Law, *Mich.* 15 *Jac. B. R. Rone*'s Caſe, *Popham* 133. and by *Mountague*, *Mich.* 15 *Jac. Hutchins* v. *Glover*, 2 *Croke* 463. where it is concluded, that a Caveat is void if entred before the Church is void, and upon that Reaſon only, which implies that if it had been ſeaſonably entred, it ſhould have had its Effects by the Common Law: And by Dr. *Amias*, if a Church becomes void, and a Stranger doth enter a Caveat with the Regiſter of the Biſhop, that none be inſtituted to the Church until he be made privy thereto, and the Biſhop before he hath Notice of the Caveat, inſtitutes an Incumbent, the Inſtitution is meerly void in the Spiritual Law, for the Regiſter ought to notify the Caveat to the Biſhop, and his Negligence in that Caſe ſhall not prejudice him that entred it; and if the Biſhop hath Notice of the Caveat, and gives Day to him that puts it in, and before the Day doth inſtitute an Incumbent, this is meerly void, for the Entring of the Caveat is as a *Superſedeas* at the Spiritual Law. *Hill.* 43 *Eliz.* Lord *Zouch*'s Caſe, *Gouldſborough* 146. And Dr. *Tallbot* ſaid, That a Caveat is of Force for three Months only, and that any one may ſafely preſent after the End thereof, as if no Caveat had been entred; in *Hutching* and *Glover*'s Caſe, *Hill.* 15 *Jac.* 2 *Croke* 464. But notwithſtanding this, it hath been adjudged, that if after a Caveat is entred, *&c.* a Clerk is preſented, inſtituted and inducted; although this is not good by the Canon Law, yet the Church is full at the Common Law, for the Breach of the Caveat is but a Breach of the Canon, and doth not make the Inſtitution void, and a Prohibition was granted to ſtay a Suit in the Arches after the Induction, to avoid the Inſtitution upon this Cauſe, *Mich.* 15 *Car. Phipps* and *Hayter*'s Caſe, *per Curiam*, *Roll's Abr. P.* 2. *p.* 361. and *Paſch.* 13 *Jac. B. R.* in *Hitching* and *Glover*'s Caſe, *Roll's Rep.* 191, *&* 227, *per Curiam*, in *Offley* and *Beſt*'s Caſe, *Trin.* 20 *Car.* 2. *B. R.* there it was ſaid, That a Caveat doth not preſerve *Jus illæſum*, as to make a Nullity of all ſubſequent Proceedings, but is only a Caution for the Information of the Court, and is like a Caveat entred in the Chancery, that a Patent ſhall not paſs, or as a Caveat in the Fine-Office in the Common Pleas, that ſuch a Fine ſhall not be levied; yet a Patent or Fine paſſing contrary to ſuch Caveats, are not thereby void. *Fieri non debet ſed factum valet.* 1 *Sid.* 293, 372. 2 *Keble* 392, *&c.* 1 *Levinz* 186, 187. *Quære*, Whether the Ordinary that inſtituted another's Clerk (after the Caveat entered) without the Privity of him that entred it, may not be puniſhed at the Common Law as a Diſturber, if he that entered the Caveat be found there to have the better Title? And if not, Whether he may not be puniſhed in the Spiritual Court for his Breach of the Canon? *Parſon's Counſellor* 16.

Entering of a Caveat is as a *Superſedeas*. In Force for three Months.

Yet *Nota*, that a Breach of the Caveat doth not make the Inſtitution void.

Jus illæſum.

Quære.

CHAP. XXI.

Remedy on Refusal.

What Remedy for a Clerk presented, if the Bishop refuse to admit him, &c. *Of* Duplex Querela, & Jure Patronatus.

The Remedy when hindred, &c.

THESE Things being thus premised, I come to the Question, What Course a Clerk may take, or what Remedies he may make use of, if he be stopped in taking a Title to an Ecclesiastical Benefice? And first if he be refused by the Bishop.

By the Ordinary.

When the Bishop doth without good Cause refuse, or unduly delay to admit and institute a Clerk to the Church to which he is presented, the Clerk may have his Remedy against the Bishop in the Ecclesiastical Court, as the Patron may in the Temporal Court.

A *Duplex Querela* in the Ecclesiastical Court.

First, The Clerk may have his Remedy in the Ecclesiastical Court, and that before the Ordinary to whom Appeals are to be made, *viz.* by the Way of a *Duplex Querela*, that is, if a Bishop doth refuse, then before the Archbishop in his Court of Appeals, and if an Archbishop doth refuse, before the Delegates; and if the Bishop doth admit the Clerk, and then doth refuse to institute him, the Clerk may have the same Remedy against the Ordinary, to inforce him to do his Duty, *Hutton*'s Case, *Hobart* 15, that is, the Clerk presented having exhibited his Presentation to the Bishop or his Vicar General, (he having Power to institute) and being refused, or unjustly delayed, complaining to the Judge of Appeals thereof, the Judge is wont to write to the Bishop in Form of Law; and this Writing they call a *Duplex Querela*.

What it is.

The Contents, with a Citation.

This *Duplex Querela* is to contain a Monition to the Bishop or his Vicar General, having Power to give Institution, that within a certain Time, (*viz.*) Nine or Fifteen Days, he admit the Party complaining; and also a Citation, whereby the Bishop may be cited to appear by himself or Proctor at a Day after, in Case he doth not institute, *&c.* to shew Cause why, by Reason of his Neglect of doing Justice, the Right of Institution is not devolved to the superior Judge. It is also expedient, that the same *Duplex Querela* doth contain an Inhibition to the Bishop and his Vicar (if he hath the Power of Instituting), that nothing may be done by either of them, *pendente lite*, to the Prejudice of the Party complaining. The Clerk refused, having obtained from the proper Judge a *Duplex Querela*, is to take Care that some Person sufficiently learned for that Purpose, doth admonish the Bishop to admit him, and do him Justice, within the Time mentioned in the *Duplex Querela*, and also according to the Contents thereof to inhibit the Bishop: If the Bishop after he is admonished to institute the Presentee, shall expresly refuse to admit him, the Mandatory may presently cite the Bishop to appear according to the Contents of the *Duplex Querela*; but if no Refusal be made, the Bishop being admonished as aforesaid, the Clerk is first to repair to the Bishop or his Vicar (if he institute) on the third Day after, if no more than nine Days are mentioned in the *Duplex Querela*, or on the fifth Day after, if fifteen Days be appointed therein, and to exhibit his Presentation, and to require

And an Inhibition.

Bishop to be admonished.

Upon Refusal to cite him.

If no Refusal.

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admit the Clerk of the firſt before the ſecond
21 *H.* 6. *p.* 44. If two Patrons preſent their ſev
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15 *Jac. B. R. Hutching* v. *Glover*, 2 *Croke* 463.
227. For a Biſhop in theſe Matters is a Judge, an
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Clerk's Converſation, or the like; otherwiſe, (
becauſe entred too ſoon, not to be void) the Biſh
be a Diſturber for that Cauſe in a *Quare Impedit*; a
ſame Perſon, or other that hath Intereſt, may ent
the Church is void, or preſent, and then the Biſho
Diſturber, if ſued in a *Quare Impedit*, according to
Paſch. 13 *Jac. B. R.* in *Hitching* and *Glover*'s Caſe,

But if a Perſon doth, before his Church is void,
to his Advowſon will be drawn into Queſtion by
it is beſt for his Security, that he enter a Caveat w
the Church doth void, leſt he ſhould not have Noti
ſoon as it happens, which Caveat (although void as
made too ſoon) may ſerve his Turn, with a prudent
until ſuch Time as he may upon Notice enter anoth
do with Speed; for then the Biſhop may ſtop an
tute another Clerk, and ſhall not be found to be a

the Biſhop, that he could not ſecond Preſentation was made. eir ſeveral Clerks, and each of awarded ſingly, (as they may) to the Verdict of the other; ous, and the Biſhop need not r the Church to lapſe to him- *Impedit* 80. But Sir *Simon* this Caſe may let the Church ot bound to admit one of the 4. But if two Coparceners be , whereupon they do ſeverally e the Church to be litigious, *on's Law, cap.* 13. And ſo it , or others that have a joint

Jure Patronatus, Lapſe, &c.

Where two Verdicts are had, and differ.

Lapſe.

Two claiming by one Title.

Clerk of him that firſt tenders himſelf of all Dangers of being ning but as Ordinary; yet it is ugh it happen to be by ſuch atron Notice thereof) that the ſon's Clerk, but that he give d to take Knowledge of the ade within a ſhort Time after een entred, whether it be en- ough it be ſaid, that the Biſhop e Avoidance of the Church. 133. and by *Mountague, Hill.* e 463. and *Roll's* 1 *Rep.* 191, dge, and not only ſo, but alſo ſo to bear himſelf, as to ma- Equity as Juſtice, and there- Perſon by his Haſte be ſo ſur- unity to ſet up his Intereſt *ounſellor* 16. But it is not admit and inſtitute a Clerk the Church was void, but him to inquire about the viſe, (ſuppoſing the Caveat, ne Biſhop may be found to *pedit*; and by this Means, the may enter a new Caveat after e Biſhop will not be found a rding to *Coke* and *Dodderidge*, 's Caſe, *Roll's* 1 *Rep.* 191, 227. s void, ſuſpect that the Title on by any Pretender thereto, aveat with the Biſhop before ve Notice of an Avoidance ſo void as is ſaid before, becauſe prudent and careful Ordinary, r another, which he had beſt ſtop any Proceedings to inſti- to be a Diſturber in a *Quare Impedit*,

Caution againſt haſty Admittance.

Caveat.

Biſhop a Judge.

Yet adviſeable to ſuſpend the Admiſſion.

Caveat to enter before Avoidance may be neceſſary.

Caveat entred.

Advantage of a regular Caveat.

Impedit; by *Coke* and *Dodderidge*, in *Hitchin* and *Glover*'s Caſe, *Roll's* 1 *Rep.* 191. For a Caveat being regularly entred, if another doth preſent, and the Biſhop doth inſtitute his Clerk before he that entred the Caveat is called and acquainted therewith, by the Canon Law the Inſtitution is void, and this ſeems to be granted at the Common Law, *Mich.* 15 *Jac. B. R. Rone*'s Caſe, *Popham* 133. and by *Mountague*, *Mich.* 15 *Jac. Hutchins* v. *Glover*, 2 *Croke* 463. where it is concluded, that a Caveat is void if entred before the Church is void, and upon that Reaſon only, which implies that if it had been ſeaſonably entred, it ſhould have had its Effects by the Common Law: And by Dr. *Amias*, if a Church becomes void, and a Stranger doth enter a Caveat with the Regiſter of the Biſhop, that none be inſtituted to the Church until he be made privy thereto, and the Biſhop before he hath Notice of the Caveat, inſtitutes an Incumbent, the Inſtitution is meerly void in the Spiritual Law, for the Regiſter ought to notify the Caveat to the Biſhop, and his Negligence in that Caſe ſhall not prejudice him that entred it; and if the Biſhop hath Notice of the Caveat, and gives Day to him that puts it in, and before the Day doth inſtitute an Incumbent, this is meerly void, for the Entring of the Caveat is as a *Superſedeas* at the Spiritual Law. *Hill.* 43 *Eliz.* Lord *Zouch*'s Caſe, *Gouldſborough* 146. And Dr. *Tallbot* ſaid, That a Caveat is of Force for three Months only, and that any one may ſafely preſent after the End thereof, as if no Caveat had been entred; in *Hutching* and *Glover*'s Caſe, *Hill.* 15 *Jac.* 2 *Croke* 464. But notwithſtanding this, it hath been adjudged, that if after a Caveat is entred, *&c.* a Clerk is preſented, inſtituted and inducted; although this is not good by the Canon Law, yet the Church is full at the Common Law, for the Breach of the Caveat is but a Breach of the Canon, and doth not make the Inſtitution void, and a Prohibition was granted to ſtay a Suit in the Arches after the Induction, to avoid the Inſtitution upon this Cauſe, *Mich.* 15 *Car. Phipps* and *Hayter*'s Caſe, *per Curiam*, *Roll's Abr. P.* 2. *p.* 361. and *Paſch.* 13 *Jac. B. R.* in *Hitching* and *Glover*'s Caſe, *Roll's Rep.* 191, *&* 227, *per Curiam*, in *Offley* and *Beſt*'s Caſe, *Trin.* 20 *Car.* 2. *B. R.* there it was ſaid, That a Caveat doth not preſerve *Jus illæſum*, as to make a Nullity of all ſubſequent Proceedings, but is only a Caution for the Information of the Court, and is like a Caveat entred in the Chancery, that a Patent ſhall not paſs, or as a Caveat in the Fine-Office in the Common Pleas, that ſuch a Fine ſhall not be levied; yet a Patent or Fine paſſing contrary to ſuch Caveats, are not thereby void. *Fieri non debet ſed factum valet.* 1 *Sid.* 293, 372. 2 *Keble* 392, *&c.* 1 *Levinz* 186, 187. *Quære*, Whether the Ordinary that inſtituted another's Clerk (after the Caveat entered) without the Privity of him that entred it, may not be puniſhed at the Common Law as a Diſturber, if he that entered the Caveat be found there to have the better Title? And if not, Whether he may not be puniſhed in the Spiritual Court for his Breach of the Canon? *Parſon's Counſellor* 16.

Entering of a Caveat is as a *Superſedeas*.

In Force for three Months.

Yet *Nota*, that a Breach of the Caveat doth not make the Inſtitution void.

Jus illæſum.

Quære.

CHAP. XXI.

Remedy on Refusal.

What Remedy for a Clerk presented, if the Bishop refuse to admit him, &c. *Of* Duplex Querela, & Jure Patronatus.

The Remedy when hindred, &c.

THESE Things being thus premised, I come to the Question, What Course a Clerk may take, or what Remedies he may make use of, if he be stopped in taking a Title to an Ecclesiastical Benefice? And first if he be refused by the Bishop.

By the Ordinary.

When the Bishop doth without good Cause refuse, or unduly delay to admit and institute a Clerk to the Church to which he is presented, the Clerk may have his Remedy against the Bishop in the Ecclesiastical Court, as the Patron may in the Temporal Court.

A *Duplex Querela* in the Ecclesiastical Court.

First, The Clerk may have his Remedy in the Ecclesiastical Court, and that before the Ordinary to whom Appeals are to be made, *viz.* by the Way of a *Duplex Querela*, that is, if a Bishop doth refuse, then before the Archbishop in his Court of Appeals, and if an Archbishop doth refuse, before the Delegates; and if the Bishop doth admit the Clerk, and then doth refuse to institute him, the Clerk may have the same Remedy against the Ordinary, to inforce him to do his Duty, *Hutton*'s Case, *Hobart* 15, that is, the Clerk presented having exhibited his Presentation to the Bishop or his Vicar General, (he having Power to institute) and being refused, or unjustly delayed, complaining to the Judge of Appeals thereof, the Judge is wont to write to the Bishop in Form of Law; and this Writing they call a *Duplex Querela*.

What it is.

The Contents, with a Citation.

This *Duplex Querela* is to contain a Monition to the Bishop or his Vicar General, having Power to give Institution, that within a certain Time, (*viz.*) Nine or Fifteen Days, he admit the Party complaining; and also a Citation, whereby the Bishop may be cited to appear by himself or Proctor at a Day after, in Case he doth not institute, *&c.* to shew Cause why, by Reason of his Neglect of doing Justice, the Right of Institution is not devolved to the superior Judge. It is also expedient, that the same *Duplex Querela* doth contain an Inhibition to the Bishop and his Vicar (if he hath the Power of Instituting), that nothing may be done by either of them, *pendente lite*, to the Prejudice of the Party complaining. The Clerk refused, having obtained from the proper Judge a *Duplex Querela*, is to take Care that some Person sufficiently learned for that Purpose, doth admonish the Bishop to admit him, and do him Justice, within the Time mentioned in the *Duplex Querela*, and also according to the Contents thereof to inhibit the Bishop: If the Bishop after he is admonished to institute the Presentee, shall expresly refuse to admit him, the Mandatory may presently cite the Bishop to appear according to the Contents of the *Duplex Querela*; but if no Refusal be made, the Bishop being admonished as aforesaid, the Clerk is first to repair to the Bishop or his Vicar (if he institute) on the third Day after, if no more than nine Days are mentioned in the *Duplex Querela*, or on the fifth Day after, if fifteen Days be appointed therein, and to exhibit his Presentation, and to require

And an Inhibition.

Bishop to be admonished.

Upon Refusal to cite him.

If no Refusal.

Remedy on Refuſal. require Admiſſion and Juſtice in all Reſpects to be done him, and to offer himſelf ready to ſubſcribe the Thirty-Nine Articles of Religion, and the Declaration as required by Law, and to take the Oaths of Supremacy, and of Canonical Obedience, *&c.* and to do every other Thing required by Law to be of him performed, in reſpect of his Admiſſion and Inſtitution unto that Benefice. And this he is to do two Times more, if not received, *viz.* every Third, or every fifth Day, according to the Time given in the *Duplex Querela.* But if he cannot come to the Preſence of the Biſhop, he is to proteſt his Readineſs to receive his Admiſſion, *&c.* and to ſubſcribe, *&c.* as aforeſaid, and to have at leaſt two Witneſſes thereof. If the Biſhop ſhall not do the Clerk Juſtice within the Time limited, after the Expiration thereof, the Party preſented is to take Care that the Biſhop be cited according to the Tenor of the *Duplex Querela.* If the Perſon that is to cite the Biſhop cannot come to his Preſence, he is to ſignify to ſome of the Biſhop's Servants, that he hath a *Duplex Querela* at the Inſtance of *A. B.* the Perſon preſented to the Church of *C.* to be by him executed, and to deſire that he may come to the Preſence of the Biſhop. If he may not come to the Biſhop's Preſence, ſo that he cannot cite him, the Preſentee is to expect till the Day in which the Biſhop ſhould appear, had he been cited, at which Time he is to be called, and if he appear not by himſelf or Proctor, a Citation *Viis & Modis* is to be decreed, which is to be executed perſonally if the Biſhop may be ſpoken with, and if not, then by affixing it to the outward Doors of the Biſhop's Palace, or of the Houſe where the Biſhop reſides, or of his Cathedral Church. After the Biſhop is cited, whether by the firſt or by a ſecond Mandate, the Perſon citing is to certify to the Clerk or his Proctor by his Letters, or by ſubſcribing upon the Backſide of the Mandate the Day of executing the Monition, to inſtitute, and the Inhibition, the ſeveral Days of the Preſentee's aſking Admiſſion, and the Day of his citing the Biſhop; and if the Biſhop refuſed expreſly to admit, that alſo is to be certified. If the Biſhop appear not at the Day, upon the Petition of the Preſentee's Proctor, the Biſhop being thrice called, is by the Judge pronounced Contumacious, and as a Puniſhment of his Contumacy, the Judge doth pronounce the Right of inſtituting the Preſentee to his Benefice, to be devolved to the ſuperior Judge, and doth decree that the Clerk ſhall be inſtituted, and that he will write to the Archdeacon or Ordinary of the Dioceſe where the Church is, commanding him to induct him. Then the Clerk is remitted (if the Proceedings be in the Court of the Arches or Audience) to the Archbiſhop to examine him, and the Archbiſhop approving of him, returns him with his *Fiat Inſtitutio* to the Judge, who, before he inſtitutes, is wont to require a Bond of the Preſentee to ſave him harmleſs upon that Account. But if the Biſhop doth appear, and doth alledge ſome juſt Cauſe why he refuſed the Clerk, then are they to proceed to the Trial of that, as in other ſummary Cauſes. If the Cauſe alledged by the Biſhop be not proved, the Judge pronounces as before for his own Juriſdiction, and the Biſhop is to be condemned in Expences; and ſo if he doth alledge an inſufficient Cauſe, as that the Church is litigious, for this he ought to have tried. If the Reaſon of the Biſhop's Refuſal was for that the Church was full before, or was become litigious, the other Clerk concerned may appear when the Biſhop ſhould, and defend his Cauſe as his own, and in his own Name, or having obtained the Biſhop's Mandate, he may imploy a Proctor to manage his Defence in the Biſhop's Name, and then the Judge ſhall not pronounce for his own Juriſdiction, if the Church be not full, unleſs upon Cauſe after

Repetition.

Proteſtation.

Citation.

Citation, *Viis & Modis.*

Certificate.

Contumacy pronounced.

Fiat inſtitutio.

If Biſhop appears, and alſiedges Cauſes.

appearing. See for this Matter, Clerks *Praxis*, Tit. *Duplex Querela*, &c. And this Way of proceeding in this Caſe againſt a Biſhop is allowed of by the Common Law, *Hutton*'s Caſe, *Hobart* 15, and no Prohibition lies for the Biſhop, in *Stoke*'s Caſe v. *Sykes*, *Hill.* 2 *Car. Latch* 192.

By Duplex Querela.

No Prohibition.

Though the Clerk be relievable in the Spiritual Court as is aforeſaid, in caſe that he be not admitted, *&c.* yet the Patron hath no Remedy there for any Diſturbance; and therefore if the Church being litigious by reaſon that two have preſented to the inferior Ordinary, and one Patron doth libel in the Court of Audience, affirming the Title to preſent to be in him, this Libel being of the Nature of a Declaration upon a *Quare Impedit* at Common Law for the Right of preſenting, and ſo for a Thing triable at Common Law, a Prohibition lies. *Paſch.* 13 *Jac. B. R. Baile* and Sir *Henry Wallop*'s Caſe, *Roll's* 1 *Rep.* 173.

Patron's Remedy.

If Biſhop ſues for Prohibition.

And if the Biſhop be ſued by a *Duplex Querela* for refuſing one Clerk, and after doth inſtitute the Clerk of another Patron, and then doth ſue for a Prohibition againſt the Clerk that ſues him in the Spiritual Court to ſtop his Proceeding there, tho' a Prohibition be granted, yet a Conſultation may be had, the Libel containing nothing but the Contumacy of the Biſhop, in admitting *pendente lite*, eſpecially after he was inhibited; for he is to be puniſhed by the Spiritual Judge, although the Biſhop to have a Prohibition doth ſuggeſt to the Court, that there is no ſuch Church in his Dioceſe to which the firſt Clerk was preſented. *Trin.* 31 *Eliz. B. R. Slug* v. *The Biſhop of Landaffe*, 1 *Leon.* 181. *Trin.* 15 *Jac. Middleton* v. *Lawte*, *Moor* 879.

If two Clerks be preſented by one Patron.

So if two Clerks be preſented by one Patron, and the one doth ſue the other by a *Duplex Querela*, a Prohibition doth not lie before Inſtitution, by *Dodderidge*; but *Jones* denied it, and ſaid, that it had been reſolved to the contrary; to which *Dodderidge* ſaid, that then the Induction was *pendente lite*. *Hill.* 2 *Car. Stoke* v. *Sykes*, *Latch*, *p.* 192.

If Biſhop ſued before his Metropolitan, *&c.*

If a Biſhop refuſing a Preſentee, be ſued thereupon before his Metropolitan, whereupon the Metropolitan doth ſend to ſuch Biſhop a Monition to receive the Clerk within a certain Time, or elſe to appear before him to anſwer as aforeſaid, and the Biſhop doing neither, the Archbiſhop doth receive the Clerk and inſtitute him, and by his Warrant cauſe him to be inducted, and after the Biſhop and the Preſentee of another Patron do ſue in like Manner before the Delegates to void the Inſtitution made by the Archbiſhop as null, and by Conſequence the Induction is void alſo, ſuch Suit may be ſtopped by a Prohibition; for if by Induction, which is a Temporal Act and triable by Temporal Law, the Church is abſolutely full, it may not be avoided but by a Suit upon a *Quare Impedit*, or the like, at the Common Law, and may not be undermined by alledging Inſufficiency in the Inſtitution in the Court Chriſtian. *Hutton*'s Caſe, *Hobart* 15. *Mich.* 12 *Jac. Rowth* v. *The Biſhop of Cheſter*, *Moor* 861. *Trin.* 15 *Jac. Middleton* v. *Lawte*, *Moor* 879. *Trin.* 15 *Jac. Wilſon*'s Caſe, *Hill.* 15 *Jac. B. R. Hitching* v. *Glover*, *Roll's Abr.* 2. 283. By which it appears, that after another Clerk is inducted, this Way of proceeding by a *Duplex Querela* in the Spiritual Court is not to be uſed, though the Church be filled by the Biſhop pendent the *Duplex Querela*. And it is generally ſaid, that after a Clerk hath got Induction he is not to be queſtioned, neither as to the Validity of his Inſtitution, nor of his Induction. *Trin.* 9 *Jac. B. R. Holt*'s Caſe, 1 *Bulſt.* 179. And accordingly, if a Man be admitted, inſtituted and inducted to a Church, and after be deprived, for that he was inſtituted againſt the Courſe of the Canon Law; this is a void Sentence of Deprivation, for that it is now a

after ſues before the Delegates.

Duplex Querela, where uſeleſs.

Remedy on Refusal.

Lay Fee by Induction.

Lay Fee by Induction. *Hill.* 15 *Jac. B. R. Hitching* v. *Glover, Roll's Abr.* 2. *p.* 282. And it is also held, that Institution cannot be voided by Sentence in the Spiritual Court, for which *Linwood* is vouched; and if so, this Remedy by *Duplex Querela* must fail, if a former Clerk be instituted although unjustly. *Mich.* 15 *Jac. B. R. Rone's* Case, *Popham* 133. But in *Offley* and *Best's* Case, *Trin.* 18 *Car.* 2. *B. R.* 1 *Sid.* 293, it is agreed, That if after Induction the Spiritual Court goes about to repeal the Institution, a Prohibition shall be granted; but if the Repeal be before Induction, there no Prohibition shall go; and where it is said, that the Spiritual Court cannot proceed against an Incumbent after that he is inducted into the Church, that is not to be intended generally so understood, for without Doubt, the Spiritual Court after the Clerk is inducted may proceed against him, and deprive him upon the Account of Crimes he may be guilty of, or any Incapacities he lies under, as they may deprive any Incumbent upon the Account of Simony, as hath been before observed, or if he entered into Deacons Orders before Twenty-Three Years of Age, and into Priests Orders before Twenty-Four, as was *Roberts* and *Pain's* Case, 1 *Jac.* 2. *B. R.* 3 *Mod. Rep.* 67, and no Prohibition in such Cases shall be granted: So if he be a Drunkard, or otherwise of an ill Life and Conversation, as was said by the Court in that Case.

After Induction a Prohibition.

Deprivation after Induction.

Proceedings both by the Clerk and Patron.

If a Clerk be unjustly refused or delayed by the Bishop, though he may have the aforesaid Remedy, yet his Patron may also bring his Writ of *Quare Impedit*, or *Darrein Presentment*, as his Case shall require, and thereby inforce the Admission and Institution of his Clerk; but though the Patron should so proceed against the Ordinary for disturbing him to present, yet the Clerk may also proceed by a *Duplex Querela* against him in the Ecclesiastical Court, as seems to be implied by *Hutton's* Case, *Hobart* 15. And if by Means of such Proceeding, he doth get himself to be instituted and inducted, yet this is no Abatement of his Patron's Writ; but if the Patron be put afterwards to sue for a Prohibition to stop a Suit in the Delegates, brought by any Person to avoid his Clerk's Institution and Induction, had upon his Suit in the Ecclesiastical Court from the Metropolitan, the Patron must make his Surmise, That the Church being full of his Presentation, they attempt to avoid it in the Spiritual Court, upon a Pretence that the Institution is null, and by Consequence the Induction also, without making any Mention of the *Quare Impedit*; otherwise, that his *Quare Impedit* will abate by his own shewing; *Hutton's* Case, *Hobart* 15. *Quære.* But whatever the Patron pleaseth to do, the aforesaid Course of Proceeding in the Ecclesiastical Court is the most proper Remedy that the Clerk can use, in case he be refused by the Bishop upon the Account of any personal Fault or Defect; and not only because by such Course the Clerk in a short Time, at less Charge, and Hazard of losing of his Living by Errors, (which are easily fallen into at Common Law) may gain Institution, but also because, although his Patron bring his Action at Common Law, for refusing his Clerk for Crime or Insufficiency, such Cause of Refusal shall be tried by a Spiritual Judge; that is, if a Bishop refuse, by the Metropolitan of the Province, as was granted by *Shuttleworth* Serjeant. *Mich.* 30 *Eliz. C. B.* in *Specot's* Case, 3 *Leon.* 199. same Case in *Gouldſ.* 35. If the Archbishop of *York* refuse, the Cause of Refusal shall be tried by himself only; by *Dyer*; but *Manwood* Justice said, that it should be tried by the Archbishop of *Canterbury:* But that I doubt, and the Ecclesiastical Judge is to make Certificate of his Judgment to the Temporal Court; upon which they may proceed to Sentence. But if the Party in whom Disability is alledged be

A Surmise by the Patron.

In the Ecclesiastical Court, best for the Clerk.

If Refusal be by Archbishop of *York.*

dead before his ſecond Examination, ſo as he cannot be examined, the Trial of his Ability or Diſability ſhall be by the Country, for which was cited 39 *Ed.* 3. *Mich.* 15 *Eliz. C. B. Leon.* 3. *part* 199. 40 *Ed.* 3. 25. 4 *Ed.* 3. 26. and by *Dyer*, *Mich.* 15 & 16 *Eliz. C. B. Dyer* 327. *Mich.* 8 *Jac. Robert*'s Caſe, 2 *Croke* 269. *Watſon* and *Baker*'s Caſe, 20 *Car.* 2. 1 *Sid.* 390. So in a *Quare Impedit* againſt the Archbiſhop of *Canterbury*, if the Ability of the Clerk come in Queſtion, it is ſaid by *Hardres* Serjeant, that it ſhall be tried by the Country, and not by any inferior Ordinary, *Trin.* 1656. *Hardres* 65, and the ſame Reaſon ſeems to be as to the Archbiſhop of *York*.

By Jure Patronatus.

Trial by the Country.

This Remedy alſo is proper for the Clerk, in caſe the Biſhop doth refuſe him upon Pretence that the Church is full; for that full or not full, for the moſt part, ſhall be tried by the Certificate of the Biſhop, being that Plenarty is by Inſtitution; but void or not void, being an Act notorious to the Country, and diſtinguiſhable by them, ſhall be tried by the Country, *Mich.* 20 *Car.* 2. *Watſon* v. *Baker*, 1 *Sid.* 390. but whether the Church be void by Deprivation or Ceſſion ſhall not be tried by the Ordinary. 15 *E.* 4. 25. *Roll's* 2 *Abr.* Tit. *Trial* 583. Yet in the Caſe of *Watſon* and *Baker*, as reported, 2 *Keb.* 446, it's ſaid, that the Court was of Opinion that Voidance by Reſignation ſhould be tried by the Country.

If full, or not full, how triable.

If the Clerk be refuſed by the Biſhop, upon a Pretence only that the Church is become litigious, he may have his Remedy by the ſame Biſhop that refuſed, by requiring the ſaid Biſhop to award a *Jure Patronatus*, to inquire in whom the Right of preſenting is, and where a *Jure Patronatus* is awarded, the Ordinary ought in Juſtice to admit him, in whom the Right is found by the Verdict, and certified to be by the Commiſſioners, although it be found and certified againſt the true Patron. 34 *H.* 6. 11. 34 *H.* 6. 38. And according to the Commiſſioners Certificate, in caſe they certify contrary to what is found, 22 *H.* 6. 30, for the Ordinary is a Judge in this Caſe, and therefore ought to carry himſelf indifferently amongſt Pretenders; and having put the Patron to the Charge of an Inquiry, he ought in Juſtice to follow the Verdict and Certificate, eſpecially becauſe the Law hath provided this Means to ſatisfy the Biſhop, and to ſecure him from being puniſhed as a Diſturber, if he pleaſe to follow ſuch Verdict as ſhall be given and certified to him. *Paſch.* 17 *Jac.* Sir *William Elvis* v. *The Archbiſhop of York*, *Taylor* and *Biſhop*, *Hobart* 317. And if the Biſhop in going againſt the Verdict chance to admit the Clerk of the true Patron, yet this will not excuſe him from Diſturbance in a *Quare Impedit* brought againſt him by the Perſon for whom the Verdict was found, for it is no Plea to ſay that he admitted the true Patron's Clerk. However, the Biſhop is not compellable to award a *Jure Patronatus* when the Church is litigious, nor after he hath awarded it, to follow the Verdict given, but if he pleaſe may inſtitute the Clerk of the Patron he takes to have the better Title, either before a *Jure Patronatus* is awarded, *Hitching* and *Glover*'s Caſe, *Roll's Rep.* 227. or whilſt it is depending, or after it is executed, although it be contrary to what is certified, and the Biſhop having ſo admitted a Clerk to the Church, he is not to be ſued in the Spiritual Court for that Cauſe; if he be, he may have a Prohibition to ſtop ſuch Suit. But if the Patron of the Clerk that is rejected, doth bring his *Quare Impedit* againſt the Biſhop, *&c.* and will maintain him to be a Diſturber, if either the Patron whoſe Clerk he hath inſtituted will not plead and defend his Title, (for the Biſhop may not do it), or if he doth defend it, and the other be found to have

Remedy by requiring a *Jure Patronatus*.

To follow the Verdict.

Biſhop not compellable.

Quare Impedit by the Patron againſt the Biſhop.

Remedy on Refusal.

have the better Title, the Bishop will be punished as a Disturber, whether his Case be, that after the Church became litigious, he upon Request refused to award a *Jure Patronatus*, and instituted without it, or whilst it was depending, or having awarded it, he instituted contrary to the Verdict; or if such Patron doth not name the Bishop in his Writ, but only the Patron and Incumbent, and proves his Title; by the Opinion of *Hobart*, he may have an Action upon the Case against the Ordinary for that wilful Wrong and Trouble he hath put him to, and recover his Costs and Damages, not in respect of the Value of the Church, (for there is no Damage for that by the Common Law, but by the Statute of *Westm.* 2.) but for the Injury and Wrong he hath done him by such Admission; but if he name the Ordinary in his *Quare Impedit*, he can have no such Action, and if he doth not name him, yet he cannot have such an Action upon the Case before he hath tried his Title in a proper Action, and against the proper Parties; but if he happen to institute the Clerk of him that upon Trial at Common Law is found to have the better Title, the other is without all Remedy against the Bishop, as much as if the Bishop had awarded a *Jure Patronatus*, and followed the Verdict given thereupon. *Pasch.* 26 *Eliz. C. B. Gerrard*'s Case, 2 *Leon.* 168. *Pasch.* 17 *Jac.* Sir *William Elvis* v. *Archbishop of York*, *Taylor* and *Bishop*, *Hobart* 318. and Lord *Stanhop*'s Case v. *Bishop of Lincoln*, &c. *Hobart* 242. See *Chap.* 20.

Action upon the Case against him.

The Effects of a *Jure Patronatus.*

This Inquest by a *Jure Patronatus* is by Law allowed, not only for the Security of the Ordinary when a Church is litigious, so that Disturbance may not be imputed to him, if he duly proceed therein, and act according to the Verdict thereupon given, and as a Remedy by which one of the Pretenders Clerks may have Admission, and so the Cure may not be long neglected; but also to satisfy the Ordinary when the Church is not litigious, that is, when but one Person doth present, if the Bishop doubts that he who presents hath no good Title to the Advowson, or present Avoidance of the Church. *Pasch.* 17 *Jac.* Sir *William Elvis* v. *Archbishop of York*, *Taylor* and *Bishop*, *Hobart* 317. And indeed the Bishop if he please may inquire of the Right of every Person that presents a Clerk to him, by awarding a *Jure Patronatus* before he admits his Clerk. 21 *H.* 6. 44. And if in such Case it be found that a Stranger hath a Right, if the Stranger doth present in six Months, the Ordinary is to admit his Clerk, but if he let the six Months pass, the Ordinary is obliged to admit the Clerk of the Disturber, and so is however barred of the Benefit of Lapse. 34 *H.* 6. 40.

When the *Jure Patronatus* is by Commission.

When a *Jure Patronatus* is awarded, the Bishop doth proceed either by himself, or, and that more usually, by a Commission made under his Seal to certain Persons as best pleaseth him: If by Commission, then it is done after this Manner; The Bishop doth appoint to sit in the void Church on a certain Day, and doth decree a Monition against the Patrons presenting and the Clerks presented, to be present there at the Day appointed, to see the Proceedings. Also the Bishop is to de-

Publick Edict.

cree, and send forth a publick Edict against all having or pretending to have any Interest or Right of presenting to the vacant Church, to appear at the Day and Place appointed, to shew their Right, *&c.* And this publick Edict is to be affixed to the Door of the void Church in Time of Divine Service. And against the Day of Appearance, certain Articles are to be prepared, which are to contain the Particulars about which the Jury are to inquire, *viz.* (1.) Whether the Church be void, and how it became void? (2.) Who presented at the last preceding Avoidance, and to the two foregoing Avoidances? (3.) Whether the Persons presenting

preſenting preſented in their own Right? (4.) In whom the Inheritance of the Advowſon is, and who ought to preſent to the void Turn? (5.) Whether any of the Clerks preſented be known, or ſuſpected to be guilty of any Crime rendring him incapable of Admiſſion to the ſaid Benefice, as Hereſy, Simony? *&c.* By Jure Patronatus.

At the Day appointed for this Inquiry, the Perſon or Perſons executing the aforeſaid Mandates or Citations, are to make Oath of the due Execution thereof, or the Execution of them may be certified upon the back-ſide of the ſaid Mandates, which muſt be done under ſome authentick Seal, *viz.* of the Archdeacon, Commiſſary or Rural Dean, againſt which Day, the Biſhop is alſo to ſummon a Jury for this Purpoſe by way of Citation, which Jury is to conſiſt of ſix Clerks, and ſix Laymen that live near to the void Church, and then the Parties cited, and thoſe of the Jury are to be publickly called, and if any of the Jury appear not, being duly ſummoned they may be puniſhed, that is, the Clergymen by Sequeſtration, the Laymen by Excommunication, and ſo compelled to appear; but leſt any fail, it is beſt to ſummon more than the Number of Twelve, for that more, if the Judge think fit, may be ſworn of the Jury, provided that there be an equal Number of the Lay and Clergy. And if others cited appear not, they are to be pronounced contumacious, and the Proceedings are to go on however, *& in Pœnam Contumaciæ* of them that do not appear. If ſix Clergy and ſix Laymen appear to be of the Jury, which is the competent Number, they are to be ſworn faithfully to inquire of the Articles, and in ſwearing them, firſt a Clerk, then a Layman is to be ſworn, till a Jury of Twelve be made up. The Jury being impanelled, the Articles to be inquired of are to be publickly read and delivered to them, and then the Parties or their Counſel are to ſet forth their Intereſts or Titles, and produce their Evidences to prove them. When the Parties and their Counſel have been fully heard, the Jury may give their Verdict at any Time the ſame Day, or if the Cauſe be doubtful, the Judge may aſſign them a longer Time for to conſider of the Matter, and aſſign alſo a Place where they ſhall give their Verdict. Oath or Certificate of the due Execution of Citations. What Number. Equal Number. Verdict given.

If the Verdict be that one of the Preſenters is Patron, or hath Right to preſent to the Avoidance, his Clerk ought to be admitted, unleſs they find alſo that the Clerk is guilty of ſome Crime. But ſuppoſe Jury will not give any Verdict, or that they be equally divided, half for one Patron, and half for the other, or give a ſpecial Verdict, *Quære*, what farther Courſe is to be taken, *viz.* Whether the Biſhop may ſummon a new Jury, or ſuffer the Church to lapſe, as if no *Jure Patronatus* had been awarded, which I rather think. *Vide Clerk's Praxis, cap.* 98, 99, 100. *Parſon's Counſ.* 19, 21. 34 *H.* 6. 41. 35 *H.* 6. 19. If they give no Verdict, *&c.*

The Biſhop is not bound to make this Inquiry in Perſon, but may (as is uſual) ſubſtitute others, either of the Clergy or Laity, by his Commiſſion under his Seal to act for him; but if his Commiſſioners neglect to execute their Commiſſion duly, it will not excuſe the Biſhop, for that they are of his own making: But the *Civilians* ſay, that the Commiſſioners ſhall be named by the Parties, and they only ſhall be prejudiced by the Commiſſioners Neglect. *Parſon's Counſellor* 22. And Note, That the *Jure Patronatus* ſhall be ſued at the Coſts of the Party or his Clerk, and not of the Biſhop. *Br. Quare Impedit* 12. 34 *H.* 6. 38. 5 *H.* 7. 22. *a. contra, Bro. Coſts* 2. Parties to name Commiſſioners.

Remedy by Quare Impedit, &c.

CHAP. XXII.

Of the Writs of Quare Impedit, Ne Admittas, Quare Incumbravit, *and Aſſiſe of* Darrein Preſentment, *for what and for whom they are maintainable, and upon what Seiſin,* &c.

Remedy for the Patron againſt the Biſhop, &c.

AS the Clerk may have his Remedy in the Eccleſiaſtical Court, if the Biſhop doth unjuſtly refuſe or delay to inſtitute him, *&c.* that is, until ſuch Time as another Clerk is inducted, or at leaſt inſtituted, ſo as hath been ſaid, upon what Account ſoever the Patron is diſturbed in preſenting, he, generally ſpeaking, may have his Remedy at the Common Law againſt the Biſhop and all other Diſturbers.

How the Patron is diſturbed in preſenting.

A Patron is ſaid to be diſturbed in preſenting, either when the Biſhop hath admitted and inſtituted a Clerk upon the Preſentment of another pretended Patron, or when the Biſhop will not admit the Patron's Clerk preſented to him upon any Pretence; but if the Ordinary hath filled the Church by a wrongful Collation, the Patron is not thereby diſturbed, and therefore in ſuch Caſe the Patron muſt actually preſent, and the Ordinary muſt refuſe to admit his Clerk before the Patron can bring his Action; for though the Ordinary hath collated, yet the true Patron may preſent to the ſame Ordinary, and he may inſtitute, *&c.* his Clerk, and then the two Clerks in Treſpaſs, Ejectment or Aſſiſe, ſhall try who hath the better Title. *Grendon*'s Caſe, *Plowden* 500. *b.* Neither is the true Patron diſturbed by a Stranger's preſenting a Clerk to the Biſhop to be admitted to his Church, unleſs the Biſhop hath admitted him accordingly; but the Biſhop's refuſing to admit the Patron's Clerk when preſented, is the Diſturbance, and therefore the Patron, before he can bring his Action for any Diſturbance, muſt cauſe his Clerk to tender his Preſentment to the Biſhop and require Admiſſion, and the Biſhop muſt refuſe his Clerk, or elſe, tho' the Biſhop be named in the Writ, he may at the End of the ſix Months collate for Lapſe. *Jenkins, Cent.* 1. *Caſe* 19. *Paſch.* 14 *Jac. Brickhead* v. *Archbiſhop of York, Brownl.* and *Gouldſ.* 1. *part* 164. The ſame Caſe *Hobart* 200, that is, if his Church be not filled, or only filled by Collation; but if it be filled upon a Preſentment made by a Stranger, the Patron is thereby diſturbed, and may bring his Action without making any Preſentment to the Biſhop, (as I conceive,) becauſe his Preſentment to the Biſhop when the Church is ſo filled is vain; and if the Biſhop ſhould admit and inſtitute the Clerk upon ſuch Preſentment, all would be void.

By refuſing his Clerk.

Upon Preſentment of a Stranger.

Remedy by 13 *E.* 1. *c.* 5.

The Patron being ſo diſturbed that he hath Cauſe of Action thereby, the next Thing is to conſider what Remedy the Law affords in ſuch Caſe moſt proper for him; and theſe Remedies muſt be either ſuch as are given by ſome Act of Parliament, or elſe ſuch as are by the Common Law. Firſt then it is provided, **Where an Agreement is made between many claiming one Advowſon, and inrolled before the Juſtices in the**

Roll, or by Fine, in this Form; That one shall present the first Time, and at the next Avoidance another, and the third Time another, and so of many in case there be many; and when one hath presented, and had his Presentation which he ought to have according to the Form of their Agreement and Fine, and at the next Avoidance he to whom the second Presentation belongeth is disturbed by any that was Party to the said Fine, or by some other in his stead; it is provided, That from henceforth they that be so disturbed shall have no need to sue a Quare Impedit, but shall resort to the Roll or Fine.

Remedy by Quare Impedit, &c. Upon an Agreement inrolled, or by Fine.

And if the said Concord or Agreement be found in the Roll or Fine, then the Sheriff shall be commanded that he give knowledge unto the Disturber that he be ready at some short Day, containing the Space of Fifteen Days or Three Weeks (as the Place happeneth to be near or far) for to shew if he can alledge any thing wherefore the Party that is disturbed ought not to present; and if he come not, or peradventure doth come, and can alledge nothing to bar the Party of his Presentation, by Reason of any Deed made or written since the Fine was made or inrolled, he shall recover his Presentation with his Damages. 13 E. 1. cap. 5.

Sheriff to give Notice, &c.

This Clause of the Statute extendeth as well to Strangers of Blood, as to Coparceners who are Privies in Blood, and if one of the Parties, or his Heirs, or a Stranger usurp in the Turn of another, the Party wronged is not driven to his *Quare Impedit*, for it may be, that the *Quare Impedit*, or Assise of *Darrein Presentment* may fail, and yet he may have Remedy by this Branch of this Statute, for albeit there be a Plenarty of six Months, yet the Party may have a *Scire Facias* upon the Roll or Fine, and therein recover the Presentation and Damages. 2 *Inst.* 362.

The Extent of this Clause.

Scire Facias.

In other Cases when the Patron is disturbed in presenting, though there lies no Action of the Case against the Bishop for not instituting, as is said *Mich.* 12 *Jac. B. R.* in *Powle* and *Godfrey*'s Case, *Roll's* 1 *Rep.* 64. yet ordinarily he hath his Remedy by the Writ of *Quare Impedit*, or of *Darrein Presentment* as his Case shall be, yea, though the Patron be but an Infant; for of Advowson of Churches, there be but three original Writs, that is to say, one Writ of Right, and two of Possession, *viz.* these of *Quare Impedit* and *Darrein Presentment*. *Stat.* 13 *Ed.* 1. *cap.* 4. And having already spoken of the Writ of Right in *Chap.* 13. these two Writs of Possession, which indeed chiefly relate to this Matter are here to be treated of.

Quare Impedit or *Darrein Presentment.*

But Note first, that there are other Writs that are of Use to the Person that is to recover a Presentment, as *Ne Admittas*, *Quare Incumbravit*, and *Quare non Admisit*; the Writ of *Ne Admittas* lies for a Patron of a Church after a *Quare Impedit* by him brought and depending, *viz.* returned 2 *E.* 4. 11. That is, if he doubt that the Bishop will collate, or admit the Clerk of another Person, *Pendente lite:* The Writ is to be directed to the Bishop to prohibit him. *Terms of Law*, *Quare Impedit*, *Mich.* 6 *Jac.* in *Langdale*'s Case, 12 *Coke* 59, 60. *Fitz. Nat. Br.* 37. *Lit. F.* But this Writ must be sued out within the six Months, and not after, unless it be in the Case of the King. *Regist. Orig.* 31. *a.* and a Writ may be directed to the Chief Justice of the Common Pleas, to certify whether there be any Plea depending in that Court concerning that Church. *Regist. Orig.* 31. *b.* And if the Bishop doth admit the Clerk of any other Person pending the Suit, and he that brings the *Ne Admittas* doth

Ne Admittas lies after a *Quare Impedit.*

Quare Incumbravit, &c.

Quare Incumbravit when.

doth recover, he ſhall have a *Quare Incumbravit*, and thereby remove him who came in *Pendente lite*, by whatſoever Title he came in, and ſhall force him that hath Right to recover by *Quare Impedit*. *Mich.* 3 *Jac. B. R. Lancaſter* v. *Lowe*, 2 *Cro.* 93. But if the *Ne Admittas* be ſued out before any Writ of *Quare Impedit* pending, if a *Quare Impedit* be after brought, and made returnable before any Certificate had from the Chief Juſtice of the Common Pleas, whether there be ſuch a Suit pending or not, I ſuppoſe it may be well enough. If two be in Suit for an Advowſon, and the Biſhop doth admit the Clerk of one of them within the ſix Months, and the other recovers, he may have the Writ of *Quare Iucumbravit* againſt the Biſhop; but one ſhall not have this Writ of *Quare Incumbravit* without making mention in the Writ of ſome Recovery by him had. *Regiſt. Orig.* 32. *b.* *Fitz. Nat. B. R.* 42. *k.* And this Writ lies not but after a *Ne Admittas* ſued out. *Fitz. Nat. Br.* 42. *b.*

Not till after a *Ne Admittas*.

Upon Verdict that the Biſhop hath incumbred.

When a *Quare Incumbravit* is brought againſt the Biſhop, if it be found by the Verdict that the Biſhop hath incumbred the Church after the Prohibition of *Ne Admittas* delivered to him, and within the ſix Months after the Avoidance, to the Damage of the Plaintiff, the Damages taxed by the Inqueſt are to be awarded to the Plaintiff, and a Writ for him is to be directed to the Biſhop to diſincumber the Church; but the Temporalties of the Biſhoprick are not to be ſeiſed in this Caſe for the Contempt, as they may be in an Attachment upon a Prohibition; and if the Biſhop indeavour to prevent the taking of the Inqueſt, by alledging that he hath received the Clerk of the Plaintiff, and hath inſtituted him, this will not be allowed. 21 *Ed.* 3. 3. *Br. Quare Incumbravit.* But it is a good Plea for the Biſhop, that he did not incumber the Church after a Prohibition delivered to him. If the Plaintiff be Nonſuit in a Writ of *Quare Incumbravit*, he may have another Writ of *Quare Incumbravit*, and may vary from his firſt Declaration. *No. Na. Br.* 48. 21 *Ed.* 3. 42. And note, that this Writ is to be brought in the Country where the Church is. 38 *H.* 6. 15. *Fitz. Nat. Br.* 48. *d.*

Nonſuit.

Second Writ.

Quare Impedit, &c. in what Caſes, *&c.* for what.

And now to conſider in what Caſes the Patron may be relieved by the Writs of *Quare Impedit* or *Darrein Preſentment:* Firſt, a Patron may have a *Quare Impedit* for a Chapel, Prebend, Vicarage, Hoſpital, 18 *Ed.* 3. 1. *Regiſt. Orig.* 31. *a.* or other Houſe that is of the Advowſon of other Men, by *Stat.* 13 *Ed.* 1. *cap.* 3. So a *Quare Impedit* doth lie of a Donative, and the Writ ſhall be *Quod permittat ipſum præſentare ad Eccleſiam*, and the Patron is to ſet forth the ſpecial Matter in his Declaration, *Coke Litt.* 344. ſo it doth lie of a Free Chapel, which a Man hath by the Patent of the King, if the Sheriff will not put him into Poſſeſſion, 14 *H.* 4. 11. *b.* ſo it doth lie for a Deanery by the King, altho' that it be Elective, 17 *Ed.* 3. 40. and for an Archdeaconry, for it is not a meer Function, but is Local, in that an Archdeacon hath *Locum in Choro:* Alſo for a Prebend, by the Equity of the Statute of 13 *Ed.* 1. *cap.* 5. *Trin.* 31 *Eliz. C. B. Smallwood*, &c. v. *The Biſhop of Litchfield*, &c. 1 *Leon.* 205. and *Trin.* 31 *Eliz.* 3 *Croke* 141. 24 *Ed.* 3. 42. *Paſch.* 31 *Eliz. C. B. Sale* v. *The Biſhop of Litchfield*, *Owen* 99. But it doth not lie of a Chancellorſhip or Commiſſaryſhip, becauſe they are but meer Offices, tho' they be granted for the Life of the Patentee, and are not local, ſuch Officers having no Place in the Cathedral.

Darrein Preſentment.

And what is ſaid of the *Quare Impedit*, I ſuppoſe is true alſo of the Writ of *Darrein Preſentment*; only I find that the Writ of *Darrein Preſentment* is ſaid not to lie of Prebends, or Churches prebendated, altho' that the Writ of *Right of Advowſon*, and *Quare Impedit* doth lie

lie thereof. *Fitz. Nat. Br.* 32. *d.* 19 *H.* 3. *Fitz. Darrein Preſentment* 23. And the Reaſon given is, That an Aſſize of *Darrein Preſentment* doth require the Jurors to view the Church by the Words of the Writ; and therefore out of Reverence to Cathedral Churches where Prebends are, theſe Writs lie not thereof. *Jenkins, Cent.* 1. *Caſe* 1.——See 2 *Inſt.* 363.

Darrein Preſentment for whom.

Tho' theſe Writs do lie even indifferently for the Preſentments aforeſaid, yet they do not lie indifferently for all Perſons. Where a Man may have an Aſſize of *Darrein Preſentment*, he may have a *Quare Impedit*, but not contrary-wiſe; an Aſſize of *Darrein Preſentment* lies where a Perſon or his Anceſtors have preſented formerly to a Church, in preſenting to which, being void, he is diſturbed; but a *Quare Impedit* lies upon Diſturbance for a Perſon that had never before preſented. See *Terms of Law, Quare Impedit.*

Difference between *Darrein Preſentment* and *Quare Impedit.*

Though it be ſaid, that an Aſſize of *Darrein Preſentment* doth lie where a Perſon or his Anceſtors have preſented formerly, yet if *J. S.* doth preſent in my Name, and with my Aſſent, and afterwards the Church becomes void, this is a ſufficient Preſentment for me to have an Aſſize of *Darrein Preſentment* againſt *J. S.* for that this was as my Preſentment. *Trin.* 5 *Ed.* 1. *Rot.* 25. He that is Tenant in Fee of an Advowſon may have this Writ. *Roll's Abr. Part* 2. *p.* 382. And ſo may Tenant in Tail of an Advowſon, and is not driven of Neceſſity to his *Quare Impedit.* 46 *Aſſize* 4. And not only he who hath the Freehold, but alſo he who is a Leſſee for Years only, having preſented before, may bring this Writ. *Fitz. N.* 31. *J.* 5 *H.* 7. 16. *b. Farfax contra, Kellway* 118. *b.* 50 *Ed.* 3. 14. by *Holt.* And ſo may Tenant at Will who hath preſented. *Roll's Abr. Part* 2. *p.* 380, 381. *Contra* 50 *Ed.* 3. 14. This Writ, as hath been ſaid, is not only maintainable upon a Preſentment made by him that brings it, but alſo upon a Preſentment made by any of his Anceſtors; and therefore an Heir that comes in by Deſcent, his Anceſtor having preſented, may maintain this Writ, *Britton, fol.* 242. *b.* and the Preſentment of the Grandfather is ſufficient for the Grandſon to have it, who had never preſented, if it be the laſt Preſentment. *Trin.* 5 *Ed.* 1. *Rot.* 25. And altho' the Church became void by Reſignation, Deprivation, *&c.* yet the Writ ſhall be to inquire, *Quis Advocatus, &c. Præſentavit ultimam perſonam quæ mortua eſt, &c.* 6 *E.* 3. 41. *b.* But this Writ doth not lie amongſt Coparceners when one doth uſurp in the Turn of the other by reaſon of the Privity that is between them, and by the Words of the Writ it is againſt him that *advocationem deforceat,* 20 *Ed.* 3. 15 *Ed.* 3. *Fitz. Darrein Preſentment*, but in ſuch Caſe a *Quare Impedit* lies. *Jenkins, Cent* 1. *Caſe* 1. And Note, That when 'tis ſaid, that to the Maintaining of this Writ, he that brings it, or his Anceſtor muſt have preſented, it is to be underſtood, that the Clerk preſented be alſo inſtituted, and Inſtitution without Induction is ſufficient. 38 *H.* 6. 16. *b.*

Who may have *Darrein Preſentment.*

Tenant in Fee.

Tenant in Tail.

Leſſee for Years.

Tenant at Will.

Heir.

Grandſon.

Not amongſt Coparceners.

Preſentation and Inſtitution.

To the maintaining of this Writ of *Darrein Preſentment* it is further required, That he who brings it have the ſame Eſtate, or Parcel of the ſame Eſtate, by which the former Preſentment was made. *Roll's Abr. Part* 2. *p.* 38. Therefore if a Man being Tenant for another's Life of an Advowſon, doth preſent, and after his Eſtate is inlarged for his own Life, and then the Church doth void again, he ſhall not maintain an Aſſize of *Darrein Preſentment* upon the ſaid Preſentment, becauſe this is not the ſame Eſtate, nor any Parcel of the Eſtate, upon which the firſt Preſentment was made, but a new Eſtate. *Kellway* 118. *b.*

He muſt have the ſame Eſtate, *&c.*

Quare Impedit, &c. for what and whom.

So if Leſſee for Years of an Advowſon doth preſent, and after his Eſtate is inlarged for Life or in Fee, and then the Church doth void, he ſhall not have an Aſſize of *Darrein Preſentment*, becauſe he hath a new Eſtate by the Inlargement. The ſame Law is if Leſſee at Will doth preſent, and after his Eſtate is inlarged for Life, or for Years. If Leſſee for Years of an Advowſon doth preſent, and his Leaſe being ended, he takes a new Leaſe for Years of the ſame Advowſon, it ſeems clearly that he ſhall not have this Writ, becauſe he hath another Eſtate than that upon which the Preſentment was made: Or if Leſſee for Years, or for another Life, doth preſent, and after doth purchaſe the Reverſion, and then the Years expire, or *Ceſtuy que vie* dieth, and after the Church doth void, he ſhall not have this Writ, for that he is in of another Eſtate; and ſo it ſhall be, although that the Church doth void during the Years, or during the Life of the *Ceſtuy que vie*; for the firſt Eſtate is extinct by his own Act, and therefore he ſhall not have any Benefit of the firſt Eſtate. Or if the Grantee of the next Avoidance doth preſent, and then purchaſeth the Advowſon, he ſhall not have this Writ upon the next Avoidance, becauſe this is merely a new Eſtate, and no Parcel of the firſt Eſtate upon which the Preſentment was made.

Not if Eſtate be inlarged.

Baron and Feme.

If a Feme be Leſſee for Life of an Advowſon, the Remainder for Life to the Huſband, the Huſband preſents, and then the Wife dieth, the Huſband ſhall not have this Writ at the next Voidance, becauſe that the firſt Preſentment was in the Right of his Wife by reaſon of her Eſtate, and now he is ſeiſed of another Eſtate in his own Right. So if the Huſband, being ſeiſed of an Advowſon in the Right of his Wife, doth preſent, and after hath Iſſue, and then the Wife being dead, the Church becomes void, the Huſband ſhall not have this Writ, becauſe that now he is ſeiſed of another Eſtate than that upon which he preſented before; for at the firſt he had not any Eſtate but only in the Right of the Wife, and now he is ſeiſed of an Eſtate for his own Life as Tenant by the Courteſy. *Dubitatur*, *Kellway* 118. *b.* But if the Huſband hath preſented after he hath Iſſue, and then the Wife doth die, and the Church doth after become void, the Huſband ſhall have this Writ, becauſe that he had an Inception of an Eſtate for Life by the Courteſy at the firſt Preſentment, which by the Death of the Wife is become compleat.

Tenant by Courteſy.

Where Parcel of the Eſtate continues.

If Leſſee for Life of an Advowſon upon Condition to have the Fee doth preſent, and after the Fee doth accrue when the Church doth void, it ſeems that he ſhall have this Writ, becauſe that Parcel of the old Eſtate doth continue, and it had a Poſſibility of accruing at the Time of the firſt Preſentment.

Jointenants.

So if two Jointenants for Years, Life, or in Fee, do preſent, and after one of them doth die, the Church after becoming void, the Survivor ſhall have this Writ, becauſe he hath the ſame Eſtate that he had upon the firſt Preſentment. So if Tenant in Fee, or in Tail of an Advowſon, upon Condition to have it for Life, or for Years, doth preſent, and after his Eſtate doth decreaſe, he ſhall have this Writ when the Church doth void again, becauſe he hath Parcel of the old Eſtate. So if Tenant in Tail doth preſent, and afterwards become Tenant after Poſſibility, at the next Avoidance he ſhall have this Writ, becauſe this is a Remnant of the Eſtate-Tail; for all which laſt Caſes, ſee *Roll's Abr. Part* 2. *p.* 381.

If Eſtate decreaſeth.

Quare Impedit the ſafeſt Courſe.

But ſeeing the Writ of *Quare Impedit* doth lie for all Perſons who may maintain an Aſſize of *Darrein Preſentment*, it ſeems to be the

ſafeſt Courſe to bring that Writ upon any Diſturbance: But altho' it be ſaid, That a Man may in many Caſes have either Writ, yet in no Caſe can he maintain both; therefore if the Plaintiff hath brought a *Quare Impedit* upon a Diſturbance, and hanging the ſame, doth bring an Aſſize of *Darrein Preſentment* againſt the ſame Defendants, the Defendants may in pleading ſhew this ſpecial Matter in certain, and aver that both Writs are upon the ſame Avoidance, and the Writ of *Darrein Preſentment* will be abated, *Mich.* 15 *Jac. William Andrews* v. *Archbiſhop of York, Mary Counteſs of Shrewſbury* and *Haker*, *Hobart* 184, and *Hutton* 3, and *Moor* 883. For if an Aſſize of *Darrein Preſentment* be brought, and after that a *Quare Impedit* for the ſame Avoidance, the Aſſize ſhall abate, and the *Quare Impedit* ſhall ſtand, for the *Quare Impedit* is of a higher Nature than the Aſſize, 10 *Ed.* 3. *Statham* in *Darrein Preſentment* 3, vouched by Juſtice *Warburton* in *Hutt.* 4. *Regiſt. Orig.* 30. *a*, and a *Quare Impedit* is ſaid to be depending when it is returned. 2 *Ed.* 4. *fol.* 11. And it is alſo ſaid, that if he againſt whom an Aſſize of *Darrein Preſentment* is brought doth bring a *Quare Impedit*, the *Darrein Preſentment* ſhall abate. *Regiſt. fol.* 30. See *Stat. Weſtm.* 2. *c.* 5. which gives to him that is diſturbed the Election of one Writ or the other, but not both Writs. *Mich.* 15 *Jac. Andrews* v. *Hacker*, *Hutton* 4.

Quare Impedit, &c. for what.

Abatement of the Aſſize, &c.

As a Patron that is diſturbed cannot have both a *Quare Impedit* and Aſſize of *Darrein Preſentment* for the ſame Avoidance, ſo neither can he have two *Quare Impedits*: And altho' the Patron, after the firſt *Quare Impedit* brought, the Church remaining void, doth preſent a ſecond Clerk to the Biſhop, who is as the former refuſed, and doth bring his ſecond Writ, and declare upon the latter Diſturbance; yet the ſecond Writ ſhall abate, becauſe the principal Effect of the Suit is to gain and recover the Preſentation, and if the ſecond Writ ſhould not abate, he ſhould have two Suits at once for the ſame Thing: Beſides, the Nature of a *Quare Impedit* is to be final upon Nonſuit or Diſcontinuance; but this Way were to defeat the Law in that Point, and the Adding a new Defendant in the latter Writ to the Defendants in the former Writ will not amend the Caſe, for ſtill there are two Suits depending againſt one Man for the ſame Thing: But 'tis ſaid, that a Man may have as many *Quare Impedits* as he will againſt ſeveral Perſons. *Trin.* 14 *Jac. Edward Earl of Bedford* v. *William Biſhop of Exeter* and *Henry Wilſon*, *Hob.* 137. the ſame Caſe, *Brownlow* and *Gouldsborough*, 1 *Part* 163.

May not have two Quare Impedits.

Unleſs againſt ſeveral Perſons.

Concerning the Writ of *Quare Impedit*, we muſt know, that altho' it be of more general Uſe than an Aſſize of *Darrein Preſentment*, yet it doth not lie for all Perſons, and in all Caſes; for if, when a Church is void, the Ordinary doth by Wrong collate, and after the rightful Patron doth grant away the Advowſon in Fee, as by ſuch a Grant the Grantee cannot have the void Turn; ſo neither can the Grantor have any Action for it, he having deſtroyed, not transferred over all his Right and Remedy to it by his Grant of the Advowſon. *Hill.* 14 *Eliz. Leake* v. *Biſhop of Coventry* and *Doctor Babington*, 3 *Croke* 811. 6 *Ed.* 3. *Br. Preſent. al'Egliſe* 62. From which it ſeems to follow, that if one who is ſeiſed in Fee of an Advowſon doth mortgage the ſame for a Sum of Money, and the Money being not paid, the Grant becomes abſolute, and the Church doth then void: If during the Avoidance, the Money being paid, and the Advowſon reconveyed, the Mortgagor doth get the Clerk inſtituted to the void Church, the Mortgagee is without all Remedy, altho' the void Turn was in him, and could not paſs by his Reconveyance of the Advowſon; or if the Biſhop doth in ſuch Caſe collate, or other Perſon doth get the Church filled

Quare Impedit lieth nor for all Perſons, &c.

Upon a Mortgage.

Quare Impedit, &c. for what, &c.

Coparceners.

filled by Uſurpation, both Mortgagor and Mortgagee are without all Remedy for that Turn. *Quære.* Yet it hath been held, that if two Coparceners be of an Advowſon appendant to a Manor, and the Church voiding, the one of them doth alien before their Clerk is admitted, yet both of them ſhall have a *Quare Impedit* for the void Turn, as being veſted in them. So if he that is ſeiſed of Land, to which an Advowſon is appendant, be diſſeiſed, and the Diſſeiſee doth levy a Fine to a Stranger of the Land, to which, *&c.* the Diſſeiſor ſhall keep the Land, and by Conſequence the Advowſon for ever; for the Diſſeiſee againſt his own Fine cannot claim, and the Conuſee cannot enter; the Right, which the Diſſeiſee had, being extinct by the Fine. 2 *Co.* 56. See *Terms of Law*, Diſſeiſor; but 1 *Croke* 484 ſeems to be to the contrary.

Diſſeiſor.

For clearing up the Doctrine concerning Preſentation by a Mortgagee, the following Caſes are now inſerted in this fourth Edition.

The Defendant was a Mortgagee, and in Poſſeſſion; the Plaintiff brought a Bill to redeem, and had a Decree accordingly; before the Account taken, the Church became void, and the Mortgagee preſented. Upon the Plaintiff's Petition, the Chancellor ordered that he ſhould revoke his Preſentation, and preſent ſuch a Perſon as the Mortgagor or his Vendee (for he had contracted to ſell) ſhould appoint.

The Reporter adds, Q. How this Revocation is to be? for I think a common Perſon can only *variare præſentando*, but not revoke his Preſentation, though the King may. *Prec. in Chan.* 71. *Jory* v. *Cox.*

The Defendant having mortgaged the Manor of *Thunderſley*, to which an Advowſon was appendant, to the Plaintiff, who brought the Bill to forecloſe, the Church became void; the Defendant moved the Court for an Injunction to ſtay the Proceedings in a *Quare Impedit* brought by the Plaintiff.

Per Cur. Although the Defendant *Dawling* hath no Bill, yet being ready and offering to pay the Principal, Intereſt and Coſts, if the Plaintiff will not accept his Money, Intereſt ſhall ceaſe, and an Injunction to ſtay Proceedings in the *Quare Impedit*; for the Mortgagee can make no Profit by preſenting to the Church, nor can account for any Value in reſpect thereof, to ſink or leſſen his Debt, and the Mortgagee therefore in that Caſe, until a Foreclоſure, is but in the Nature of a Truſtee for the Mortgagor.

And the like Order was made between *Jory* and *Cox*, where the Defendant had an Injunction againſt the Plaintiff to ſtay his preſenting to a Church that became vacant pending the Suit. 2 *Vern.* 401. *Amhurſt* v. *Dawling.*

Samuel Gardiner, the Plaintiff's Father, being poſſeſſed of a long Term for ninety-nine Years of the Advowſon of *Eckington*, made a Mortgage thereof to the Defendant by way of Aſſignment of the Term, upon Condition to be void upon Payment of the Mortgage-Money and Intereſt at the End of the Year; and there was a Covenant in the Mortgage Deed, that on every Avoidance of the Church the Mortgagee ſhould preſent.

Several Years after the Mortgagor died. It was admitted by the Lord Chancellor and Counſel on both Sides, that if there be a Mortgage made of a Manor, and an Advowſon appendant, before the Mortgage is fore-cloſed, (though the Mortgagee be in Poſſeſſion) yet the Mortgagor ſhall preſent if the Church becomes void; for the Preſentation is to be preſumed to yield no Profit, and conſequently cannot be accounted for, nor go towards Satisfaction of the Mortgage; for which was cited *Wood and Hinchman* verſus *Sir Thomas Stanley*, and alſo Mr. Serjeant *Selby*'s Caſe. (*a*)

2 But

(*a*) See alſo 2 *Vern.* 401. *Amhurſt* verſus *Dawling*; 2 *Vern.* 549. *Attorney General* verſus *Hesketh*; and *Preced. in Chan.* 71. *Jory* verſus *Cox.*

But the principal Caſe was ſaid to differ, nothing being mortgaged here but the Advowſon, ſo that the Mortgagee could have no other Satisfaction than by providing for a Child, Relation or Friend, on the Advowſon's becoming void; and the rather, for that it was the expreſs Agreement in the Mortgage-Deed, that as often as the Church ſhould become void the Mortgagee ſhould preſent, which expreſs Agreement would be good even in caſe of a Mortgage of a Manor with an Advowſon appendant; and this was ſtill ſtronger, as it was the Caſe of a periſhing Term, where every Preſentee or Incumbent would have an Eſtate for Life in the Church; to which the Court, though it gave no Opinion, yet ſeemed to incline.

Quare Impedit, for what, &c.

But it appearing, that this Bill againſt the Mortgagee and his Preſentee was brought ſeven Months after Inſtitution, Lord Chancellor diſmiſſed the Bill, declaring, That as a *Quare Impedit* was confined to the ſix Months after the Death of the laſt Incumbent, ſo the Bill ſeeking to compel the Defendant to reſign, and conſequently to deprive him of his Living, ought by the ſame Reaſon to be limited to the ſame Time; and the Relieving againſt this would be to relieve againſt an Act of Parliament, which had punctually been obſerved for ſome Hundreds of Years, ever ſince the 13th of *Ed.* 1. and that the *Tempus Semeſtre* ought to be as much obſerved here as at Law, in regard it tended to the Peace of the Church.

Indeed, had a *Quare Impedit* been brought within the ſix Months, and the Bill been preferred after the ſix Months, the Court might, on a proper Caſe, give Directions in Aid of the *Quare Impedit*, that the Mortgage ſhould not be given in Evidence, *&c.* but here there was no *Quare Impedit* brought, and the Bill came out of Time. Wherefore,

Per Cur', Diſmiſs the Bill as to that Part which ſeeks to compel the Defendant to reſign his Living; but let the Plaintiff redeem the Mortgage on Payment of Principal, Intereſt and Coſts. 2 *Williams* 404, 405. *Gardiner* v. *Griffith.*

Mortgagee of a Manor and Advowſon being in Poſſeſſion, the Church becomes vacant. The Mortgagor makes a Simoniacal Preſentation to *A.* which is rejected by the Biſhop. Then the Mortgagor and Mortgagee join in preſenting *B.* *C.* gets the Title of the Crown, and brings an Information in the Name of the Attorney General to remove the Mortgagee's Title, and that it might not be ſet up at Law; and it was ſo decreed. 2 *Vern.* 549. *Attorney General* v. *Hesketh*, *Scarisbrick* and *Sadell.*

The ſame Caſe follows as reported by another.

A. mortgages a Manor (to which an Advowſon was appendant) in Fee to *B.* then *A.* preſents *C.* by Simony; and *C.* being for that Reaſon refuſed by the Biſhop, *A.* preſents *D.* who is admitted, *&c.* but after reſigns, and is again preſented by *A.* and *B.* the Relator having got an Aſſignment of the King's Title for the Simony, brings his *Quare Impedit*, and a Bill in this Court, that the Mortgage may not be ſet up, nor given in Evidence againſt him at Law; and decreed accordingly. *Preced. in Chan.* 214. *Attorney General, at the Relation of Hindley* v. *Sudele, Heskith and Scarsbrick.*

A. being ſeiſed in Fee of Lands, and of an Advowſon in Groſs, by Leaſe and Releaſe conveyed the Lands to Truſtees in Fee to raiſe a Sum for Brothers and Siſters, and afterwards by Leaſe and Releaſe (bearing Date before the former, but executed after) conveys the ſame Lands, and by Indenture conveys the Advowſon to Serjeant *Selby* and his Heirs. Afterwards *A.* grants the next Avoidance to *B.* and dies, and *C.* his Heir brings his Bill againſt *Selby* to be let into a Redemption. *Selby* inſiſted that he was an abſolute Purchaſer; but upon hearing decreed that he was only a

Quare Impedit, &c. for what, &c.

Mortgagee, and that *C.* ſhould ſtand in the Place of *A.* and be admitted to redeem, *&c.* Afterwards *D.* articled for the Purchaſe of the Lands and Advowſon, but the Account was not then ſettled by the Maſter; the Church becomes void, *B.* preſents, *Selby* alſo preſents, and *D.* preſents. Decreed that *Selby* the Mortgagee is only a Truſtee, a Truſtee for the Mortgagor, and for his Repreſentative, and for his Grantee. *Selby* ſhall preſent ſuch Perſon as *B.* ſhall name. *Gally* v. *Serjeant Selby* in *Can. Comyns* 343, *&c.*

Muſt be before an Uſurpation compleated.

It is to be noted, That when it is ſaid that the Patron may have his Remedy as well when the Church is full as when it is void, it is to be underſtood if the Patron doth uſe his Remedy before the Uſurpation be ſo compleated as that the Uſurper's Clerk may plead Plenarty by ſix Months, for then that Turn is gone without Recovery. *Jenkins, Cent.* 3. *Caſe* 7. But when an Uſurpation is ſo compleated, thereupon the Patron is barred of all Remedy at Law for the Avoidance that ſhall afterwards happen, ſo that he doth thereby loſe his Advowſon for ever without Remedy. See *Chap.* 10 and 13. But Plenarty is not pleadable ordinarily by an Incumbent againſt the King, for that he at any Time having Right may bring his Writ; yet if a Clerk by Inſtitution and Induction upon the Preſentation of a Stranger, being become Incumbent, *de facto*, of a Church of the King's Gift, the King may by ſpecial Words confirm to ſuch Incumbent, ſo that the King cannot afterwards remove him by a *Quare Impedit*, 7 *H.* 4. 37. and by *Popham, Trin.* 4 *Jac. King* v. *Matthew, Brownlow and Gouldsborough*, 1 *Part* 166. and *Jenkins, Cent.* 7. *Caſe* 96. which ſeems alſo to be granted, *Mich.* 13 *Jac. King* v. *Biſhop of Norwich & alios, Roll's* 1 *Rep.* 235. but it is there ſaid, that the King may preſent after the Death of the Incumbent. But if the King doth preſent to a Prebend, *Ratione Temporalium Epiſcopi, ſede vacante*, and before Inſtitution the King doth repeal his Preſentment, and after the ſame Preſentee is inſtituted and inſtalled by the Guardian of the Spiritualties, although that the King ſhould recite that the Preſentee was canonically inſtituted *ex ſua Præſentatione*, and ſhould ratify his Preſentation and Incumbency, yet the King may either preſent another, and his Admiſſion ſhall be good, or have his Remedy at Law to inforce the Admiſſion of another Preſentee, becauſe the Clerk was never in *ex Præſentatione Regis*, nor by Collation, or Inſtitution and Induction when the Confirmation was made; and ſo the Confirmation being made of a Title when there was none, was void. *Trin.* 12 *Eliz. Dyer* 292. See 25 *Ed.* 3. *fol.* 47, 90. So if the King be uſurped upon, and the Uſurper's Clerk be only inſtituted, and then the King by his Letters Patent doth ratify and confirm to him his Eſtate for Term of his Life; this Confirmation will not bar the King, but he may bring his Writ and remove the Clerk, by Reaſon that he was not in Poſſeſſion, for want of Induction when the Confirmation was had, 7 *H.* 4. *fol.* 7. vouched by *Manwood* in *Hare* and *Buckley*'s Caſe, *Trin.* 20 *Eliz. C. B. Plowden* 528. So if the Clerk be compleat Incumbent by Uſurpation, and the King doth bring his *Quare Impedit*, and after the King doth confirm the Incumbent's Title, yet if the Court doth perceive that the Confirmation ſhall be to the Prejudice of the King in After Times, the Court ſhall adjudge the Confirmation void, and proceed in the *Quare Impedit.* 45 *Ed.* 3. 19. *Br. Preſentation al'Egliſe* 8. *Quære.* However, the Clerk who obtains the King's Confirmation in ſuch Caſe, muſt be as well inducted as inſtituted, otherwiſe the Confirmation will nothing avail him. 11 *H.* 4. 7. *Br. Quare Impedit* 150.

Plenarty.

Where the King's Confirmation is void.

Simile.

Induction.

And as the King, ſo, as I ſuppoſe, any common Patron may confirm the Title of an Uſurper's Clerk to bar himſelf of his Remedy to remove him; but if there be two Tenants in Common of an Advowſon, and one of them being ſummoned and ſevered, the other doth recover alone; he that is ſevered after the Recovery cannot releaſe or confirm to the Incumbent, ſo as to bar the other that recovered; by *Dodderidge*, *Haughton* and *Damport*, *Mich.* 13 *Jac. B. R. Fairbank* v. *Durham*, *&c.* 1 *Roll's Rep.* 244. However, he may releaſe to the Uſurper, when his Clerk is inſtituted and inducted, and ſo bar himſelf of all Actions at Law, whereby the Uſurper's Clerk might be removed; but if divers Perſons, as Coparceners, be ſeiſed of an Advowſon, and one of them doth releaſe to the Uſurper's Clerk all Demands, Actions and Wrongs touching the Preſentment; this is only available to bar him that doth releaſe, and not the others. *Mich.* 39 & 40 *Eliz. C. B. The Counteſs of Northumberland*'s Caſe, 5 *Coke* 97, and *Moor p.* 455, and 2 *Anderſon* 48.

Quare Impedit, &c. for whom.

How a Patron may bar himſelf.

Alſo if a Preſentation be made by a Stranger to an Appropriation, upon which his Clerk is inſtituted and alſo inducted, yet the Patron of the Appropriation cannot have this Writ, becauſe by ſuch Induction he cannot be put out of Poſſeſſion. 44 *Ed.* 3. 33. *b. Grendon*'s Caſe, *Plowd.* 500. *b.* And before the Statute of 27 *H.* 8. of Uſes, if *Ceſtuy que Uſe* of a Manor, to which an Advowſon was appendant, had preſented to the Church when it was void by the Sufferance of the Feoffee; yet if he had been diſturbed, he could not have maintained this Writ, for that he had not any Eſtate in him, 17 *H.* 7. *Keb.* 42. *b.* but now he may. If one hath a Grant of an Avoidance for Years, or the like, and the Church being void is diſturbed in preſenting, and dies, his Executors may have a *Quare Impedit* ſpecially upon their Caſe for ſuch Diſturbance. *Trin.* 31 *Eliz. Smallwood*, *&c.* v. *Biſhop of Litchfield*, *&c.* 1 *Leonard* 205. and that by Equity of the Stat. 4 *Ed.* 3. *c.* 7. *Paſch.* 32 *Eliz. C. B. Sale* v. *The Biſhop of Coventry*, *&c.* 1 *Anderſon* 241. and ſhall recover Damages, *Mich.* 32 & 33 *Eliz. Smallwood and others* v. *Biſhop of Coventry*, *&c.* 3 *Croke* 241. which ſhall be Aſſets in the Hands of the Executor. *Paſch.* 31 *Eliz. Scale* v. *The Biſhop of Litchfield*, *Owen* 99. So if an Husband be ſeiſed of an Advowſon in the Right of his Wife, and the Church doth become void during the Coverture, he may have a *Quare Impedit* in his own Name, as ſome hold, but the Wife ſhall have it if ſhe ſurvive, and the Husband if he ſurvive her, 1 *Inſt.* 351. *a.* but if the Church had fallen void before the Coverture, the Turn is a Thing merely in Action, and therefore the Husband ſhall not have it if he ſurvive her. 2 *Inſt.* 351. *b.* A Chapter may have this Writ againſt their Dean of their ſeveral Poſſeſſions. 40 *E.* 3. 28. *b.* Generally he that will maintain this Writ muſt be able to count of ſome Seiſin or Poſſeſſion, for 'tis a Writ of Poſſeſſion, and the Preſentment is the Poſſeſſion, and he that brings it muſt be capable of alledging a Preſentment in himſelf, or in ſome other Perſon whoſe Eſtate he hath, 21 *Ed.* 4. 2. and by *Warburton*, *Trin.* 14 *Jac. Digby* and *Fitzherbert*, *Caſe* 1. *Brownlow* and *Gouldsborough* 167. That is, that his Clerk be inſtituted at leaſt upon ſuch Preſentment, for that is ſufficient without Induction, 38 *H.* 6. 15. *b.* by *Markham*; and upon this Reaſon it is, that the Lord *Coke* ſaith, Admiſſions and Inſtitutions are the Life of Advowſons, and therefore, if the Patron ſuſpect that the Regiſter of the Biſhop will be negligent in the keeping of them, he may have a *Certiorari* to the Biſhop to certify them into the Chancery. 2 *Inſt.* 358.

Appropriation.

Ceſtuy que Uſe.

By Executors.

Damages.

Baron and Feme.

Seiſin, &c.

If

Quare Impedit, &c. for whom.

He who now erects a Church.

If a Man doth erect a Church at this Day, and be disturbed in presenting, it is said that he cannot maintain a *Quare Impedit*, because he cannot alledge any Presentment. *Roll's Abr. Part* 2. 376. *Dubitatur.* 20 *Ed.* 4. 14. *b. Contra* 21 *Ed.* 4. 3. But by *Fitz. Nat. Br.* 33. *b.* vouched in the Case of the King against the Bishop of *Worcester*, &c. *Vaughan* 57, he may in such Case have a *Quare Impedit* without alledging a Presentation by any Person, declaring upon the special Matter; and so I suppose the Law is now taken to be.

Appropriation and Abbey dissolv'd.

If a Church hath been appropriated Time out of Memory to an Abbey, and then the Abbey to which it was appropriated is dissolved; this perpetual Incumbency is not a sufficient Seisin for the Patron, for that the Church was not presentative. *Roll's Abr.* 2. *p.* 377. *Dubitatur.* 20 *Ed.* 4. 15. But if the King be seised of an Advowson which hath been ever held as appropriated, he shall have a *Quare Impedit* without alledging any Presentation. 17 *Ed.* 3. 10. *b.* 20 *E.* 4. 15.

Prebendary. Treasury.

So a Presentation unto a Prebendary, which is afterwards changed into a Treasury, is sufficient to maintain a *Quare Impedit* upon a Disturbance to the Treasury. 50 *E.* 3. 26, cited in *Bevil's* Case, 4 *Co.* 9. *b.* But if an Advowson be granted to one by Parliament, such Person being disturbed may have his *Quare Impedit*. 21 *Ed.* 4. 3. *b.* So if the King be intitled to an Advowson by Office, he shall have his Writ without Presentation, 21 *E.* 4. 16 *H.* 7. 2, but 17 *E.* 3. 10, is to the contrary, for there a Presentment is alledged and traversed, and the Traverse allowed by the Court, where the King made Title by a Seisure by Office of the Possession of a Prior Alien, and a Presentment alledged in the Proctor of the Prior; but it is said, that if the Escheator seise an Advowson upon particular Command to seise it, the King may have a *Quare Impedit* without alledging any Presentment, for the Seisure made Title without more.

Recovery in a Writ of Right.

If a Man doth recover in a Writ of Right of Advowson, and hath Execution, he may have a *Quare Impedit* without alledging any Seisin, for that the Recovery doth very sufficiently affirm his Right. 14 *E.* 2. *Quare Impedit* 171. And it is said that he may alledge Seisin in the Recoveree by Presentment; but this is not traversable. 17 *Ed.* 3. 10. *b.* So a Recovery against one in a *Quare Impedit*, and Damages for two Years, for that the Church was full of an Incumbent, is a good Title after in another *Quare Impedit*, without alledging any Presentment; but in this Case, if he had once presented, and the Church full after the Recovery upon his Presentment, this Recovery is no sufficient Title. 42 *Ed.* 3. 8. *b.* But it is said, that a Recovery in a *Quare Impedit* without alledging a Presentment is not sufficient, for that it may be against a Deforceor that claimeth nothing in the Patronage. 39 *H.* 6. 25. *b.*

Title in *Quare Impedit*.

What Allegation necessary.

But generally, he that will have this Writ, must alledge a Presentment in himself, or in him whose Estate he hath, and such Presentment which was not before the Time of Memory, for that such Presentment is not triable, 17 *Ed.* 3. 10, 11, 14. *b.* 20 *Ed.* 4. 15. 42 *Ed.* 3. 4. *b.* but in such Case may alledge the Presentment to be within the Memory of Man, and then it is good, because the Time is not traversable. 17 *E.* 3. 14 *b.*

King's Grantee.

If the King be seised of a Manor to which an Advowson is Appendant, and the Church voiding, a Stranger doth usurp, and after the King doth grant the Manor and Advowson in Fee to another, as he may, for that the said Usurpation doth not put the King out of Possession, and then the Church doth become void, the Grantee shall have his *Quare Impedit* being

disturbed, and make his Title by the last Presentment of the King without making Mention of the Presentation of the Stranger. *Hob.* 140. *Mich.* 14 *Eliz.* *Leonard* 3. 18, 61. 4 *Leon.* 209. *Dallison* 75. By this Case it appears, that one may have a *Quare Impedit*, and need not therein mention the Presentation of the last Incumbent by whose Death the Church is void, and upon which Avoidance the Plaintiff brings his Action to present. So if upon an Alienation in Mortmain of an Advowson, if the Lord of whom it is held, at the next Avoidance, doth bring a *Quare Impedit*, it is sufficient for him to alledge a Presentment in his Tenant that did alien it in Mortmain. 21 *Ed.* 3. 27. *b.* So a Presentment or Collation made by an Ordinary upon the Account of a Lapse is a sufficient Seisin for the Patron, 39 *H.* 6. 24. *b.* because the Ordinary in such Case doth present or collate as in the Right of the Patron, and the Law interprets it as done by the Patron himself. *Mich.* 32, 33 *Eliz.* *B. R.* *Lancaster* v. *Lucas*, 1 *Leonard* 234, *Hob.* 154, in *Colt* and *Glover*'s Case. So a Presentment in the Grantor of an Advowson is sufficient in a *Quare Impedit* brought by the Purchaser, 2 *Instit.* 356, and if the Purchaser be disturbed by his Grantor, he shall have a *Quare Impedit* against him, 39 *H.* 6. *Quare Impedit* 95. *per Cur.* and said to have been very often so adjudged; so a Presentment by the Father is sufficient for the Wife of the Son being Tenant in Dower of the Advowson, and also for the second Husband in the Right of the Wife. 14 *H.* 4. 12. So the Presentment of the Grantee of a next Avoidance is a sufficient Title for the Patron in Fee to have this Writ, because the Presentment of the Grantee is made in the Right and Title of the Grantor. 9 *H.* 7. 23. Countess of *Northumberland*'s Case, 5 *Coke* 97. *b.* 6. But against this it was said, that in a *Quare Impedit* the Presentment ought always to be alledged in him who hath the absolute Inheritance, and not in any other, for which were cited, 18 *Ed.* 3. 15. 24 *Ed.* 3. 37. 40 *Ed.* 3. 10. 43 *Ed.* 3. 4. 33 *H.* 6. 32. 7 *Ed.* 4 20. 9 *H.* 7. 23. 16 *H.* 7. 7, in which Books it is held, that a Presentment by a Tenant for Life, or for Years, or by a Guardian, or by a Grantee of the next Avoidance, is no Title for him in Reversion; but all the Justices but *Owen* held as before, and answered, that those Books be not directly, that a Presentment alledged in the Grantee is not good, but that where a Presentment is alledged in the Grantor and Grantee, that the Presentment in the Grantor is only traversable, for that is the Principal, and the Alledging of the Presentment in both is not double; and here the Title is not only alledged by the Presentment, but also by the Descent principally, (which note) and so Judgment was given. *Mich.* 38, 39 *Eliz.* *C. B.* *Fitton* and the Countess of *Northumberland*, &c. v. *Hall.* 3 *Croke* 518, and *Moor* 455. So if a Grantee of a next Avoidance doth present, and after the Heir of the Grantor doth grant the next Avoidance, the said Presentment is sufficient for the second Grantee, 9 *H.* 7. 23, or if the Grantee of a next Avoidance doth present, and after the Grantor doth grant away the Advowson to *A.* who doth grant it to *B.* the said Presentment is sufficient for *B.* without alledging any Presentment in his Grantor, or *A.* *Dyer* 1 & 2 of *Mary* 106. So if a Tenant for Years doth present during his Term, it is sufficient for him in Reversion, 22 *E.* 4. 9. *b.* the like if Lessee for Life doth present, 22 *Ed.* 4. 9. *b.* *Co.* 5. 97. *b.* *Co.* 6. *Brediman*'s Case, 57. *b.* 9 *H.* 7. 23, or Tenant at Will, 22 *Ed.* 4. 9. *b.* Tenant in Dower, or by Courtesy, Tenant by Statute Merchant, Staple or Elegit, *Co.* 5. 97. *b.* or Guardian during the Wardship, 22 *Ed.* 4. 9 *b.* *Co.* 5. 97. *b.* altho' that the King be the Guardian; and so where a Manor doth descend, and no Presentment hath been before by the Ances-

Quare Impedit, &c. for whom.

Need not mention the last Incumbent.

Mortmain.

Collation.

Purchaser.

Tenant in Dower.

Grantee.

Grantee.

Tenant for Years.

Quare Impedit, &c. how brought.

tors of the Heir who was the Purchaſer of the Manor. 42 *Ed.* 3. 4. *b.* Alſo if the King doth preſent in the Right of his Ward, tho' the Ward hath no Right, this is an Uſurpation for the Ward, and is a ſufficient Preſentation for the King, if the Church doth void again during the Nonage, and for the Heir afterwards. 42 *E.* 3. 4. *Contra* 21 *Ed.* 4. 9. *b.* as to the Heir. However it is ſaid, that a Preſentation made by the Proctor of an Abbot in the Right of the Abbot, is a ſufficient Seiſin for the Abbot, 17 *E.* 3. 14. Admit. 60, 76, and that this Preſentment by the Proctor ſhould have been ſufficient for the King, having the Poſſeſſion by Reaſon of War, the Abbot being an Alien, 17 *E.* 3. 10. Admit. 60. Adjudg. 76; ſo a Preſentment by a Biſhop as Patron is ſufficient for the King to maintain a *Quare Impedit* for an Advowſon that comes to him with the Temporalties of a Biſhoprick. 50 *Ed.* 3. 26.

Proctor.

Biſhop.

CHAP. XXIII.

Writs of Quare Impedit *and* Darrein Preſentment, *how to be brought.*

Care in bringing the Writs.

HAving ſhewed of what Preferments, and for whom the Writs of *Darrein Preſentment* and *Quare Impedit* do lie; the next Thing to be ſhewed, is how theſe Writs are to be brought, and in bringing of which the Plaintiff muſt be very careful; as alſo in managing his Suit in every Reſpect.

Of the Form.

Firſt, therefore the Patron muſt ſee that his Writ be duly made out, and that in reſpect of the Form thereof, *Paſch.* 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Co.* 27, for tho', if the Writ abate upon that Account, the Plaintiff may have a new Writ, yet if ſuch new Writ may not be brought within the ſix Months, he cannot recover that Avoidance, and for that Reaſon the Judges have frequently been very tender in abating Writs upon nice Exceptions to the Form or Latin of the Writ, where the Party can have no new Writ, but ſhould remain Remedileſs if the Writ brought ſhould abate; as where the Writ ſhould have been, *quæ ad Donationem ſuam ſpectat*, and (*ad*) was left out thereof, yet the Writ was amended after divers Motions, becauſe the ſix Months were paſt, and ſo the Preſentation ſhould otherwiſe have been loſt. *Mich.* 30 & 31 *Eliz. Rooksby*'s Caſe, 3 *Croke* 119. So a *Quare Impedit* being brought by the Queen, Exception was taken to the Writ, becauſe the Words were, *Quod permit' ipſam præſent' ad Rectoriam de D.* where it ought to be *ad Eccleſiam.* The Court awarded, that the Writ ſhould be openly amended in the Court by a Clerk of the Chancery. *Paſch.* 37 *Eliz. C. B. Leonard* 4 *Part*, *Caſe* 47. So one having Title to preſent to a Vicarage, brought his Writ of *Quare Impedit ad Præſentandum ad Eccleſiam de W.* which Word *Eccleſiam* always intends Right of Advowſon of the Parſonage; but when the Title is to the Vicarage only, there is a ſpecial Writ, *ad Præſentandum ad Vicariam*, *Regiſt. Orig.* 31. *a*, ſo the Writ was

Rectoriam for *Eccleſiam.*

Ad Vicariam.

miſtaken

mistaken; before the Appearance of the Defendant, the Plaintiff moved, that the Writ might be amended, and it was amended accordingly, but this Amendment was made upon special and particular Reasons which were in the Case, *viz.* because it was a peremptory Action; and the six Months being past, and the Plaintiff a Purchaser of the Advowson, and if this Writ failed, he had lost his Advowson for ever; and the Misprision happened (as was made appear) by the Clerk, who did not pursue his Direction. *Trin.* 3 *Car. C. B. Turner* v. *Palmer*, 1 *Croke* 74. But this Case being upon such special and particular Reasons, is not to be depended upon in other Cases that do not come up to the Reason of it. See *Freman*'s Case, 5 *Co.* 45. By this Case it appears, that if a Patron be disturbed to collate to a Vicarage, his Writ shall be, *Quod permittat præsentare ad Vicariam*, *F. N. B. fol.* 32, and 15 *Eliz. Dyer* 323. *Regist.* 31. and not *ad Ecclesiam*; but it is not necessary to say *ad perpetuam Vicariam*, 17 *Ed.* 3. 12. for there is no such Writ: Yet we find, that if the Writ be, *Quod permittat præsentare ad Ecclesiam*, and the Title is *ad Vicariam*, this is no Error, for that *Vicaria* is *Ecclesia*, and by the Grant *de Ecclesia*, the Advowson passes; by *Coke*; to which the Court seemed to assent. *Mich.* 13 *Jac. King* v. *The Bishop of Norwich and others*, *Roll's* 1 *Rep.* 237. So where by the Statute 22 *Car.* 2. for rebuilding of *London*, and uniting several Parishes there, it is enacted, That the Parishes of St. *Andrew Ward*, and of St. *Anne Black-Fryars*, shall be united, St. *Andrew* to be the Parish-Church, and that the Patrons shall present by Turns; the first Presentment to be to the Patron of the Church which is of the greater Value: And in a *Quare Impedit* the Plaintiff declared upon this Statute, and shewed that the Church of St. *Andrew* was of greater Value than the Indowment of the said Vicarage of St. *Anne Black-Fryars*, and that the Patron of St. *Andrew* presented one *B.* who was dead; therefore it belonged to the Plaintiff to present: In this Case, Exception was taken to the Declaration, for that the Plaintiff made Title to *prædict' Vicaria* where no Vicarage was mentioned before, also the Plaintiff's Title is to a Vicarage where the Statute mentions only Churches, so the Plaintiff had not brought his Case within the Statute. But it was resolved by the Court that the Word *prædicta* shall be taken as void, and not the whole Sentence made void by it; and as to the second Objection, that altho' *Ecclesia & Vicaria* are different Things, yet it appearing by the Record, that the Rectory of St. *Anne Black-Fryars* is appropriated, the Vicarage shall be a Church within the Intent of the Statute. *Hill.* 7 *W.* 3. *C. B. Reynoldson* v. *Episc. London* and *Blake*, 3 *Levinz.* 435.

Quare Impedit, &c. how brought.

In the Case of a Purchaser.

Vicaria is *Ecclesia.*

Where no Vicarage was mentioned before.

If a Writ be brought upon a Disturbance to collate, yet it shall be good if it say *Præsentare*. 17 *Ed.* 3. 64. But if a Patron doth bring his Writ for a Chapel, the Writ shall not be *Quod permittat præsentare ad Ecclesiam*, but *ad Capellam*, 8 *H.* 6. 32, 37, and if he hath the Right of presenting, his Writ shall be *Præsentare*, not *Nominare*, else it will abate. *Bronlow* and *Gouldsborough* 1 *Part*, *p.* 159. If the Clerk of a Donative be disturbed, his Patron may have a *Quare Impedit, quod permittat ipsum præsentare ad Ecclesiam, &c.* and declare upon the special Matter. *Co. Litt.* 344. 1 *Jac. B. R. Fairchild* and *Gair*'s Case, *Roll's Abr. Part* 2. *p.* 380.

Ad Capellam.

Donative.

If there be two several Patrons, and two several Incumbents of one and the same Church, so that the one Patron hath a distinct and separate Half of the Tithes for his Incumbent from the other Patron and

Præsentare ad Medietatem where two Patrons, *&c.*

Quare Impedit, &c. how brought.

and his Incumbent, as it may be, *Mich.* 15 *Car. B. R. Stoughton* v. *Palmer*, *Jones* 446. 10 *Coke*, *fol.* 136. *F. N. B.* 39. in this Caſe, both the Advowſon and the Church are ſever'd in Right and Poſſeſſion, and either Patron, if diſturbed to preſent to his Moiety, may have a *Quare Impedit præſentare ad Medietatem Eccleſiæ.* 33 *H.* 6. 11. 1 *Inſt.* 17. *b.* 18. *a.*

Three Patrons, *ad tertiam partem.*

So where there are three Patrons and Parſons of one Church, *&c.* each Patron may have his *Quare Impedit præſentare ad tertiam partem Eccleſiæ*, and not *ad Medietatem Eccleſiæ. Vide F. N. B.* 30, 31 *Ed.* 3. *Droit* 68, 69. 22 *Aſſ. p.* 33.

Ad duas partes Eccleſiæ.

And ſo if one be Patron of two Parts of a Church, his Writ may be *Præſentare ad duas partes Eccleſiæ*; but in theſe Caſes, (by *Coke*) the Patron may, if he pleaſe, have a *Quare Impedit præſentare ad Eccleſiam*, as well as in the other Form, becauſe upon the Matter as to him it is one Church, *Trin.* 10 *Jac. C. B. Richard Smith*'s Caſe, 10 *Coke* 136, to which agreeth the Book of Entries 477. Title *Quare Impedit*, 6 *Ed.* 6. *Dyer* 78, and the Lord *Windſor*'s Caſe, 5 *Co.* 102.

Two Advowſons in one Church.

But however, it is ſaid that where there be two Advowſons in one Church, the Declaration muſt be to the Moiety, or the third Part, as the Caſe ſhall be. *Mich.* 15 *Jac. Windham* v. *Biſhop of Norwich*, *Brownlow* and *Gouldsborough* 1 *Part* 165. And according to this, when one brought a *Quare Impedit præſentare ad duas partes Eccleſiæ*, and in his Declaration made Title to the Advowſon of two Parts of the Church, it was held *per Curiam*, that the Writ was good, and that the Declaration did well maintain it, becauſe that in a Church there may be

Several Portions in one Church, *&c.*

ſeveral Portions to which Preſentments may be made; as one of the Firſt, another of the Second, and another of the Third Portion, *&c.* and of them there may be divers Advowſons, and he that is diſturbed may declare that he is ſeiſed of the Firſt, Second, or Third Part, as the Caſe requires. But in the principal Caſe, if the Declaration had not been that he was ſeiſed of the Advowſon of the two Parts; but according to the Writ, that he was ſeiſed of the two Parts, and preſented; the Writ and Declaration would have abated. *Paſch.* 37 *Eliz. Stanhope* v. *The Biſhop of Lincoln*, *C. B.* 2 *Anderſon* 23.

One Incumbent and Advowſon ſever'd.

But when there is but one Incumbent of one Church, although that the Advowſon be divided and ſevered into ſeveral Hands, to preſent by Turns, yet there ſhall never be a *Quare Impedit præſentare ad Medietatem ſeu tertiam partem Eccleſiæ*, but *ad Eccleſiam* generally, becauſe there being but one Incumbent, one Church, and one Cure, there is not any Moiety in the Church which is the Parſon's, but the ſame is intire, although that there be in the Advowſon. *Vide F. N. B.* 39. *f. g.* 5 *H.* 7. 8. *Trin.* 10 *Jac. C. B. Richard Smith*'s Caſe, 10 *Coke* 136. 1 *Inſt.* 18. *a.*

Claim of intire Advowſon to preſent by Turn.

Therefore in a *Quare Impedit* brought to permit him to preſent to the Church of *A.* and declared that he was ſeiſed of a Manor to which the Advowſon of the Church was appendant, *viz.* to preſent thereto every firſt Turn; and that another was ſeiſed of another Manor, to which the Advowſon was appendant, *viz.* to preſent thereto every ſecond Turn; and an Exception was taken to the Declaration, becauſe by the Writ the Plaintiff claimed the intire Advowſon, and by his Count he claimed but the firſt Turn, and alſo becauſe he did not alledge that he ought to have the firſt Turn; but the Exception was over-ruled, becauſe when in ſuch Caſe the Church is void, he to whom it appertains to preſent, hath the intire Advowſon. *Mich.* 13 *Jac. Windham* v. *The Biſhop of Norwich*, *Brownlow* and *Gouldsborough*, 1 *Part* 165.

Quare Impedit, &c. how brought.

Two Patrons, and the Church afterwards appropriated.

But if in ancient Time there have been two Patrons of one Church, and the one Patron was wont to preſent to one Moiety, and the other to the other Moiety, and after both the Moieties at two ſeveral Times be appropriated to one and the ſame Church or Hoſpital, and after that is held as one intire Rectory, and certified into the Court of Firſt Fruits as one Rectory, and then this Church is preſented to by the Appropriator, or by him that may happen to be the Impropriator thereof, as to an intire Rectory, upon any Diſturbance which may after happen, the Writ ſhall be *Quare Impedit præſentare ad Eccleſiam*, for that then is but one Incumbency, and one Patron of the whole Church, which I collect from *Stoughton* and *Palmer*'s Caſe, *Mich.* 5 *Car. B. R. Jones* 446.

Writ of Right in theſe Caſes.

As concerning the Writ of Right in theſe Caſes, it is ſaid by *Coke*, that where two Patrons do preſent two ſeveral Perſons to one Church, a Writ of Right lieth *de advocatione Medietatis Eccleſiæ*; but when the Advowſon is only parted betwixt Coparceners, and one is diſturbed by a Stranger, a Writ of Right lieth *de Medietate advocationis. Trin.* 10 *Jac. C. B. Richard Smith*'s Caſe, 10 *Coke* 136.

Alteration as to Name, &c. of the Church, hinders not.

The Alteration of the Church, as to its Name or otherwiſe, doth no Ways obſtruct the Patron from having this Writ of *Quare Impedit* for the Recovery of the Preſentment, if this Writ might have formerly been brought before ſuch Alteration made; therefore if a Patron hath preſented to a Provoſtſhip, and after the Name is changed, yet the ſaid Preſentment is a ſufficient Seiſin to maintain a *Quare Impedit* upon the new Name. 50 *Ed.* 3. 26. and 4 *Coke* 9. So if a Preſentment hath been made to a Church Parochial, and then it is turned to a Church Collegiate, the Patron may have a *Quare Impedit* without other Preſentment; or if Preſentment hath been made to two Churches, and after they be united, he that is made Patron by this Union may have this Writ without other Preſentment; or if Preſentment be made to an Advowſon, and after it be appropriated, and a Vicarage made in the ſame Church, the Preſentment aforeſaid is ſufficient to have a *Quare Impedit* for the Vicarage, without other Preſentment to the Vicarage; and after a Vicarage is indowed, if the Patron doth preſent thereto as to a Parſonage, it is thereby become a Parſonage, and the Incumbent may be ſued in a Writ of Annuity as Parſon, and the Patron upon ſuch Diſturbance may have his Writ as to a Church. 11 *H.* 6. 18. cited, *Mich.* 4 *Jac. C. B.* Sir *Moyle Finch*'s Caſe, 6 *Co.* 66. So if a Perſon be Patron of a Chapel that hath *Jura Parochialia*, and doth preſent thereto by the Name of a Church, and the Preſentees have been received thereto, as to a Church, it is no longer a Chapel, but a Church; and if a Diſturbance happen upon any Avoidance thereof, the Patron may have his *Quare Impedit* as to a Church. 47 *E.* 3. 5. *a.* cited *Mich.* 4 *Jac. C. B.* Sir *Moyle Finch*'s Caſe, 6 *Coke* 66. and by *Dodderidge* and *Coke*, *Hill.* 12 *Jac. Church-Wardens of Aſhton* v. *The Pariſh of Brummage*, *Roll's* 1 *Rep.* 126. And if the Defendant ſhould plead that the ſame is a Chapel and no Church, that Matter ſhould be tried by the Country, and not by the Biſhop. 45 *Ed.* 3. 6. 8 *H.* 6. 32, 37. But a Preſentation to a Church by the Name of a Chapel will not make it ceaſe to be a Church; for the Caſe was, that in the Time of *H.* 3. there were two Rectories, *A.* and *B.* and the Patron of *A.* 8 *H.* 3. purchaſes the Rectory of *B.* After which, conſtantly Preſentations were to the Church of *A. cum Capella de* B. and reſolved, That altho' the Patrons of *A.* ever after the ſaid Purchaſe, had preſented only unto the ſaid Church of *A. cum Capella de* B. yet *B.* notwithſtanding remained in

Union.

Appropriation.

Parſonage.

Chapel by Name of Church.

Trial.

Church by Name of Chapel.

Quare Impedit and Darrein Preſentment, &c.

Right a Church, and the Freehold of it in Suſpenſe. *Savil* 17, 18. It is alſo ſaid, that every Chapel ſhall be intended to be temporal, and not to belong to the Ordinary's Juriſdiction, rather than Spiritual, and within the Ordinary's Juriſdiction, unleſs that be made to appear. 6 *H.* 14. *a.* If a Church be known by two Names, the Patron may have this Writ for the Church by either Name, though it hath not had both Names Time out of Mind. 21 *H.* 8. 4. And if Iſſue be joined, that there is no Church known by that Name in the County where the Writ is brought, yet if there be any Church in the ſame County known by ſuch Name, it is ſufficient to maintain that Writ; which agreeth with the Book of 41 *Ed.* 3. 30. *Mich.* 4 *Jac. C. B.* Sir *Moyle Finch*'s Caſe, 6 *Coke* 66. And if two Churches be united, and the Advowſons become one, if it be known by the Name of both Churches, the Patron may maintain his Writ by one Name or the other, and need not mention both Names, as to ſay *Dale cum Sale. Coppledicke* v. *Tanſy*, *Hutton* 31. Neither is it requiſite in a *Quare Impedit* or *Darrein Preſentment* brought, to name the Saint to which the Church was dedicated, but only to ſay generally, *ad Eccleſiam*, or *ad Vicariam de Dale*, as the Caſe ſhall be, becauſe the Church is ſufficiently known by that Name. Dr. *Ayry*'s Caſe, *Hill.* 11 *Jac.* 11. *Coke* 22. But if there be ſuch a Miſnoſmer of the Church, that there cannot appear to be any ſuch Church, or that it be not ſufficiently differenced, ſo that it may be known from another Church, the Writ will abate. See for this 40 *Ed.* 17. *Dyer* 259. *b.* In all Writs of *Quare Impedit*, the Teſt of the Writ ought to be made the very Day it is taken out, and not at any Time before; and this by Reaſon of the Lapſe. *Regiſt. Orig.* 30. *a.*

If Two Names. Iſſue.

Need not mention both Names.

Nor Saint's Name.

So it be ſufficiently differenced.

CHAP. XXIV.

Quare Impedit *and* Darrein Preſentment, *by whom, againſt whom, and in what County to be brought; and what ſhall be ſufficient Cauſe to abate ſuch Writs, and incidently of* Jure Patronatus & Quare non Admiſit.

Jointenants, &c. to join in the Writ.

IN the next Place, Care muſt be taken that the Writ be brought by proper Perſons, as to that Tenant in Common and Jointenants ought to join in the Writ. *Paſch.* 37 *Eliz. Stanhop* v. *The Biſhop of Lincoln*, *Anderſon* 2 *Part* 23. *Mich.* 24 & 25 *Eliz. William Harris* v. *Nichols*, *And.* 63. So if an Advowſon doth deſcend to Coparceners, and a Stranger doth preſent, all the Coparceners muſt join in the Writ, becauſe he that uſurps gains the intire Advowſon againſt them all; but if the Writ be brought jointly by many, and they do vary in their Declaration as to the Title they make, the Writ ſhall abate, becauſe the Judgment ought

Coparceners.

Variance an Abatement.

to be according to the Writ, if there be not Summons and Severance; and upon divers Titles a Joint Judgment cannot be given, and they can but have one rightful Title, which muſt be intended to be jointly in them all, the Writ being brought jointly by them. *Moor* 184. 26 *H.* 8. 5. *a.* But if two Coparceners or Jointenants join in a *Quare Impedit*, and the one will plead covenouſly, he may be compelled in Chancery to join with the others in Plea. *Cary, p.* 20.

Quare Impedit and Darrein Preſentment.

If an Huſband be ſeiſed of an Advowſon in the Right of his Wife, the Church voiding, the Huſband alone without his Wife, but in the Right of his Wife, may maintain a *Quare Impedit*. *Bro. Abr.* Tit. *Baron* and *Feme* 28 and 41. For the Preſentment that is to be recovered is but a Chattel, and belongs to the Huſband, and the Words of the *Quare Impedit* are proper to ſerve him, for that he is hindred to preſent to a Church that is in his Gift; or he may, as is ſaid by ſome Books, bring an Aſſize of *Darrein Preſentment* without joining his Wife, becauſe the Preſentment alone is recoverable in the one Writ as well as the other. *Jenkins, Cent.* 1. *Caſe* 1. *Hill.* 5 *Car. C. B. Dixy* v. *The Bailiffs and Burgeſſes of Derby, Hetly* 159. *Litt. Rep.* 274. 1 *Inſt.* 351. But in *March* 47 it ſeems to be held, that the Wife ought to join with her Huſband, becauſe though the Preſentment belongs to the Huſband, yet it is in her Right. But it is made a Doubt by ſome Books, whether an Aſſize of *Darrein Preſentmeat* doth lie in ſuch Caſe for the Huſband alone; for tho' it be granted that the Writ of *Quare Impedit* doth well lie, yet it is ſaid that an Aſſize of *Darrein Preſentment* is not maintainable by the Huſband without his Wife, for that the Huſband ſhall recover nothing but his Preſentation and Damages, which is the Judgment in a *Quare Impedit*; but an Aſſiſe of *Darrein Preſentment* is a mixed Action in which the Advowſon itſelf is to be recovered; which the Huſband cannot do without his Wife joining with him. *Bro.* Tit. *Baron* and *Feme* 48. 1 *Brownl.* 159. But this ſeems contrary to what is ſaid by *Coke* in *Harris* and *Auſtin's* Caſe, 3 *Bulſt.* 38. and alſo to the Regiſter 30. *a.* and to 1 *Brownl.* 160. and to all the Books which own that a *Quare Impedit* is a Writ of higher Nature than the Writ of *Darrein Preſentment*. *Brownl.* and *Goulds.* 1 *Part* 159. *Br. Abr.* Tit. *Baron* and *Feme*, *Nu.* 28. So if a Feme Sole, being an Infant Heir, be uſurped upon, and after, ſhe being of Age and married, the Church doth void again, it is doubted whether the Huſband alone in ſuch Caſe may bring the Action; but the Court ſeemed to think that he might. *Hill.* 5 *Car. C. B. Dixy* v. *The Bailiffs and Burgeſſes of Derby, Hetley* 159. The Reaſon of the Doubt in this Caſe was, the Remedy given to Infants by the *Stat. Weſt.* 2. *c.* 5. and the Wife had but a Right left in her by the Uſurpation in her Infancy before her Marriage, and ſo ought to join with her Huſband to recover that Right; but if the Huſband or Wife had by Preſentation reveſted the Poſſeſſion of the Advowſon in the Wife, then the Court was clear of Opinion, the Huſband upon any other Diſturbance might bring his Action alone without his Wife. However the Writ may be brought by Huſband and Wife, when the Advowſon is the Huſband's, in the Right of his Wife; by *Coke, Paſch.* 31 *Eliz. Hall's* Caſe, 7 *Coke* 26. *Trin.* 29 *Eliz. Specot* v. *Biſhop of Exeter, Goulds.* 35. *Marſh, Caſe* 75.

Baron and Feme.

What recovered in *Quare Impedit.*

And what in a *Darrein Preſentment.*

Feme Sole uſurped upon.

Preſentation reveſted.

As the Writ muſt be brought by proper Perſons, ſo that it may not abate, it muſt be brought againſt proper Perſons; and therefore when by the Judgment in a *Quare Impedit*, the Inheritance, Eſtate or Intereſt of the Patron is to be deveſted, the Patron who preſented ought to be named in the *Quare Impedit:* Firſt, Becauſe the Patronage ſhould be elſe recovered

Againſt whom to be brought, when, &c.

Quare Impedit and Darrein Presentment.

Patron who presented.

recovered against him who hath nothing in the Patronage, *viz.* the Clerk; and it is not Reason that he who is Patron should be dispossessed, and outed of his Patronage when he is a Stranger, and not Party to the Action, especially when he may be made a Party. Secondly, Because at the Common Law (till altered by Statute 25 *E.* 4. *cap.* 7.) the Incumbent could not plead the Patron's Title, or any Plea that did concern the Right of the Patronage; and therefore it is contrary to Reason, that he should be named only that could neither defend his Patron's Right nor his own; upon which Reasons, it is said by *Coke*, that it was agreed by the Court, that the Patron in such Case shall be named. *Pasch.* 31 *Eliz. C. B. Hall*'s Case, 7 *Coke* 26. and *Savile*, *Case* 184. But this Case reported by *Coke*, being afterwards moved, as appears, 2 *Leon.* 58. *Mich.* 32 *Eliz. C. B. Hall* and *The Bishop of Bath*'s Case, *Drew* Serjeant argued for the Plaintiff, that the Writ was well brought without naming the Patron: First, Because the Writ shall not abate if the Patron Defendant die pendant the Writ. Secondly, Because the Plaintiff might not know who had presented the Incumbent whom he found a Disturber. Thirdly, Because if such Patron must of Necessity be named, supposing that he should die before the Writ brought, he that hath Cause of Action would be without Remedy. Upon which Reason, *Anderson* and *Periam* Justices said, that the Writ was good in such Case without naming the Patron. And *Anderson* put this Case, if one by Usurpation present his Clerk who is received, and thereby having gained the Patronage, doth grant it to another, against whom is the Writ to be brought? *Walmsly* (who it seems was for the naming the Patron) said against the Grantee. *Anderson* doubted. But what Judgment was given is not said, but the Law is commonly taken to be, that the Patron ought to be named in the Writ, or it will abate. And so it is said, *Brownl.* and *Goulds.* 1 *Part* 158. and in *Winchcomb* and *Pulleston*'s Case, *Hob.* 193. And so it was resolved, *Mich.* 20 *Jac. B. R.* in the Case of Sir *George Savile* v. *Richard Thornton*, 2 *Cro.* 651. *Palm.* 311. *Jon.* 12. *Roll.* 2 *Rep.* 239. And altho' the Patronage be gained by the Presentation, Admission and Institution of a Clerk by Usurpation, yet such Patron ought to be named with the Incumbent in a *Quare Impedit*, *Jenkins*, *Cent.* 5. *Case* 18, and delivered by *Frowick* for clear Law. *Trin.* 19 *H.* 7. *Kell.* 53.

But the Law otherwise taken.

Aliter, if the Inheritance, &c. shall not be devested.

But when the Inheritance, Estate or Interest of the Patron in the Patronage shall not be devested by the Judgment, if any other be named in the Writ as a Disturber, it is not needful to name the rightful Patron, or he that presented as such. *Pasch.* 31 *Eliz. C. B. Hall*'s Case, 7 *Coke* 26. Therefore where the Presentation was only to be recovered, and not the Advowson, nor the Patron put out of Possession, the Writ was adjudged good without naming the Patron. 7 *H.* 4. 25, 37. *Savile*, *Case* 184. Or if the King doth present, and the Clerk is admitted and instituted, the *Quare Impedit* must be brought for Necessity against the Bishop or Incumbent, for that it doth not lie against the King, nor did it against the Pope. 12 *H.* 8. 12. 4 *H.* 7. 15, &c. *Winchcomb* and *Pulleston*'s Case, *Hob.* 193, and by *Frowick*, *Trin.* 19 *H.* 7. *Kell.* 53. The same may be said as to an Assise of *Darrein Presentment*, 1 *Brownl.* and *Golds.* 158. And as the King as Patron cannot be named in the Writ, so need not the King name any Patron, when he sues, but only the Incumbent. 17 *Ed.* 2. 11. *Pasch.* 31 *Eliz. C. B. Hall*'s Case, 7 *Coke* 26. *b.* Yet it is said, that if the King claim to present by Lapse or Simony, the Patron ought to be named, although the Patron be only a Grantee of the next Avoidance. *The King* v. *Bishop of Litchfield*, &c. *Noy* 151.

King's Clerk.

Patron need not be named.

But

Against whom, and when, and how brought.

But the contrary of this hath been ſince adjudged, *viz.* that where the King brings a *Quare Impedit*, and makes Title to preſent by Reaſon of Simony, that the Patron need not be named in ſuch Action, for his Title is not in Queſtion, but admitted, and the King in ſuch Caſe claims in Affirmance of the Patron's Title, and in his Right, and the Patron ſhall not be put out of Poſſeſſion by Recovery in ſuch Action, but hath had the Fruit of his Preſentment; therefore the Patron need not be made a Party in the Suit, but the Clerk is to be thereby removed for the Simony; by three Juſtices againſt *Charlton* Juſtice, who doubted. *Paſch.* 33 *Car.* 2. *B. R. Dominus Rex* v. *Archiepiſcopum Ebor'* and *Sowton*, 3 *Lev.* 16, and *Mich.* 36 *Car.* 2. *C. B. Dominus Rex* v. *Piget*, 3 *Lev.* 206.

If the Biſhop hath collated by Lapſe.

If the Biſhop hath collated by Lapſe, it is ſufficient to name the Incumbent only. 9 *H.* 6. 32. by *Babington* and *Noy* 851. So where the Defendant is a Diſturber without any Preſentment, 7 *H.* 4. 26, or upon a void Preſentment, as when a Dean is preſented by the Dean and Chapter to a Living of their Gift. *Jenk. Cent.* 4. *Caſe* 18. *p.* 199, or if the Incumbent be deprived, and doth keep himſelf in, 4 *Ed.* 18, which Caſes were cited by Serjeant *Fenner*. *Mich.* 28 & 29 *Eliz. C. B. The Queen* and *Middleton*'s Caſe, 1 *Leon.* 45.

Incumbent ought to plead the Abatement.

When the Patron is not named in the Writ, the Incumbent may plead it in Abatement of the Writ, but the Ordinary cannot, for the Ordinary's Office and Acts are not joined with, nor do depend upon the Patron's Right as the Incumbent's do; by *Hobart*, in Sir *William Elvis*'s Caſe v. *The Archbiſhop of York, &c. Hobart* 317.

When the Patron ought to be named.

When ever the Patron is not named in the Writ when he ought to be, the Incumbent is to plead the ſame, if he will have any Advantage of it; and if he doth not plead it, altho' the Jury doth find, that the Incumbent is of the Preſentation of one who is not Party to the Writ, yet this finding of the Jury will not avail the Incumbent, it being but of Office only, and the Incumbent not taking Advantage of it by Plea hath waved it; but if ſuch Matter be pleaded, it doth not abate the Writ, but only makes it abatable, and ſuch Matter as makes a Writ abatable only, is not aſſignable for Error. *Mich.* 6 *Ed.* 6. *Dyer* 76. *Jenk. Cent.* 5. *Caſe* 36. So 'tis ſaid, if the Writ be brought againſt the Biſhop and Incumbent, without the Patron, the Writ is not *prima facie* void, but voidable by Plea, *viz.* of the Incumbent, and becauſe there be two Caſes, as 'tis ſaid, in which the Patron ſhall not be named, that is, if the Incumbent be preſented by the King, or by the Pope, the Incumbent ought to ſhew of whoſe Preſentation he is in, that it may appear to the Court that his Patron ought to be named, for it ſhall not be intended, but rather the contrary; and a Fault that abates the Writ *ipſo facto*, ought to be apparent to them as Judges; alſo the Party ought to conclude to the Writ, in all Caſes when he would have it to be abated, and if the Defendant ſhall ſay, that he is in *Ex Præſentatione A. B.* who is in full Life, *&c.* this is not offered as any Plea in Abatement, being he doth not conclude to the Writ, but pleads it as in Bar to the Action; and by *Ley* Chief Juſtice, the Averment of the Life of the Patron in ſuch Caſe is ſuperfluous, and not traverſable; and by him, the naming of the Patron is not for the Benefit of the Patron, but of the Incumbent; and ſo if he will not take Advantage of his not being named, the Writ ſhall not be abated. And the Court agreed, that the Party having admitted the Writ to be good in the Court of Common Pleas, by not pleading there in Abatement of it, he ſhall be concluded to alledge it upon a Writ of

Writ not void, but voidable.

Concluſion to the Writ.

Writ abated, &c.

Where the Court ought to abate the Writ, &c. *ex Officio.*

Collateral Matter.

Error brought. Alſo the Court reſolved, That the Court of Common Pleas ought not to have abated the Writ *ex Officio* in ſuch Caſe, neither ought the King's Bench *ex Officio* upon a Writ of Error, to reverſe the Judgment, upon an Allegation of ſuch Omiſſion. And therefore they took a Difference when the Writ is vitious in Subſtance, or when it appears to them thereby, that the Patron hath not Cauſe of Action, there the Court ought to abate it *ex Officio*, but when it is abatable by collateral Matter of Fact out of the Writ, of which they cannot take Notice as Judges, it ſhall be otherwiſe, if it be not pleaded, as here, if he be Patron, or if he be in Life. *Mich.* 20 *Jac. B. R. Thornton* v. Sir *George Savil, Palmer* 311. 2 *Cro.* 651. *Jones* 12. 2 *Rol. Rep.* 239.

Bill to diſcover the Patron.

And note, That if Doubt be who is Patron, a Bill may be in Chancery to diſcover him, whereby a *Quare Impedit* may be brought; Ordered, 2 *Car. Tothil* 230.

Where the Incumbent muſt be named.

Not only the Patron, but alſo his Incumbent muſt be named in the Writ, for if an Incumbent at the Time of purchaſing the Original Writ be admitted and inſtituted at the Preſentation of any one, altho' the Ordinary and his Patron be named, yet ſuch Incumbent that is not mentioned ſhall not be removed, but only the Patronage recovered; by *Dodderidge* and *Coke, Trin.* 13 *Jac. B. R. Harris* v. *Auſtin, Bulſt.* 3 *Part* 28. *Jenkins, Cent.* 5. *Caſe* 18. *Brownl.* and *Gouldſb.* 1 *Part* 158. *Paſch.* 13 *Eliz. Hall* v. *The Biſhop of Bath* and *Wells* and *Manton, Savil's* Caſe 184. *Mich.* 3 *Jac. Boſwell's* Caſe, 6 *Coke* 51. 9 *H.* 6. 32, and 56. 19 *H.* 6. 68. *b.* 5 *Ed.* 4. 115, and by *Hobart, Paſch.* 17 *Jac.* in Sir *William Elvis's* Caſe v. *The Archbiſhop of York, Taylor* and *Biſhop, Hobart* 316. And tho' a Clerk be received by the Ordinary upon a void Preſentment, in which Caſe he is in only as it were by wrongful Collation, and the Ordinary will not receive the true Patron's Clerk, ſo that he is driven to his *Quare Impedit*; yet if ſuch Incumbent be not named therein he cannot be removed, by the Opinion of the Chief Juſtice *Hobart, Hill.* 17 *Jac. Gawdy* v. *The Archbiſhop of Canterbury*, &c. *Hobart* 302. And as the Incumbent muſt be named, ſo he muſt be named with his proper Addition; therefore when the Dean of St. *Paul's* was promoted to the Archbiſhoprick of *Dublin*, and a *Quare Impedit* was brought againſt him as Dean, wherein he was not named Biſhop, altho' after Election, and before Conſecration, it was reſolved, that in all Caſes concerning the Lands of the Dean he ſhall be called Dean, but in Actions, as *Quare Impedit*, &c. he ſhall be named Biſhop elect. 5 *E.* 2. *Fitz. Brief* 800.

By proper Addition as Biſhop elect, &c.

Ordinary when to be named.

In ſome Caſes it is neceſſary alſo to name the Ordinary in the Writ, for if the Patron be diſturbed in preſenting, and the Church be not filled, the Ordinary is to be named in the Writ, or elſe he will collate hanging the Suit by Lapſe; whereas if he be named, he muſt either diſclaim, and then Judgment may be had againſt him, or elſe he muſt plead, and ſo allow himſelf to be a Diſturber, and being made Party to the Action, he is barred of the Advantage of Lapſe. *Mich.* 3 *Jac. Lancaſter* v. *Lowe,* 2 *Croke* 93. *Hill.* 9 *Car. Lort* v. *The Biſhop of* St. *Davids, Jones* 332. *Paſch.* 17 *Jac.* in Sir *William Elvis's* Caſe v. *The Archbiſhop of York, Taylor* and *Biſhop, Hobart* 320. *Regiſt. fol.* 31, and by *Hobart, Mich.* 15 *Jac. Brickhead* v. *The Archbiſhop of York, Hobart* 200. and *Jenk. Cent.* 1. *Caſe* 74. And note, that not always the Biſhop within whoſe Dioceſe the void Church is, but ſome other, may be the Ordinary that ought to be named, for in the Time of Vacancy of the Biſhop's See, or if the Biſhop be *in remotis* about the Affairs of the King, or State, then the Preſentation muſt be made to the Guardian of the Spiritualties, which

Guardian or Vicar General.

commonly is the Dean and Chapter, or to the Vicar General which ſupplieth the Room and Place of the Biſhop. 17 *Ed.* 3. 23. *b.* *F. N. B.* 93. And it is ſaid, that if a Biſhop maketh a Guardian of the Spiritualties, and then go beyond the Sea for any of the Cauſes aforeſaid, and the Patron doth preſent his Clerk to the Guardian of the Spiritualties in the Abſence of the Biſhop, and he refuſeth to admit him into the Benefice or Church without ſufficient Cauſe of ſuch his Refuſal, that the Patron in ſuch Caſe may have and maintain a *Quare Impedit* againſt the Guardian of the Spiritualties; by *Paſton* and *Aſcough* Juſtices. 22 *H.* 6. 29. *b.* So if the Church be filled by the Biſhop upon the Account of Lapſe, and the Patron will bring his *Quare Impedit*, the Patron muſt name the Biſhop with the Incumbent, for if the Writ be only againſt the Incumbent, altho' that he anſwer that he doth not claim any Thing in the Patronage, but that the Biſhop did preſent him by Lapſe; yet becauſe neither the Patron, nor the Biſhop, who in this Caſe is in the Place of the Patron, are named, the Writ will abate; for if ſuch Writ was maintainable, every Patron by Covin between a Stranger and Incumbent, may be outed of his Advowſon, 42 *Ed.* 3. 7. and therewith agree 9 *H.* 6. 30, 31. 3 *H.* 4. 2, 3. 13 *H.* 8. 13, vouched by *Coke*, *Paſch.* 31 *Eliz. C. B. Hall's* Caſe, 7 *Coke* 26.

Writ abated, &c.

When Church filled by Lapſe.

But if the Church be full, ſo that there is no Danger of Lapſe, it is in vain to name the Ordinary, and ſo to arm him with a Plea who now can do no more Hurt or Good, but only to be anſwerable as to Damages, (if he be anſwerable or not, *Quære*, and ſee *Jenkins*, *Cent.* 1. *Caſe* 19,) which the Patron and his Incumbent will be ſufficient to anſwer. And if the Biſhop be named, and doth diſclaim, it is beſt for the Plaintiff to take his Judgment, and not to maintain him a Diſturber, for if he doth, and it be found againſt the Plaintiff, *Hobart* holds, that the Biſhop's Collatee for Lapſe, hanging the Suit, ſhall not be removed, by reaſon the Plaintiff can have no Judgment nor Writ, *non obſtante reclamatione Epiſcopi*, he being barred as againſt the Biſhop. And *Hobart* further adviſeth a Plaintiff, not to name more Diſturbers in his Writ than are likely to have reaſonable Titles, becauſe every Diſturber will make a ſeveral Title, and traverſe, or confeſs and avoid the Plaintiff's Title, whether he himſelf hath good Title or not; and ſo 'tis better not to name them, for they can but preſent and get their Clerks in, hanging the Suit, which will be removed by a Writ to the Biſhop, if their Titles be not good; but ſuch as have reaſonable Pretence of a Title are fit to be named, that their Titles may be diſcuſſed directly at the *Miſe* of the Parties, and not left to an After-game, *viz.* the Title to be tried between the Incumbent that comes in, hanging the Writ, and the Clerk that is admitted upon the Writ to the Biſhop, whom the Biſhop may not refuſe upon account of the Church's being full of the other, (but *Quære* as to that). Sir *William Elvis's* Caſe v. *The Archbiſhop of York*, *Taylor* and *Biſhop*, *Hobart* 320.

Aliter when no Danger of Lapſe.

Not to name more Diſturbers than needful.

But as to the naming of the Biſhop in the Writ, to prevent his having the Advantage of a Lapſe, it may be ſaid that it is not, or at leaſt not generally true, that the bringing of the Writ againſt the Biſhop ſhall prevent him from collating, or prevent the Lapſe; for if a *Quare Impedit* be brought againſt a Biſhop for a Diſturbance, and the Plaintiff doth lay in his Count the Diſturbance to be after the Date of the Writ, he ſhall be barred, and the Biſhop may collate when his Time by Lapſe comes. *Mich.* 15 *Jac. Brickhead* v. *The Archbiſhop of York*, *Hobart* 199. And ſo I ſuppoſe he may in all Caſes, when the Plaintiff is barred by his Plea.

Biſhop's Diſturbance laid after the Date of the Writ.

And

Writ abated, &c.

And *Hobart* puts another Caſe, in which the Biſhop, tho' named in the Writ, may collate by Lapſe *Pendente lite*, and his Clerk ſhall injoy the Benefice, which I ſhall ſet down with his Reaſons in his own Words.

Caſes put by Juſtice *Hobart*, that the Biſhop, tho' named in the Writ, may collate by Lapſe *Pendente lite*, &c.

Suppoſe (ſaith he) that I have Right to preſent to an Advowſon, but I preſent not, nor am any way diſturbed, but the Church remains void and open to me; but before the ſix Months incurred, or before Collation made by the Ordinary, I bring a *Quare Impedit* againſt him, whether now the Ordinary be debarred of preſenting by Lapſe hanging the Writ? I am of Opinion that he is not debarred. And firſt, it were a Caſe full of Miſchief, that the Ordinary, bearing himſelf never ſo juſtly and ſincerely, ſhould againſt Law and Reaſon be ſubject to cauſeleſs Actions and Charges, and defrauded of his due Lapſe, and the Church kept void, *Eccleſia viduata*, by the Fraud of the Patron, by a fraudulent Action as long as he liſt. For if he brought no Action, the Lapſe ſhould run, and now by bringing of a feigned Action he ſhall ſtop the Lapſe in the Ordinary, and by Conſequence, it will not come to the Metropolitan, nor to the King. But to examine the Reaſon and Authorities:

Unreaſonable Puniſhment.

Can there be any Thing more unreaſonable, than that a Man ſhould make Benefit of an unjuſt Suit, as in this Caſe the Plaintiff ſhould; or be puniſhed doing nothing amiſs or againſt his Office, as the Defendant ſhould? But you will ſay to me, it is an Effect of Law, and *Executio juris non habet injuriam*; for when the Biſhop comes in, he is charged by the Declaration with the Diſturbance, which if he doth not avoid, he ſhall be taken as a Diſturber, and then indeed he cannot collate, or his Collatee ſhall be removed; therefore when he doth appear, he doth but caſt an Eſſoin, and tho' that do not make him a Diſturber to maintain the Writ, becauſe it is after the Writ, yet it faſteneth upon him the Charge of the Diſturbance laid in the Declaration, ſo that he ſhall not be

Ne diſturba pas.

received after that to plead *Ne diſturba pas*, or the ordinary Plea which amounts to as much; for that Plea pretending Innocency, muſt (as all other the like Pleas) be offered the firſt Day upon the Appearance, for

Oppoſitum in objecto.

Delay makes him nocent, and ſo is *oppoſitum in objecto*. Then again, if the Ordinary plead his own Plea of Acquittal, amounting to *Ne diſturba pas*, the Plaintiff may pray a Writ to the Biſhop, and ſo remove his Clerk, becauſe he comes in hanging the Writ; and thus it is a *Dilemma* made by Law, and not by Fraud of the Party; and the Rule in the Regiſter, *fol.* 31, is ſo, That if the Dioceſan be named Defendant in the *Quare Impedit*, he ſhall never preſent by Lapſe.

Reſponſ. As to *Ne diſturba.*

To this I anſwer, ſays he, That if the Biſhop do not plead according to his Innocency, that the Proceedings ſhall be againſt him, and the Conſequence of it as againſt a Diſturber; but if he plead that he did not diſturb, which is true, it ſhall be taken according to the Caſe, that he did not diſturb before the Action brought, neither unlawfully, nor by lawful Collation; but it can never be underſtood to deny or renounce any actual Collation ſince, for if he ſhould plead that, it were in vain, and to no purpoſe, as hath been ſaid. Now then if he did not diſturb before the Writ purchaſed, and therefore hath not deſpoiled himſelf of his Right of Collation in its due Time, and then collates by Lapſe lawfully when his Time comes, when the Patron hath wilfully and without his Fault ſurceaſed his Time, and then pleads that he claims nothing but as Ordinary, *&c.* without mentioning his Collation hanging the Writ, becauſe it is impertinent (as it hath been ſaid:) neither indeed (ſays he) do I ſee how he can be received to plead it, no not by the Way of ſaving it by Proteſtation, as upon Attornment to ſave Privilege of Waſte. But cer-

tainly

tainly it is not neceſſary, tho' upon ſuch Plea the Plaintiff may have a Writ to the Biſhop, he may perhaps be compellable to admit the Clerk of the Plaintiff in Obedience to the Writ; but yet it ſhall not work a Removal of the Biſhop's Clerk, but he ſhall retain the Benefice as having the better Right, like unto the Caſe and Reaſon where *A.* brings a *Quare Impedit* againſt *B.* and hanging the Suit a Stranger preſents, and his Clerk is inſtituted, *&c.* And then *A.* hath a Judgment againſt *B.* and a Writ to the Biſhop, *Non obſtante reclamatione B.* the Biſhop ſhall receive the Clerk of *A.* without diſputing of the Right of *A.* and the Stranger; but yet if the Stranger hath the better Right to the Patronage, his Clerk ſhall retain the Benefice, and ſo *e converſo.* Jure Patronatus.

Note, That the Writ to the Biſhop in this Caſe ſhall not be with the Clauſe of *Non obſtante Reclamatione Epiſcopi*; for he makes no Claim, as in the Caſe of Diſturber, who ſets up a Title and Pretence of Right. Beſides, the Ordinary's Plea neither makes the Patron's Title better, nor his own worſe, than are proper to them both, and as they were before, neither doth he thereby diſclaim any Right he hath as Ordinary. *Non obſtante Reclamatione, &c.*

But now I put another Caſe (ſays he:) If my Church become void, and I preſent to the Biſhop, and ſo alſo doth another Perſon that hath no Right, in which Caſe the Biſhop, tho' he may receive at his Peril, yet doth (as he may lawfully do) refuſe to receive either till the Right be inquired, without doing himſelf any Act of Diſturbance. In this Caſe, if the true Patron doth bring his *Quare Impedit* againſt the Diſturber only, then the Biſhop may collate by Lapſe without Queſtion; but in that Caſe, if the true Patron name the Biſhop a Defendant together with the Diſturber, and then the Biſhop comes in and pleads, that he claims nothing but as Ordinary, *&c.* and the Plaintiff hath an Award of a Writ to the Biſhop, with a *Ceſſet Executio*, *&c.* and then recovers againſt the Diſturber, and the Biſhop in the mean Time collates by Lapſe, in that Caſe perhaps the Biſhop's Clerk may be removed, for it differs much from the former Caſe; for here was a true and not a feigned Diſturbance, whereunto the Ordinary gave Way ſo far, that the Plaintiff could not get his Clerk received, but was driven to his *Quare Impedit:* For if he had proceeded to his *Jure Patronatus* without *Quare Impedit*, and the Time had incurred, the Biſhop might have preſented to Lapſe remedileſs: And therefore ſince he did his Indeavour to preſent, and was interrupted by a Stranger, and the Ordinary alſo refuſed his Clerk, for which he had rather have an Excuſe than a Juſtification, and now both being made Defendants, and the Plaintiff's Title is approved againſt them both, as if it had been ſo from the Beginning; it ſhould be hard that the Biſhop ſhould make Advantage of his Refuſal, which now appears to have been againſt Right, and the Party to the Suit. And there is alſo this Note made in the Margin of the Book, *viz.* That it is not ſo much the Preſentation of the Diſturber as the Biſhop's Refuſal of the Patron's Clerk that preſents, which intitles him to his *Quare Impedit.* And therefore it is enough for a Biſhop to eſcape the Charge of a Diſturber, and not alſo to make Advantage of a Lapſe cauſed by himſelf. *Mich.* 15 *Jac. Brickhead* v. *The Archbiſhop of York*, *Hobart* 200, 201. Writ againſt the Diſturber only. Collation by Lapſe. *Aliter*, if Biſhop named. Upon a true Diſturbance. *Jure Patronatus.* Biſhop not to take Advantage, *&c.*

But as to this latter Caſe put by *Hobart*, I cannot but think that the Biſhop ought to have the Turn by Lapſe, altho' that he be named in the Writ, notwithſtanding he did admit and inſtitute the Clerk of the Plaintiff after the Church was become litigious, that is, if he was not a Diſturber by any other Act.

Jure Patronatus.

Quære, If in the laſt Caſe the Biſhop ought to have the Turn by Lapſe.

For firſt it is granted, that in ſuch Caſe it is the Biſhop's Duty to refuſe both Clerks until the Right be determined. Alſo it is granted, that the Biſhop is not bound of Office to inquire of the Right by awarding a *Jure Patronatus*, but at the Prayer of the Party (which I ſuppoſe not to be made,) ſo that the Biſhop before that he is named in the Writ is altogether as Innocent, as if no Preſentment had been made to him before the Writ was brought. Thirdly, It is granted, that if the Biſhop be no Diſturber, he ſhall have the Benefit of a Lapſe, if it falls. Fourthly, It is granted, that in this Caſe, if the Biſhop be not named in the Writ, he may collate at the End of ſix Months. And I cannot ſee why, in this Caſe, the making of him a Party in the Writ ſhould make him a Diſturber. that was none before, more than the Bringing the Action before any Preſentment was made ſhall faſten a Wrong upon the Biſhop who is named therein. And I ſuppoſe that the Biſhop's Plea, that he claims nothing but as Ordinary, cannot be conſtrued to diſclaim his Right as Ordinary, *viz.* his Lapſe when it falls to him, ſo that his Collatee may not defend himſelf againſt him whom perhaps the Biſhop may be forced to admit upon him; and with this *Hobart* accords in the former Caſe, and why then may it not be as well allowed in the latter?

A Difference in the Caſes.

But *Hobart* ſaith, that the Caſes differ: Firſt, In that in the latter Caſe there is not a feigned but a real Diſturbance, whereunto the Ordinary gave Way ſo far that the Patron could not get his Clerk received. To which I anſwer, That 'tis true, here is a real Diſturbance, but the Biſhop makes it not, neither doth he further give Way to it than by Law he is bound to do, neither doth the Biſhop by ſuſpending any Admiſſion hinder the Patron's Clerk from being admitted; for the Biſhop may be required to a *Jure Patronatus*, which if he doth refuſe he may be ſued, and maintained to be a Diſturber, and ſhall not have the Advantage of Lapſe. And tho' it be ſaid by *Hobart*, that if the Patron doth proceed to a *Jure Patronatus*, and the Time doth incur, the Biſhop will collate remedileſs. I anſwer, If the Time doth incur thro' the Biſhop's Fault by delaying, he ſeems to be a Diſturber, even as if he had refuſed to award the *Jure Patronatus*. And if the Patron (who hath ſix Months allowed him in which he may preſent) doth not preſent ſo ſeaſonably that he may have the Advantage which the Law doth give him by the *Jure Patronatus*, it is his own Fault, and he is no more to be thought worthy of Relief by this Device of naming the Biſhop in the Writ, than if he ſhould ſuſpend preſenting until ſuch Time that the ſix Months are ſo near at an End, that the Biſhop hath not Time to examine his Clerk before they paſs; in which Caſe the Biſhop may juſtify his collating by Lapſe. So that the Patron is not without his Remedy whereby he may ſave his Intereſt, unleſs it be thro' his own Neglect, altho' he ſhould not bring his *Quare Impedit* firſt; for if he be not ſatisfied with the Verdict given upon an Inquiry by a *Jure Patronatus*, upon which his Adverſary's Clerk is admitted, which prevents a Lapſe, he may have afterwards a *Quare Impedit*, and remove ſuch Clerk and have his Preſentment. Beſides, the Patron is in as good a Caſe now, if the Naming of the Biſhop in the Writ will not hinder the Lapſe, as Patrons were before ſuch Courſe was in Practice. And *Jenkins* ſaith, That at this Time, *viz.* in *Edward* VI.th's Time, Biſhops were rarely made Parties in *Quare Impedits*, in Reverence of their Perſons. *Cent.* 5. *Caſe* 36. *p.* 22. And that the Practice of making them Parties is not antient, appears by the Statute of *Weſt.* 2. *cap.* 5. made the Thirteenth Year of *Edward* the Firſt; by which it is Enacted, That in Writs of Quare Impedit and Darrein

***Jure Patronatus* ought to be required.**

Patron's Delay.

***Quare Impedit* after a *Jure Patronatus*.**

Preſentment **Damages ſhall be awarded; that is, to wit, if the Time of ſix Months paſs by the Diſturbance of any, ſo that the Biſhop do confer to the Church, and the very Patron loſeth his Preſentation for that Time, Damages ſhall be awarded for two Years Value of the Church. And if the ſix Months be not paſſed, but the Preſentment be deraigned within the ſaid Time, then Damages ſhall be awarded to the half Year's Value of the Church.**

Quare Impedit, the Writ, &c.

Damages awarded.

Now if ſuch Practice had been then known, or had been thought ſufficient to have prevented the Biſhop from having the Benefit of a Lapſe, in caſe the Preſentment was not recovered within the ſix Months, why ſhould two Years Value of the Church be given to recompence the Loſs of the Turn by Lapſe, which would not be but only through the Patron's Neglect to name the Biſhop, if that would ſerve to prevent him? For if that the putting the Biſhop's Name in the Writ would hinder the Biſhop of Lapſe, the Parliament's giving of two Years Value of the Church as Damages was altogether uſeleſs and vain, and little Reaſon or Need could there be to inſert that Clauſe in the Statute that gives the two Years Value in Damages, if this Practice was then known, or ſuppoſed to have that Effect in Law that now it is taken and ſuppoſed to have, *viz.* that naming the Biſhop in the Writ will hinder the Loſs of the Preſentment by Lapſe, and the Benefit of the double Value of the Church is thereby waved, as it were, by the Plaintiff. If it be ſaid that the Law was antiently ſo, but not the Practice, in Reverence to the Perſons of Biſhops: I reply, That this ſpeaks that all Patrons when their Church became litigious did in thoſe Days, *viz.* before the Statute, and at that Time, loſe their Preſentments, and only becauſe they would not make Biſhops Parties in *Quare Impedits* out of Reverence to them; and that they ſhould ſo do, is as incredible as may be, eſpecially before this Statute for Damages was made, by which the Miſchief of loſing the Turn by Lapſe is repaired. And with this Opinion the Author of the Expoſition of the *Terms of Law* doth agree, where he ſaith upon the Term *Quare Impedit*, If the Plea be depending between two Parties, and be not diſcuſſed within ſix Months, then the Biſhop may preſent by Lapſe, and he that hath Right to preſent may recover his Damages, as appeareth by the Statute of *Weſt.* 2. *c.* 5. And the Archbiſhop of *Canterbury* putting this Caſe to *Frowick* Chief Juſtice in theſe Words, Whether he that hath nothing offended in the Law of the Land ſhall be puniſhed, or compelled to do a Thing in Derogation of his own Right and Liberty, as he may that is Party to a Wrong? It is ſaid by the Reporter *Keilway*, it ſeems that he ought to be at his Liberty to make Collation, notwithſtanding the Iſſue be found for the Plaintiff; yet he ſets down no Reſolution by *Frowick*, but a *Quære*. *Mich.* 20 *H.* 7. *Keil.* 57. *b.*

Naming the Biſhop in the Writ to prevent a Lapſe, not antient Practice.

Benefit of double Value.

To repair the Loſs.

Quære.

And I ſee no Reaſon why it ſhould be thought hard againſt the Patron, if the Biſhop may not be hindred from collating by being made a Party to the Writ, if the Preſentment be not recovered within the ſix Months, ſeeing that if he doth not recover within ſuch Time by the Diſturbance of any, ſo that the Biſhop doth confer to the Church, and the very Patron loſeth his Preſentation, as the Words of the Statute are, the Patron ſhall have two Years Value of the Church. And in Truth, it is much better for Patrons if the Naming of the Biſhops in the Writs doth not hinder a Lapſe, or if it doth hinder, that they do not name them in the Caſe put, for thereby they loſe in Damages ſo

Value is for the Patron's Advantage.

Quare Impedit, the Writ, &c. And would prevent Law-Suits, &c.

ſo much as would go far at leaſt in the repaying them the Expences of a tedious and coſtly Suit. And then alſo Diſturbers of Patrons and Law-Suits thereupon would not be ſo frequently heard of, nor Churches be kept void, when the Right of preſenting is queſtioned for ſome Years, as upon the Suppoſition that the Naming the Biſhop in the Writ will in ſuch Caſe ſtop him from collating, there needs muſt be; to avoid which, by the Statute of *Weſt.* 2. *c.* 5. the Parliament did not take away, but ſeems to ſuppoſe the Biſhop's Power of collating, if the Recovery was not within the ſix Months, but gave Damages to the Patron for the Loſs.

A common received Opinion.

To all this I may add, that I never found any Caſe in which it hath been judicially determined, that to make the Biſhop a Defendant in a *Quare Impedit* when the Church is litigious, doth obſtruct his Title to collate; yet becauſe ſome have been of that Opinion, as *Hobart* before, and 2 *Croke* 93. *Mich.* 3 *Jac.* in *Lancaſter* and *Lowe*'s Caſe, and *Jenkins*, *Cent.* 1. *Caſe* 74. and becauſe Biſhops in ſuch Caſe having executed the Writs of them that have recovered, and their Incumbents have ſet down by it, ſo it is even commonly received, that the Biſhop's Collatee is actually removed by the Reception of the Patron's Clerk. And in the 49 *E.* 3. 15. *a.* 'tis there ſaid, where the Biſhop is found to be a Diſturber he ſhall never have Advantage of Lapſe; which doth imply, that barely making him a Defendant without proving him guilty of ſome Diſturbance will not prevent it, for the Biſhop was a Defendant in that Caſe of 49 *E.* 3. And in the 17 *E.* 3. 71, there is an Opinion which is ſaid to be held by ſome, that if in a *Quare Impedit* the Plaintiff was eſſoined, and did not after that recover till after the ſix Months were paſſed, and the Biſhop had preſented, that he ſhould recover only the half Year's Value, by reaſon he had delayed his Recovery himſelf by being eſſoined; but this Opinion is there denied, and it is holden, that the Plaintiff ſhall not ſuffer for uſing an Eſſoin, but may recover his two Years Value notwithſtanding: This Caſe alſo ſhews, that the Practice of making the Biſhop a Party was not then known, or not uſed; for 'tis taken for granted, that after ſix Months the Biſhop may preſent; but if making him Party would prevent his Preſentation according to the Opinion there recited, the Plaintiff in no Caſe ought to recover the two Years Value, for it would be his Fault not to make the Biſhop a Party to prevent it.

Diſturbance to be proved.

Eſſoin.

If Biſhop may not preſent, Plaintiff ought not to recover in Value.

Writs to be brought in a proper Place.

That a Writ may not abate, not only proper Perſons muſt be named therein, but the Writ muſt be brought in a proper Place; for 'tis ſaid, that Writs of *Quare Impedit* and *Quare Incumbravit* ſhall be always brought where the Church is. 38 *H.* 6. 14. *vide* 4 *Ed.* 3. 9, otherwiſe it is in the King's Caſe. And ſo for an Advowſon in *Wales*, the Writ ſhall be brought in the next *Engliſh* County, for they cannot award a Writ to the Biſhop, 11 *H.* 6. 3, and Judgment in ſuch Caſe ſhall be given in the Action at the Aſſizes where 'tis tried, and Deceit lies as upon a Judgment had in this Action upon Default, if no Summons was made. *Brownlow* and *Gouldſborough*, 1 *Part* 160. And ſo 'tis ſaid, that the Writ may not be brought before the Juſtices of the Grand Seſſions. *Hill.* 9 *Car. B. R. Cort* v. *The Biſhop of St. Davids*, *Owen* and *Pritchard*, 1 *Croke* 341 and 348. But *Vaughan* Chief Juſtice makes a Difference between Churches in Lordſhips, Marchers of *Wales*, and Churches within the antient Shires, or of the Principality of *Wales*. In the firſt Caſe he agrees the Law to be, that for ſuch Churches the *Quare Impedit* was to be brought in the

Wales.

Difference of Churches in *Wales.*

next *Engliſh* County, but of Churches of the antient Shires, or of the Principality, they were to be brought in *Wales*, and that the King's Juſticiar there had Power within the County where he was Juſticiar, to write to the Biſhops, which the Lords Marchers could not do. *Vaughan* 410, 411. Quare non Admiſit.

But a *Quare non admiſit* ſhall be brought in the County where the Refuſal was, and not in the County where the Church is, becauſe Damages are only to be recovered, and the Refuſal is the Beginning of the Wrong, and the Ground of the Action. 38 *H.* 6. 14. *F. N. B.* 47. *f.* And a *Quare Impedit* of a Prebend ſhall be brought in the County where the Cathedral Church is, and not in the County where the Body of the Prebend is, becauſe the Plaintiff's Clerk is to be inſtituted and inſtalled in the Cathedral. 21 *Ed.* 3. 5. 2 *Eliz. Dyer* 194. but 43 *Ed.* 3. *fol.* 1, 34. 15 *Ed.* 3. *B.* 325. ſeem contrary. *Vide* 27 *Ed.* 3. 37. And ſo the Law is well explained in a Caſe in which there were different Opinions in our Books, (ſaith *Coke*) *Mich* 26 & 27 *Eliz. Bulwer*'s Caſe, 7 *Croke* 3. And if a Grant be made of a next Avoidance in one County, and the Church doth lie in another County, (by *Fenner*) the Trial may be either where the Grant was made, or where the Church is. *Williams*, *Fenner* and *Coke* clear of Opinion, that the Trial where the Church lay was good, and the Iſſue well tried, to which *Yelverton* at length aſſented, and ſo the former Judgment was affirmed. *Mich.* 8 *Jac. B. R. Biſhop of London* and *Baldwin's Caſe* v. *Drew*, 1 *Bulſt.* 47. And note, That ſuch Writs cannot be brought within any Liberty, becauſe they that hold Plea in a Franchiſe cannot award a Writ to the Biſhop. 11 *H.* 6. 3. *Quare non admiſit*, where brought. Prebend. Upon Grant of next Avoidance.

Though the Writ be well brought, yet it may abate upon other Accounts; for if the Plaintiff be made a Knight hanging the Writ, it is an Abatement of the Writ. *Paſch.* 40 *Eliz. Sir Hugh Portman*'s Caſe, 7 *Coke* 27. and 6 *Coke* 10. *b.* becauſe he is at his Election whether he will take this Degree or not. *Jenkins*, *Cent.* 2. *Caſe* 85. But if the Son and Heir apparent of an Earl bring any Writ, and his Father dies *pendant* the ſame, the Writ ſhall not abate, becauſe 'tis by the Act of God. 31 *H.* 6. 29. So if one hath Right to preſent, and being diſturbed doth die, and then his Executor doth bring his Writ againſt the Diſturber, *Quod permittat ipſum Præſentare ad Eccleſiam jam Vacantem, & ad Præſentationem teſtatoris in vita ſua, & nunc in retardationem Executionis Teſtamenti*, the Writ will abate, becauſe a Diſturbance to the Teſtator cannot be ſuppoſed as a new Matter *in retardationem executionis Teſtamenti*, as where Goods were taken out of the Poſſeſſion of the Teſtator, upon which the Executors brought Treſpaſs, *in retardationem executionis Teſtamenti*, the Writ abated. But if the Executors be diſturbed in preſenting to a void Turn, they may well ſay *in retardationem executionis Teſtamenti*, and the Damages they recover ſhall be Aſſets in their Hands. *Trin.* 31 *Eliz. C. B. Smallwood*, *&c.* v. *The Biſhop of Litchfield*, 1 *Leonard* 205. It is fit to obſerve upon the former Part of this Paragraph, that by *Stat.* 1 *Ed.* 6. *ch.* 7. if any Demandant or Plaintiff in an Action be made a Knight, *&c.* depending the Suit, yet it ſhall not be abated. And *Quære* whether this does not extend to the Writ here in Queſtion. And note, that as to Coercion to take the Order of Knighthood, the Lawyers for the Crown *temp. Car.* 1. were of Opinion for the affirmative, which has been remedied by Act of Parliament, ſo that this Reaſon ſeems to fail. Other Cauſes of Abatement. Heir of an Earl. Executors diſturbed. In preſenting to a void Turn.

So when a Writ of Right of Advowſon was brought againſt Coparceners, one of them dying, it was adjudged without Argument that the Writ ſhould abate, being a real Action; and the like Law is, if they had One Coparcener dies.

Quare Impedit, the Writ, &c.

Wife dies.

been Jointenants, *&c. Hill.* 15 *Car. B. R. The King* v. *Sir John Dridon, &c.* 1 *Croke* 511, 574. Yet *Coke* ſaith, that a *Quare Impedit* well brought by divers, as Coparceners, or Jointenants, *&c.* ſhall not abate by the Death of one of them; nor a *Quare Impedit* brought by the Husband and Wife ſhall not abate by the Death of the Wife, becauſe that otherwiſe the Plaintiff (if the ſix Months be paſt) ſhall be without Remedy; for which he cites *F. N. B.* 35. *b.* 38 *Ed.* 3. 43. 37 *H.* 6. 11. 7 *H.* 4. 19. 14 *H.* 4. 12. 9 *H.* 6. 30, 37. 1 *H.* 5. 1. 13. 17 *Ed.* 3. 11. 17 *Ed.* 3. 304. *Hall's* Caſe, *Paſch.* 31 *Eliz. C. B.* 7 *Coke* 26. and ſo by *Brownlow* and *Gouldsborough*, 1 *Part* 158. The ſame Law, if one of the Defendants doth die *pendant* the Writ, for it abates not thereby. *Brownlow* and *Gouldſborough*, 1 *Part* 158. So if divers Coparceners do join in a *Quare Impedit*, and one of them after the laſt Continuance doth releaſe all Actions, Wrongs, *&c.* to the Incumbent concerning the Preſentment, this is no Abatement of the Writ, but Summons and Severance ſhall be awarded upon the Default of him that releaſes, and the other ſhall be admitted to proceed alone, and the Defendants adjudged to anſwer. *Trin.* 38 *Eliz. Counteſs of Northumberland's* Caſe, *Moor* 455. *Roll's Abr.* 2. 411. for it is not Reaſon that the Releaſe of one of them (though it bars him that makes it) ſhould bar the reſt, no more than his Non-appearance; in which Caſe he ſhall be alſo ſummoned and ſevered, and the other ſhall proceed. *Hill.* 38 *Eliz. Thomas Cecil, William Cornwallis* and *Elizabeth Danvers* v. *Hall, &c. C. B. Anderſon*, 2 *Part* 48. the ſame Caſe, 5 *Coke* 97. and in *Moor* 455. by the Name of *The Counteſs of Northumberland's* Caſe, *b. Vide* 45 *Ed.* 3. 10.

One Defendant dies. Releaſe by one Coparcener.

Summons and Severance.

Patron dies *pendente Brevi* againſt him and the Incumbent.

In like Manner, if a *Quare Impedit* be brought againſt the Patron and Incumbent, and the Patron doth die *pendant* the Writ, the Death of the Patron ſhall not abate the Writ. 9 *H.* 6. 31. For there are two Miſchiefs, one, if the Writ ſhall abate, the Diſturbance ſhall be unpuniſhed; and although the Writ was well brought, yet the Plaintiff, and only by the Act of God, ſhall be without Remedy, becauſe there wanteth a Diſturber: And the Miſchief on the other Part is, if the Writ ſhall not abate, but the Plaintiff ſhall proceed to Judgment and Execution, the very Patron ſhall be put out of Poſſeſſion; and foraſmuch as in the one Caſe, if the rightful Patron ſhall be out of Poſſeſſion, he hath Remedy by a Writ of Right to recontinue the Advowſon; and the other Caſe, if the Writ ſhall abate, the Plaintiff ſhall be without Remedy, which is the greater Miſchief, wherefore the Writ ſhall ſtand good, and therewith agree 7 *H.* 4. 26. *b.* 13 *H.* 8. 13. 9 *H.* 6. 57. 9 *H.* 6. 31. cited by *Coke, Paſch.* 1 *Eliz. C. B.* 7 *Coke* 26. *b.*

The Judgment reverſed in Error.

Being given againſt a dead Perſon.

But although it be granted that the Writ doth not abate by the Death of the Patron *pendant* the Writ, yet when Judgment was given againſt ſuch Patron after his Death, upon a Writ of Error brought by his Son as Heir and Executor, with the Biſhop and Incumbent, who were ſevered, it is clearly held, that this was a manifeſt Error, *viz.* the giving of Judgment againſt the Patron after his Death, and ſhall cauſe the Judgment to be reverſed in all, for it cannot be reverſed by Parcels. *Paſch.* 36 *Eliz. B. R. Pipe* v. *The Queen*, 3 *Croke* 324. I ſuppoſe the Reaſon of this Caſe to be, that although the Writ did not abate by the Death of one Defendant in the Action, yet the Judgment is to be given againſt thoſe that are living only, and not againſt a dead Perſon.

Incumbent dies, and Diſturber preſents again, and dies.

So if the Incumbent hanging the Writ doth die, and the Diſturber doth preſent again, and then dies, a *Quare Impedit*, or Aſſize of *Darrein Preſentment*, according as the Caſe is, lies by *Journies Accounts* upon the firſt

first Disturbance. *Brownlow* and *Gouldsborough*, 1 *Part* 160. *F. N. B.* 32. That is, the first Writ being abated without the Default of the Plaintiff, if he purchase a new Writ within a convenient Time after the Abatement of the first Writ, it is said to be by *Journies Accounts*, and then the second Writ shall be as a Continuance of the first, and shall out the Defendant of any Plea which arises upon Matter happening after the Date of the first Writ; and fifteen Days have been held a convenient Time for the Purchase of the new Writ. *Terms of Law*, *Journies Accounts*, *fol.* 191. 6 *Coke* 10. *Spencer*'s Case. But if the Plaintiff be Nonsuit in a *Quare Impedit* after Title made, this is a good Bar in another *Quare Impedit*. 22 *H.* 6. 45. 7 *Coke* 27. *b.* Also if a Writ be well brought against a Bishop for refusing a Clerk (for so the Case seems to be) and *pendant* the same, the Archbishop after Admonition to the Bishop to receive the Clerk, or to appear, who doth neither, doth institute the Clerk, and cause him to be inducted, if upon an Endeavour in the Ecclesiastical Court to void the Institution and Induction a Prohibition be prayed; if in the Surmise that the Church is full of his Presentment, Mention be made of the *Quare Impedit*, it must abate by the Patron's own shewing, and therefore the Surmise in such Case must be, that the Church is full of his Presentment, without Mention of the *Quare Impedit*. *Hutton*'s Case, *Hobart* 15. But *Quære*, how this Case is to be understood? *viz.* How a Surmise to have a Prohibition can abate a *Quare Impedit* depending? And *Quære*, Whether in this Case the Clerk was admitted *pendente* the *Quare Impedit*, or before the Writ was brought? For though it be granted, that he whose Clerk is in the Church, cannot bring his *Quare Impedit*, but it will be abatable if he do, 12 *H.* 4. 11 & 13 *H.* 4. 7. see 7 *H.* 6. 4. 34, 36. yet if the Defendant doth plead, that the Plaintiff hath filled the Church *pendant* the Writ, and the Plaintiff doth demur, which is a Confession thereof; yet the Writ shall not abate, but the Plaintiff shall have Judgment, because the Defendant doth neither gainsay the Disturbance nor Right of the Patron. 11 *R.* 2. *Quare Impedit* 144. *F. N. B.* 35. 7 *H.* 4. 34, 36. *Hobart* 194. But 4 *E.* 4. 18. is to the contrary.

Declarations in Quare Impedit.

New Writ by *Journies Accounts*.

Where the *Quare Impedit* is not to be mentioned upon a Surmise for a Prohibition.

CHAP. XXV.

Declarations in Quare Impedit, &c. *in what Manner to be framed, and what ought to be alledged therein.*

THE Plaintiff having duly brought this Writ, must in the next Place be careful that he doth sufficiently intitle himself in his Declaration, otherwise he will be barred. 31 *H.* 6. 15. For if the Declaration be not good, although that the Plea in Bar be bad, the Plaintiff shall be barred; by *Jones* in *Standen's Case* and *The University of Oxon, &c. Hill.* 20 *Jac. C. B. Jones* 18.

Care that the Declaration be good.

First, therefore, he must in his Declaration intitle himself to the Advowson, by alledging some Presentment in himself, or some other whose Estate

Title to the Advowson.

Declarations in Quare Impedit.

Eſtate he hath. *Brownlow* and *Gouldſborough*, 1 *Part* 160. For if a Plaintiff doth only intitle himſelf to preſent by the Grant of a next Avoidance, without alledging any Preſentment in himſelf, or any other under whom he claims; by *Winch*, *Hutton* and *Hobart* he ſhall be barred. *Mich.* 22 *Jac. B. R. Woodly* v. *The Biſhop of Exeter*, *Manwaring* and *Edwards*, 2 *Croke* 691. *Trin.* 21 *Car.* 2. *C. B. The King* v. *Robert Biſhop of Worceſter*, *Vaughan* 57. But what Preſentment is to be alledged as ſufficient to intitle the Plaintiff, is declared before, *Chap.* 22 & 23.

The Plaintiff muſt not deſert his own Title.

If a common Perſon doth bring a *Quare Impedit*, and counts upon a Title to preſent, and that he is diſturbed, and the Defendant, to counterplead the Plaintiff's Title, makes (as he muſt) a Title to himſelf, and confeſſes and avoids, or traverſeth the Plaintiff's Title; after this, the Plaintiff ſhall never deſert his own Title, and by falling upon, and controverting the Weakneſs only of the Defendant's Title, ever recover or obtain a Writ to the Biſhop, though the Defendant's Title doth not appear to the Court to be ſufficient; for it by no means follows that the Plaintiff hath a good Title, becauſe it appears that the Defendant hath not. *Trin.* 21 *Car.* 2. *C. B. The King* v. *Robert Biſhop of Worceſter*, *Vaughan* 58, and by *Hobart* in *Colt* and *Glover*'s Caſe, *Hobart* 162. And if the King hath preſented by reaſon of Lapſe, or the Temporalties of a Biſhop in his Hands, Outlawry, *&c.* and when the Church ſhall void again, brings a *Quare Impedit*, and counts that he was ſeiſed of the Advowſon as in Groſs, and preſented, and then the true Patron ſhall confeſs his Preſentation, and avoid it by ſhewing upon what Account he preſented at a former Avoidance, as only upon the Title of Lapſe, *&c.* the King ſhall not deſert his Title, and by ſhewing the Weakneſs of the Defendant's Title obtain Judgment for him; yet it is agreed that there are Caſes in which the King may deſert his own Title, and not join Iſſue upon the Defendant's traverſing of his Title, or avoiding it, but traverſe the Title made by the Defendant in his Bar, which is directly taking a Traverſe upon a Traverſe, which regularly a common Perſon cannot do; nor I think (ſaith *Vaughan*) in any Caſe, but where the firſt Traverſe tendred by the Defendant is not material to the Action brought. *The King* v. *Robert Biſhop of Worceſter*, *Vaughan* 61.

But may take a Traverſe upon a Traverſe.

Where the Plaintiff needs not alledge Preſentment.

But this Rule, that the Plaintiff muſt alledge ſome Preſentment in himſelf, or ſome other from whom he claims, holds not always; for if a Man at this Day doth by the King's Licence found a Parochial Church which ſhall be preſentable, and be diſturbed to preſent to it, he ſhall have a *Quare Impedit* without alledging any Preſentment in any other, and ſhall count upon the ſpecial Matter. *Trin.* 21 *Car.* 2. *C. B. The King* v. *Robert Biſhop of Worceſter*, *Vaughan* 57. And when the Patron doth lay a Preſentment in his Count, it is not ſufficient for him to ſay that he did preſent the laſt Incumbent without more, but that he was ſeiſed in Fee and preſented, or elſe lay the Fee-Simple in ſome other, and then bring down the Advowſon to himſelf, either in Fee or ſome other Eſtate. *The Caſe of the King* v. *The Biſhop of Worceſter*, *Vaughan* 57. For the Plaintiff ought neceſſarily in his Declaration to make mention what Eſtate he hath when he preſents. 8 *H.* 5. 4. 18 *H.* 6. 24. Alſo where the Preſentation makes a Right, there the Plaintiff ought to declare that the Preſentation was made *Tempore pacis*; but if the Plaintiff doth alledge another Right precedent to the Preſentation, and the Preſentation be alledged only in Purſuance of that Right, as that the Advowſon is appendant to a Manor of which he is ſeiſed, *&c.* there the Declaration is good, although

Seiſed in Fee, and preſented, &c.

Tempore pacis.

the

the Preſentation be not laid *Tempore pacis*. *Hill.* 28 & 29 *Car.* 2. *C. B. Strode* v. *Biſhop of Bath and Wells*, Sir *George Horner*, &c. 1 *Mod. Rep.* 230, and 2 *Mod. Rep.* 185.

Narrs in Quare Impedit, &c.

And although the Plaintiff hath formerly by the Preſentment which he lays in himſelf or others, for his Title, gained the Fee by Uſurpation, yet he ſhall not be compelled to mention the Wrong, or that he hath the Advowſon by Wrong, neither can he in this Caſe of an Uſurper declare of any other Eſtate than of Fee; by *Berkly* and *Jones contra Bramſtone* and *Croke*; who held, that if a Man having no Right to an Advowſon, doth preſent by Uſurpation, and his Clerk be admitted, inſtituted, and inducted, and after Plenarty by ſix Months dies; upon a Diſturbance he cannot declare that he was ſeiſed of the Advowſon, as of an Advowſon in Groſs, and preſented, becauſe by the Preſentment alone without Inſtitution and Induction, no Right is gained, nor the Patron put out of Poſſeſſion; but it is the Ordinary's Act that makes the Uſurpation; and ſo if the Uſurpation be gained by the Inſtitution, which is ſubſequent to the Preſentation, the Uſurper in his Declaration cannot ſay that he was ſeiſed in Fee, and preſented, which is a precedent Act to the Uſurpation, which was by the Inſtitution, and the Fee only gained by Relation, which is a Fiction in Law, and ſhall not be reſpected to do Wrong, as would be in this Caſe. *Hill.* 14 *Car. B. R. Harper* v. *The Bailiff and Burgeſſes of Derby*, *Jones* 427. *Quære*, for no Judgment was given, and ſee there *Berkly*'s and *Jones*'s Reaſons for their Opinion, which ſeem good.

Uſurper not compelled to mention the Wrong, but to declare of any Eſtate in Fee.

The Plaint muſt not be double.

Alſo the Plaintiff muſt take care that his Plaint be not double, for if the Plaintiff doth alledge a Preſentment in himſelf only, or in caſe he hath not preſented, in him whoſe Eſtate he hath, this is a ſufficient Title in a *Quare Impedit*; but if he doth alledge a Preſentment in both, his Count is double, as appears by this Caſe. *B.* Plaintiff in a *Quare Impedit* counts that *A.* was ſeiſed in Fee of a Manor to which an Advowſon was Appendant, and the Church voiding he preſented, and that his Clerk was admitted and inſtituted, and after that this Manor, *&c.* was given to the King by Act of Parliament, and after that the King granted it to the Plaintiff, and that the Church voided by the Death of the Clerk of *A.* who dies; that the Plaintiff preſented another Clerk, who was admitted, inſtituted and inducted, and dies; that the Church is now void; that the Plaintiff preſented, and that the Defendant diſturbed him; and by all the Juſtices, this Count is not double, for the Preſentment of *A.* is ſuperfluous, as being deſtroyed by the ſaid Act of Parliament, and the Preſentment of the Plaintiff, is but the Execution of the Act of Parliament, and the Act of Parliament without any Preſentment is a good Title in a *Quare Impedit*; but if the Act of Parliament had not been in the Caſe, the Count had been double, by alledging the Preſentment, Admiſſion and Inſtitution of the Clerk of *A.* and of the Plaintiff's alſo, becauſe to alledge one of them is ſufficient. 16 *H.* 7. 8. *Jenkins*, *Cent.* 4. *Caſe* 86. See for this the Counteſs of *Northumberland*'s Caſe, 5 *Co.* 98. *a.* 33 *H.* 6. 12. 4 *E.* 4. 3. 11 *E.* 4. 10. 19 *E.* 4. 4. where there appears a Difference in Opinion concerning this Matter. Yet note, that though a common Perſon counting upon two Preſentments, the Count ſhall be ſaid double, and by Conſequence vitious, yet otherwiſe it is in the Caſe of the King. 43 *Ed.* 3. 14. *Br. Count.*

Allegation of one Preſentment is ſufficient.

Where a Lapſe to the Biſhop ought to be mentioned.

If a Church hath by Lapſe come to the Biſhop, who hath collated by ſuch Title, a common Perſon ought to make mention of it in his Count, for that is his Title to the Preſentment, *Mich.* 14 *El.* 3 *Leon.* 18. becauſe the Collation by Lapſe is in the Right of the Patron, and for his

Narrs in Quare Impedit, &c.

Turn; the Ordinary in this Caſe being a kind of Attorney made by Law, to do that for the Patron which is ſuppoſed he would do himſelf, if there was not ſome Let; by *Hobart*, in *Colt* and *Glover*'s Caſe, *Hobart* 154. Alſo if the Ordinary hath collated by Lapſe, becauſe the Patron having preſented one unſufficient Clerk, and upon Notice of his Unſufficiency, and the Refuſal, did not preſent another, and the Patron thereupon doth bring his Action, the Patron muſt ſet forth in his Declaration the Day in which the Preſentment was made to the Ordinary. *Mich.* 15 *Eliz. C. B.* 3 *Leonard* 47.

Where one hath two Avoidances, and another a Third.

One Perſon hath the Right of preſenting to two Avoidances of a Church, another to a third Avoidance; and upon a Diſturbance, the Declaration ſets forth, that one hath the Advowſon of two Parts of the Church, *viz.* to preſent to the ſaid Church at two Turns together, and that another hath the Advowſon of a third Part of the Church, to wit, to preſent to every third Turn, the Declaration is not good, *per Cur.* for that it appears that one hath the intire Church for the Time when he is to preſent ſole, and then, when he declares that one had the intire Advowſon of two Parts of the Church, *viz.* to preſent to two Turns, it is repugnant in itſelf, for by his own ſhewing, it is to two Parts of the Advowſon, and not to two Parts of the Church, for the Moiety or third Part of the Church is, where Parceners, or Jointenants preſent jointly, and every one hath a Part of the Church, *Trin.* 41 *Eliz. Windſor* v. *Archbiſhop of Canterbury* and *Loveday*, &c. 3 *Croke* 668; or where there are two Advowſons in one Church, for there every one hath a Part of the Church, and the Count muſt be to the Moiety, or third Part of the Church. *Mich.* 13 *Jac. Windham* v. *Biſhop of Norwich & al.* 1 *Brownlow* 165. But where two Churches are united, and the Patrons agree to preſent, the one to two Turns, the other to a third Turn, (as this Caſe was) there either of them hath the intire Church the Time he preſents. *Trin.* 41 *Eliz. C. B. Windſor* v. *The Archbiſhop of Canterbury*, *Loveday* and *Fletcher*, 3 *Croke* 687, 688.

A Moiety or third Part amongſt Parceners, &c.

Writ claims the intire Advowſon, and the Count only every firſt Turn.

So if a *Quare Impedit* be brought, that the Biſhop permit the Plaintiff to preſent to the Church of *A.* and the Declaration according to the Caſe is, That whereas *B.* was ſeiſed of a Manor, to which the Advowſon of the ſaid Church, *viz.* to preſent to the ſame very firſt Turn, was Appendant, and that *C.* was ſeiſed of the Advowſon of the ſaid Church, *viz.* to preſent to the ſame every ſecond Turn; though by the Writ the intire Advowſon is claimed, and by the Count, only every firſt Turn; and although it be not alledged by the Plaintiff that he ought to have the firſt Turn, yet it is good; *per Cur.* Becauſe when the Church is void, and it appertains to him to preſent, he hath the intire Advowſon; but otherwiſe it is if there be two ſeveral Patrons, and two ſeveral Incumbents of one Church, ſo that one Patron hath a diſtinct and ſeparate Part of the Tithes for his Incumbent from the other Patron and his Incumbent, in which Caſe there are two Advowſons in one Church; for there the Count muſt be to the Moiety of the Church, or the third Part thereof, as the Caſe requires. *Mich.* 13 *Jac. Windham* v. *The Biſhop of Norwich*, *Brownlow* and *Gouldſborough*, 1 *Part* 165. And if in this laſt Caſe one of the Patrons being diſturbed, doth ſay in his Count, that he is ſeiſed *de Advocatione Medietatis Eccleſiæ*, *&c.* it is ſufficient without ſetting forth the ſpecial Matter in the Count. *Trin.* 10 *Jac. Richard Smith*'s Caſe, 10 *Coke* 135.

CHAP. XXVI.

Proceſs, &c. in Quare Impedit, &c.

Of Proceſs and Pleas in Quare Impedit *and* Darrein Preſentment, *and what Pleas are proper, and ought or may be pleaded by the Ordinary, Patron and Incumbent reſpectively; and of what Matters a Jury in* Quare Impedit *ought to inquire.*

HAving ſhewed how theſe Writs are to be brought, and how the Patron is to intitle himſelf in his Declaration, I am next to ſpeak of the Proceſs thereupon. Of Proceſs in *Quare Impedit.*

The Proceſs in this Action of *Quare Impedit* are Summons, Attachment, and Diſtreſs Peremptory. And the Sheriff muſt ſummon the Defendant by good Summoners, and return their Names upon the original Writ, and not return common Summoners, as *John Doe* and *Richard Roe*; for a Writ of Deceit lieth if the Summons were not made indeed: But if the King be Plaintiff, and the Defendant be not ſummoned, nor attached, nor diſtrained, and the King hath Judgment by Default, no Writ of Deceit lieth. *Brownlow* and *Gouldſborough*, 1 *Part* 158, 159, 160. Summons, Attachment and Diſtreſs.

The Writs thereupon are returnable from Fifteen Days to Fifteen Days, according as it is Enacted, **In Aſſizes of** Darrein Preſentment, **and in a Plea of** Quare Impedit **of Churches vacant, Days ſhall be given from Fifteen to Fifteen, or from Three Weeks to Three Weeks, as the Place ſhall happen to be near or far. And in a Plea of** Quare Impedit, **if the Diſturber come not at the firſt Day that he is ſummoned, nor caſt no Eſſoin, then he ſhall be attached at another Day, at which Day if he come not, nor caſt no Eſſoin, he ſhall be diſtrained by the great Diſtreſs above given; and if he come not then, by his Default, a Writ ſhall go to the Biſhop of the ſame Place, that the Claim of the Diſturber for that Time ſhall not be prejudicial to the Plaintiff, ſaving to the Diſturber his Right at another Time when he will ſue therefore.** Stat. 52 H. 3. cap. 12. Returnable from Fifteen Days to Fifteen Days.

If a *Quare Impedit* be brought againſt divers, they ſhall have ſeveral Eſſoins before Appearance; if the firſt Man be eſſoined it muſt be adjourned for Fifteen Days, and *Idem dies* ſhall be given to the reſt; but at that Day another of the Defendants may be eſſoined for Fifteen Days, and an *Idem dies* given to the reſt, and ſo of all the reſt of the Defendants. And if the Defendant take not his Eſſoin upon the Summons, he may take it upon the Attachment, and if the Plaintiff doth not adjourn the Eſſoin, he ſhall be Nonſuit. And *Note*, That the Defendants are not bound to appear after that they have had their Eſſoins, until the Return of their Diſtreſs, for an Eſſoin is no Appearance, becauſe it may be caſt by a Stranger. If the Defendant doth come at the Grand Diſtreſs returned, and pleads to Iſſue, and after doth make Where ſeveral Eſſoins before Appearances, &c. Default after Pleading

De-

Proceſs, &c. in Quare Impedits.

Default, the Writ ſhall be awarded to the Biſhop without taking the Inqueſt. *Roll's Abr.* 1 *Part* 587.

Writ againſt three, and one appears.

If the Original Writ be brought againſt three, one may appear before his Companions, and Proceſs ſhall be continued until Diſtreſs be made againſt the reſt; and the Plaintiff, in the mean Time, ſhall declare againſt him that appears with a *Simul cum*, and if he that appears doth plead *Non impedivit*, the Writ ſhall be awarded to the Biſhop; but there ſhall be a *Ceſſet Executio* until the Plea between the Plaintiff and the other Defendants be determined. *Brownlow* and *Gouldsborough*, 1 *Part* 158, 159.

Non impedivit.

Againſt two, and one makes Default, &c.

If a *Quare Impedit* be brought againſt two, and one of them doth make Default at the grand Diſtreſs, and the other doth plead in Bar, a Writ to the Biſhop ſhall be awarded for the Plaintiff by the Statute of *Malebridge* without Title made; and if the Bar pleaded by the other Defendant be found for him, he alſo ſhall have a Writ to the Biſhop, and the Clerks of theſe two, upon theſe two Writs, being admitted, inſtituted and inducted, ſhall try their Right in an Aſſize, or Treſpaſs. *Jenkins, Cent.* 2. *Caſe* 85. 2 *Inſtit.* 124, 125.

Clerks to try their Right.

No Protection, &c.

In this Writ the Defendant ſhall neither have his Age, nor a Protection, nor an Eſſoin as in the King's Service, to avoid a Lapſe.

Darrein Preſentment.

In an Aſſize of *Darrein Preſentment*, if the Writ be brought in *Middleſex*, at the Return of the Writ the Aſſize ſhall be there arraigned by the Serjeants at the Bar in *French*, [Q. if not now in *Engliſh*] and the Tenant ſhall be demanded; and if the Tenant doth not appear when he is demanded, a Reſummons ſhall be awarded; and if upon the Reſummons the Tenant ſhall not appear, the Aſſize ſhall be taken againſt him by Default; and if the Tenant doth appear, he may demand Oyer of the Writ and Return, and the Writ ſhall be read to him, and the Return thereof, and the Jury ſhall have the View, and the Tenant may take Exception either to the Writ or to the Return, if there be Cauſe; and if there be no Cauſe, he may pray a Day to plead; and if the Court doth give a Day, the Jurors that appear ſhall be diſcharged of their Attendance, and ought to appear upon a new Proceſs to be awarded againſt them; and ſix of the Jury ought to have the View of the Church, to the Intent that they may put the Plaintiff into Poſſeſſion if he doth recover; and the Judgment of this Aſſize is to recover the Preſentation and Damages. The Proceſs in this Writ is Summons and Reſummons againſt the Tenant, and Summons, *Habeas Corpora*, and Diſtreſs againſt the Jury, and the Proceſs ſhall be returned from Fifteen Days to Fifteen Days, and no Eſſoin or Voucher lieth after a Reſummons. *Brownlow* and *Gouldsborough*, 1 *Part* 160.

Summons and Reſummons.

Oyer.

Day to plead.

View.

Judgment.

No Eſſoin, &c.

The Defendants, *viz.* The Biſhop, Patron and Incumbent appearing, they are to put in their Plea, or Anſwer to the Declaration of the Plaintiff, and if their Plea be ſufficient, the Plaintiff ſhall be barred, altho' his Declaration be alſo good; by *Jones* in *Standen*'s Caſe, *&c. Jones* 18. And firſt, if the Biſhop be made a Defendant upon any good Reaſon, it is becauſe he is a real Diſturber, although he is for the moſt part put into the Writ upon the Opinion that thereby he is hindred from collating *pendente lite*, (the Church being void and litigious) upon the Account of Lapſe. But ſee as to this, *Chap.* 24. But whether the Biſhop be a Diſturber or not, if he be made a Defendant, and hath no Right to collate when the Writ was brought, it is uſual for him to plead —— that he claims nothing but as Ordinary, and to demand Judgment if without ſpecial Diſturbance, *&c.* And if the

Plea ſufficient, Plaintiff barred.

Biſhop's Plea.

See

See be void, ſo that the Archbiſhop, or other Guardian of the Spiritualties, hath for the Time the Right of Admiſſion, *&c.* the Right of Collating not being in him, he is wont in ſuch Caſe to plead, that he claims nothing but as Metropolitan, and to demand Judgment if, *&c.* And thereupon the Patron is wont to pray a Writ to the Biſhop againſt the Ordinary, with a *Ceſſet Executio quouſque* the Plea between the Plaintiff and the other Defendant is determined. *Mich.* 3 *Jac. B. R. Boſwell*'s Caſe, 6 *Coke* 48. *Jenkins, Cent.* 1. *Caſe* 99. And if Judgment be given for the Plaintiff, that a Writ ſhall go for the Plaintiff againſt the Biſhop or Guardian of the Spiritualties, or againſt Biſhop and Archbiſhop, if both be made Parties in the Writ, without a *Ceſſet Executio* entred, until other Matters had been tried, it is no Error; nor will it abate the Writ, unleſs that Execution had been ſued out before Judgment had been given againſt the reſt. *Paſch.* 14 *Jac. B. R. Grange* v. *Dering*, 3 *Bulſt.* 175. See *Jenkins, Cent.* 8. *Caſe* 36. and in *Roll's* 1 *Rep.* 363, and 397. *Roll's Abr.* 1. 772. When the Biſhop pleading that he claims nothing but as Ordinary, the Patron hath Judgment againſt him, and this doth continue divers Terms without any Continuances entred; yet as *Glin* ſaid in the Caſe of *Loe* and *Lancaſter*, it was ruled that it was good in *Cobb*'s Caſe v. *John Heyden*, *Roll's* 1 *Rep. p.* 31. But the Plaintiff, if he pleaſeth, need not pray a Writ to the Biſhop, but may maintain him to be a Diſturber, and proſecute his Action againſt him to a final Judgment, notwithſtanding the Biſhop doth claim nothing but as Ordinary in his Plea. If he doth take his Writ as aforeſaid to the Biſhop, it ſhall be to the ſame Biſhop; for it doth not appear to the Court that he was a Diſturber, neither ſhall the Biſhop be amerced, but the Plaintiff *pro falſo Clamore:* If the Plaintiff doth not accept the Biſhop's Reddition, but will chuſe to make a full and final Recovery againſt him, (which is not adviſable in any Caſe) then doth he (as in all other Caſes of Election) forſake, and loſe the Benefit of the former, and ſtands to the Hazard either of a total Recovery, or a total Bar; ſo that if he doth aſſign a ſpecial Diſturbance, and it be tried againſt him, he is to be barred; by *Hobart. Mich.* 15 *Jac. Brickhead* v. *The Archbiſhop of York*, *Hobart* 198. And if the Plaintiff be at Iſſue with any of the other Diſturbers, and the Title is found for the Plaintiff, the Inqueſt ſhall not paſs betwixt the Plaintiff and the Biſhop who refuſed, becauſe the Church was litigious, altho' that the Iſſue upon the Diſturbance be joined betwixt them, for the Diſturbance is found in another, and the Church being litigious ſhall excuſe the Biſhop. *Jenkins, Cent.* 1. *Caſe* 99.

Proceſs, &c. in Quare Impedit.

Archbiſhop's Plea.

Breve Epiſcopo with a *Ceſſet Executio.*

Continuances.

Biſhop proſecuted as a Diſturber.

If the Plaintiff will not accept the Biſhop's Reddition, *&c.*

Biſhop where to be excuſed.

If the Biſhop be ſued as a Diſturber, for that he hath admitted and inſtituted a Clerk upon the Preſentment of another Patron, (which is not adviſable for him to do) he may plead the general Plea, that he claims nothing but as Ordinary, *&c.* and demand Judgment if, *&c.* And indeed, in ſuch Caſe the Biſhop cannot well plead any other Plea; for having given Inſtitution upon another's Preſentment, he cannot plead the Patron's Title upon whoſe Preſentment he hath given Inſtitution, to counterplead the Title of the Plaintiff to the Patronage, although the Incumbent may; by *Hobart*, and that upon theſe Reaſons:

Where Biſhop cannot plead the Patron's Title.

First, Becauſe the Ordinary hath nothing to do with the Patronage, neither in Intereſt nor Dependancy. Secondly, Becauſe he hath nothing to do with the Church as to the Fruits of it; and if he, having collated by Lapſe before the Statute of 25 *Ed.* 3. 7, could not by the Common Law have pleaded the Title of the Patronage to maintain it, as by the ſaid Statute appears, much leſs could he do it before the Lapſe incurred.

The Reaſon.

Pleas, &c. in Quare Impedits.

Thirdly, Becauſe the Law hath provided for him (if he doth contain himſelf within the Bounds of an Ordinary) ſufficient Means to ſave himſelf from making himſelf a Diſturber, and hath Pleas to expreſs and deduce the ſame. Sir *William Elvis* v. *The Archbiſhop of York*, &c. *Paſch.* 17 *Jac.* *Hob.* 317. *Jenkins*, *Cent.* 1. *Caſe* 47.

Patron's beſt Courſe.

If the Ordinary doth plead that he claims nothing but as Ordinary, the Patron had beſt pray a Writ to the Biſhop with a *Ceſſet Executio quouſque*, *&c.* eſpecially if the Biſhop had not refuſed his Clerk before the Church was litigious, or admitted his Adverſary's Clerk after a *Jure Patronatus* prayed, or contrary to the Verdict given thereupon; for if he will maintain him a Diſturber when the Church is full, it concerns him to make it appear that he was ſo, or he will be barred, as hath been ſaid before in this Chapter. If the Biſhop be ſued as a Diſturber for refuſing to admit a Perſon preſented to him, he may in his Anſwer either plead, as before, he claims nothing but as Ordinary, and ſo the Patron may take Judgment againſt him, or maintain him a Diſturber as aforeſaid; or elſe the Biſhop in his Anſwer may juſtify the Refuſal of a Clerk preſented to him; but then the Biſhop muſt be very careful that his Plea be ſufficient, for tho' he hath juſtly refuſed, he may make himſelf a Diſturber by his ill Plea, for which are cited 14 *H.* 7. 21. *b.* 5 *H.* 7. 20, in *Specott*'s Caſe v. *The Biſhop of Exeter*, *Goulds.* 25.

Biſhop may juſtify the Refuſal.

And muſt ſpecify the Cauſe particularly.

That the Biſhop's Plea may be ſufficient to bar the Plaintiff, he muſt therein ſpecify the Cauſe of his Refuſal particularly, ſo that the Party may anſwer to it. 5 *H.* 7. 19. 11 *H.* 7. 17. And therefore when the Biſhop in his Plea did ſpecify one Cauſe of Refuſal which was not good, and ſaid moreover, *quod propter diverſa alia Crimina* the Clerk was *Criminoſus*, *& non Idoneus*, it was held that the latter Words were too general and uncertain, *Dyer* 254, for he might as well have ſaid that he was *Criminoſus* generally, or *non Idoneus* generally; and if the Fault or Defect of the Clerk be not alledged particularly, how can the Party anſwer to it? So when a Biſhop ſhewed for Cauſe of his Refuſal of a Clerk, that the Clerk was *Schiſmaticus inveteratus*, it was adjudged and affirmed in Error that the Plea was too general, and therefore uncertain, and ſo inſufficient; for he ought to have ſhewed in what he was a Schiſmatick: Altho' whether he be a Schiſmatick or not, be triable by the Ordinary according to the Statute of *Articuli Cleri*. But by that Statute it appears that the Biſhop may refuſe only for reaſonable Cauſe, and a general and uncertain Cauſe is not a reaſonable one; and though the Biſhop is Judge in examining, yet foraſmuch as the Proceedings of the Biſhop are not of Record, the Cauſe of a Refuſal is traverſable; and if it be traverſed, and the Party refuſed be in Life, it ſhall be tried by the Metropolitan; and if he be dead, by the Country. And therefore, although it doth not appertain to the King's Courts to determine Schiſms and Hereſies, yet the original Cauſe of the Suit being Matter whereof the King's Court hath Conuſance; the Cauſe of the Ordinary's judging a Preſentee an Heretick or Schiſmatick ought to be alledged in certain, that the Judges may conſult with Divines to know if it be Hereſy or not, and if the Party be dead, direct the Jury to try it. *Hill.* 32 *Eliz.* *B. R.* *Specott*'s Caſe, 5 *Co.* 57. ſame Caſe 3 *Leonard* 199. *Gouldſborough* 351, and *Anderſon* 189. And it was alſo in this Caſe urged, that by the Plaintiff's Demurrer to the Biſhop's Plea ——— That the Clerk was a Schiſmatick, it was confeſſed: To which *Anderſon* ſaid, that if a Thing be ſufficiently alledged, it is confeſſed by the Demurrer, otherwiſe not. *Gouldſborough* 35. Nor doth the Statute of Demurrers, 27 *Eliz.* help the Incertainty in this Caſe, becauſe the Court neither

Non Idoneus.

Schiſmaticus, *&c.*

It muſt be a reaſonable Cauſe.

Traverſe tried.

Certainty.

Confeſſion by Demurrer.

neither doth nor can know how this Plea may be amended, as that Statute doth require, and therefore it is out of the Compaſs of the Statute. 1 *Anderſon* 191.

Pleas, &c. in Quare Impedits.

Alſo if a Biſhop refuſe a Clerk for Perjury, he ought in his Plea to ſhew how and in what a Clerk is *perjurus*, and before what Judge he was perjured, that the Perjury may appear to be ſuch, for it is as none if not before a lawful Judge. 38 *Ed.* 3. *fo.* 2. 2 *Inſt.* 632. In a late Caſe between the Biſhop of *Exeter & alios* v. *Sampſon Hele*, in a *Quare Impedit* brought by *Hele*, the Biſhop pleads in Bar that the Church is within his Dioceſe, and that he claims nothing but as Ordinary, *&c.* and that the Plaintiff preſented to him one *Francis Hodder* as his Clerk; that as Ordinary of the Church aforeſaid, he did examine him of his Ability and Fitneſs in that Behalf, and upon ſuch Examination found him to be a Perſon *in literatura inſufficien'*, *ac ea ratione fore perſonam inhabil' & minime idoneam ad habend'* the ſaid Benefice, for which Reaſon he refuſed him, and gave Notice thereof to the Plaintiff, *&c.* but that the Plaintiff did not preſent any other within the ſix Months, *per quod* he did collate *G. H.* who was inſtituted, *&c.* The Plaintiff replies, that *Hodder* at the Time of the Preſentation was Vicar of *U.* that he was *Homo literatus & infra ſacros Ordines Conſtitut' &c. & poſt Doctrin' & literatur' examen, Ordines Sacerdotales per Ordinationem adept' fuit*, and licenſed to preach by a late Biſhop of *Exon*, *&c.* After a Rejoinder by the Defendants, and Sur-rejoinder by the Plaintiff, the Defendants demur, and adjudged by the Court of Common Pleas, that this Plea of the Biſhop's was incertain and inſufficient, which Judgment was affirmed upon a Writ of Error in *B. R.* but upon a Writ of Error brought in Parliament, both the ſaid Judgments were reverſed. *Caſes in Parliament* 88, and 3 *Lev.* 313.

Perjury alledged.

In literatura inſufficiens.

Repl' quod literatus, &c.

Judgment againſt the Biſhop, Reverſed in Parliament.

If the Biſhop hath collated by Lapſe to the Church of another Patron than the King, whether it be that the Patron having preſented a Clerk who was refuſed, and upon the Biſhop's Notice thereof did not preſent another in Time, or becauſe no Preſentment was made within the Patron's ſix Months, and the Biſhop be therefore ſued, he may ſet up his Title of Lapſe, yea, and againſt the King, if he ſhould afterwards pretend Title to the Church, whereas a common Perſon is the true Patron: For it hath been enacted, **Item, Becauſe that many Preſentments to divers Benefices of Holy Church, as well of the Patronage of Lay People as of the People of Holy Church which were void by ſix Months, whereof the Collation of ſuch Benefices by Lapſe of Time was devolute, and of Right pertaining to the Ordinaries of the Place, were recovered by the King, by Judgments thereof given of the Aſſent of the ſaid Patrons, in Deceit of the ſaid Collations ſo made reaſonably by the ſaid Ordinaries, in which Places the Ordinaries, nor their Clerks to whom they did give ſuch Benefices, were not received to ſhew nor defend their Right in this Behalf, nor to counterplead the King's Right ſo claimed, which is not reaſonable. Wherefore the King, by Aſſent of the ſaid Parliament, will and granteth for him and his Heirs, that when Archbiſhops, Biſhops, or other Ordinaries have given a Benefice of Right devolute to him by Lapſe of Time, and after the King preſenteth and taketh the Suit againſt the Patron, which per Caſe will ſuffer that the King ſhall recover without Action tried in Deceit of the Ordinary, or the Poſſeſſor of the ſaid Benefices, and in ſuch Caſe, and all other Caſes like, where the King's Right is not tried, the Archbiſhop or Biſhop, Ordinary or Poſſeſſor,**

Biſhop's Title by Lapſe.

25 *Ed.* 3. *c.* 7.

Pleas, &c. in Quare Impedits.

Poſſeſſor, ſhall be received to counter-plead the Title taken for the King, and to have his Anſwer, and to ſhew and defend his Right upon the Matter, although that he claim nothing in the Patronage in the Caſe aforeſaid. Stat. 25 Ed. 3. cap. 7.

Gives Remedy againſt the King.

The Reaſon of which Law was this, that the King not being bound by Lapſe of Time, when the common Patron had ſuffered a Lapſe, and the Ordinary had collated lawfully; if the King pretending himſelf Patron had brought a *Quare Impedit* againſt the Ordinary and his Incumbent, they could not ſave themſelves, ſeeing that they could not deny the King's Title, and maintain the Patron's, in whoſe Default Lapſe took Place.

And others in Caſes of the like Nature.

This Statute alſo gives Remedy in like Caſes by expreſs Words, ſo that Caſes of like Nature are rather remedied by the Letter of the Statute than the Equity thereof; therefore, if a common Perſon no true Patron had preſented within the ſix Months, and the true Patron had not preſented in his Time, whereupon the Ordinary had collated for Lapſe, and the Pretender had brought a *Quare Impedit* againſt the Ordinary, becauſe the Clerk was refuſed, the Pretender muſt neceſſarily have prevailed before this Statute, becauſe his Title muſt needs be taken for good, when neither Ordinary, nor Incumbent was ſuffered to deny it; but now by this Statute they are relieved, for this is one of the like Caſes; by *Hobart*, in Sir *William Elvis*'s Caſe v. *The Archbiſhop of York, Taylor*, &c. *Hob.* 318, 319.

Biſhop's Bar ought to deny, or confeſs and avoid.

If the Patron doth bring a *Quare Impedit* againſt the Biſhop for a Diſturbance, and the Biſhop doth plead that he claims nothing but as Ordinary, and confeſſeth the Plaintiff's Title to preſent; and further ſaith, that the Church voided ſuch a Day, after which the Church remained void by the ſpace of ſix Months, and for that the Plaintiff preſented no fit Perſon within the *Tempus Semeſtre*, he collated as Ordinary after the Lapſe of ſix Months, as it was lawful for him to do; this is an inſufficient Bar, for that thereby the Defendant doth neither deny, nor confeſs and avoid the Diſturbance laid, and if the Plaintiff doth reſt upon the Bar, and demur upon it, Judgment ſhall be given againſt Defendant, altho' it be after diſcovered that the Plaintiff hath laid in his Declaration the Preſentation and Diſturbance to be after the Date of the Writ. But if to ſuch inſufficient Plea, the Plaintiff doth reply, and confeſs that the Church did void as the Biſhop ſaid on ſuch a Day, and that within the ſix Months, *viz.* on ſuch a certain Day he preſented *A. B.* praying the Biſhop to admit him, which he refuſed to do, and that the Biſhop on another Day, and within the ſix Months collated his Clerk, and then the Biſhop doth demur, for that the Replication to his Plea doth contain double Matter, and is uncertain, and after it is diſcovered that the Plaintiff hath in his Count laid the Preſentment and Diſturbance to be after the Teſte of the Writ, although the Court held, that the Replication was not double or doubtful, becauſe the Defendant's Plea was, that the Plaintiff had not preſented a Clerk to him within the ſix Months, and the Replication is, that he did preſent within the ſix Months, ſo there was a perfect Negative and Affirmative, which makes the Iſſue; and the Plaintiff did but add a Refuſal to make good the Diſturbance laid in the Declaration, and then the Plea is compleat: And tho' the Plaintiff hath laid a general Diſturbance in his Count, which is ſuppoſed true by the Defendant's Plea, and to be made before the Action brought; yet this ſhall not ſave the Plaintiff, but that he ſhall be barred for the Fault in his Declaration appearing to the Court, *viz.* that there was no real Diſturbance made, nor Cauſe of Action given to the Plaintiff at the Time of his Writ brought, and this of his own ſhewing. *Mich.* 15 *Jac. Brickhead* v. *The Archbiſhop of York*, *Hob.* 198.

Bar that the Patron preſented not within ſix Months.

Judgment *pro Def.* for Default in Plaintiff's Writ.

Alſo

Pleas, &c. in Quare Impedits.

Alſo in ſuch Caſe of the Biſhop's being ſued as a Diſturber, for that he hath refuſed the Patron's Clerk, and upon Default of preſenting another hath collated upon the Account of Lapſe, he muſt in his Plea alledge the Time of his Notice given to the Patron, becauſe if the Patron ſends his Clerk within a Month after the Avoidance, and the Ordinary will not give Notice to the Patron of his refuſing him, the ſame ſhall not be any Default in the Patron; by *Manwood*; but if in ſuch Caſe the Ordinary doth ſay in his Plea, that the Clerk was inſufficient, and that he gave Notice to the Plaintiff, and that *nullam idoneam perſonam præſentavit*, *Manwood* ſaid, that as to the Notice given to the Patron, it is well pleaded by ſuch Words, and it ſhall be intended that it was given to the Perſon of the Patron; but the Court ſaid, that to ſay that *nullam idoneam perſonam præſentavit* was no good Manner of Pleading, but that it had been better if it had been *nullam etiam perſonam idoneam præſentavit*, and that the firſt Form would be a *Jeofail*. *Mich.* 15 *Eliz. C. B.* 3 *Leonard* 47.

Time of Notice to be alledged.

Patron's Plea.

As the Biſhop, ſo the Patron that is made a Defendant, is to put in his Plea according to his Caſe, and with reſpect to the Plaintiff's Declaration; as to whom if he pleads *Non impedivit*, or any inſufficient Plea, the Writ ſhall be awarded to the Biſhop. 21 *Ed.* 4. 65. 9 *H.* 6. 16, 17. 7 *H.* 4. 32. 21 *H.* 6. 45. 22 *H.* 6. 28, 29. 10 *H.* 6. 4. 5 *H.* 5. 10. But there ſhall be a *Ceſſet Executio* until the Plea between the Plaintiff and the other Defendants be determined. *Brownlow* and *Gouldsborough*, 1 *Part* 159.

If inſufficient.

Plenarty pleaded.

If the Clerk of a Stranger be Incumbent of a Church by the Space of ſix Months by Admiſſion and Inſtitution only upon his Preſentment, this makes a Plenarty without Induction. *Hill.* 22 *H.* 7. *Keilway* 88. And the Patron may plead Plenarty againſt all common Perſons; for it is enacted, **That one Form of Pleading ſhall be obſerved among Juſtices in Writs of** Darrein Preſentment **and** Quare Impedit **in this Reſpect; if the Defendant alledgeth Plenarty of the Church of his own Preſentation, the Plea ſhall not fail by Reaſon of the Plenarty, ſo that the Writ be purchaſed within the ſix Months.** *Weſt.* 2. *cap.* 5. viz. *Stat.* 13 *Ed.* 1. *cap.* 5. But if a Writ be brought after a Plenarty by ſix Months, and Judgment be given by *Nihil Dicit*, and the Biſhop claims nothing, the Plaintiff, though a Purchaſer, ſhall have Judgment, and be remitted to his Right; by *Coke*, *Trin.* 15 *Jac. B. R. Harris* v. *Auſtin*, 3 *Bulſt.* 38, 46. Therefore *Quære*, Whether the Incumbent of ſuch Uſurper ſhall not be outed by ſuch Recovery? However, if any Perſon doth preſent to an Advowſon, the Right of preſenting to which is in the King, upon a Writ brought by the King, Plenarty cannot be pleaded to bar the King, and to eſtabliſh the Incumbent in his Poſſeſſion, although he hath been inducted by ſix Months before the Writ purchaſed; by *Anderſon* Chief Juſtice againſt *Walmſly*, *Kingſmill*, *Warburton* and *Daniel*, who held, that by Uſurpation the King might be put out of Poſſeſſion; but the Law is now taken to be otherwiſe, *viz.* that the King cannot be put out of Poſſeſſion by any Uſurpation, (that is) his Inheritance in his Advowſon cannot by any Uſurpation be deveſted out of him; but the King by a Plenarty is ſo far out of Poſſeſſion, that he cannot preſent, but muſt firſt remove the Incumbent, who hath by Preſentation, Inſtitution and Induction got the Poſſeſſion of the Church. 2 *Inſt.* 358. *Boſwell's* Caſe, 6 *Coke* 49, 50. And ſo is the Law alſo taken to be, that Plenarty is not pleadable againſt the King. *Mich.* 28 & 29 *Eliz. C. B.* 1 *Leonard* 226. and in *Boſwell's* Caſe, 6 *Coke* 49. See *cap.* 13. But Plenarty by ſix Months upon an Inſtitution, where the Inſtitution is made upon a Preſentment,

If a Plenarty by ſix Months, and Judgment by *Nihil Dicit*.

Plenarty cannot bar the King.

Pleas, &c. in Quare Impedits.

Default, and the Incumbent doth plead to the Writ, which is found for him, and then the Incumbent doth pray that the Writ may abate, and the Plaintiff doth pray a Writ to the Biſhop for Default of the Patron, in this Caſe the Writ is to be abated, and no Writ to iſſue to the Biſhop. By Advice of the Juſtices of both Benches. 7 *H.* 6. 15. 10 *H.* 6. 4.

Incumbent's falſe Plea ſhall not prejudice the Patron.

As the Plea of the Patron doth not prejudice the Clerk, ſo the Plea of the Clerk will not prejudice the Patron; and therefore if the Clerk doth plead that he is *Parſon imperſonee*, and a good Bar, and the Patron alſo doth plead his Title, but doth not acknowledge any Plenarty of his Preſentment, and Judgment is given againſt the Plaintiff, the Patron ſhall have a Writ to the Biſhop, for that the falſe Plea of the Incumbent ſhall not conclude the Patron, who could not contradict it in this Point; if it did, the Patron could not have a Writ to the Biſhop, becauſe the Church was pleaded full of his Preſentment, and ſo no Benefit of his Suit. *Roll's Abr.* 2. *p.* 389. *Hob.* 196.

Where the King's Clerk pleads Induction falſly.

So if a *Quare Impedit* be brought againſt the Incumbent of the King, and he pleads that he is *Parſon imperſonee*, that is, as well inducted as inſtituted, and a good Bar againſt the Plaintiff, ſo that it is adjudged againſt him, although in this Caſe the Defendant pleaded that he was inducted falſely, yet the King ſhall not be bound thereby, but that contrary to the Record he may have a Writ to the Biſhop, becauſe the King was no Party to the Confeſſion, but is as a third Perſon always preſent in Court; and therefore upon Suggeſtion that his Clerk is not inducted, he ſhall have his Writ to the Biſhop, but peradventure not without ſuch Suggeſtion, and if in ſuch Caſe no Writ ſhall be awarded, the King would have no Advantage by the Recovery, nor could his Clerk be ever made full Incumbent of the Church, but both the King and his Clerk loſe the Benefit of the Suit. *Mich.* 15 *Jac. Winchcomb* and *Pulleſton*'s Caſe, *Hobart* 193.

A Clerk may loſe his Incumbency by ill Pleading.

However, although the Clerk being Complete Incumbent may plead by the Statute, and alſo hath a good Title if well pleaded, yet he may deſtroy it by his own ill Pleading, and thereby loſe his Incumbency; it behoves him therefore to be very careful that there be no Miſtake in his Plea, for the Miſtake of a Name, as *Peter* for *Thomas*, *&c.* may be fatal to him, as was adjudged *Hill.* 14 *Car. B. R. Harpur* v. *The Bailiff and Burgeſſes of Derby*, *Jones* 427.

Diſturbance on the Firſt of *November*, Bar by Preſentment the Firſt of *May* upon Lapſe.

A *Quare Impedit* was brought, and the Plaintiff counted upon a Diſturbance on the Firſt of *November*, and the Incumbent pleaded, that on the Firſt of *May* next after the ſaid Firſt of *November*, he himſelf was preſented to the Church by the Queen, the Right of preſenting to the ſaid Church being devolved to her by Lapſe; upon which the Plaintiff demurring in Law, the Plea was holden inſufficient (*per Curiam*); for the Plaintiff counted upon a Diſturbance to him on the Firſt of *November*, and the Defendant intitleth himſelf to an Incumbency on the Firſt of *May* after, in which Caſe the Diſturbance ſet forth in the Count is not anſwered by Traverſe, nor confeſſed nor avoided, which it ought always to be, but the Diſturbance acknowledged; and although in this Caſe, in order to have a Writ to the Biſhop for the Queen, it was urged, that the Title of the Queen did appear to be by Lapſe, which is confeſſed (I ſuppoſe by the Plaintiff's Demurrer to the Incumbent's Plea); yet by the whole Court the Writ was denied; for though it appeareth that the Incumbent was lawfully preſented to the ſaid Church, and ſo once lawful Incumbent, yet it appeareth alſo that the

Without Traverſe, *&c.*

Title

Title of the Queen is once executed by preſenting the ſaid Incumbent, and ſo gone. And when the Incumbent as here hath loſt his Incumbency by ill Pleading, which he may do as well as by Reſignation, or other Means, the Queen's Turn is ſerved. But if in the like Caſe the Queen had been Patron, ſhe ſhould have had a Writ to the Biſhop to admit ſuch Perſon as ſhe ſhould afterwards have preſented. *Mich.* 31, 32 *Eliz. C. B. Arundel* v. *The Biſhop of Glouceſter* and *Chaffin*, 1 *Leonard* 194, and *Paſch.* 32 *Eliz. Stanley* v. *Chaffin*, *C. B.* 1 *Anderſon* 238.

Pleas, &c. in Quare Impedits.

Aliter if the Queen had been Patron.

That the Incumbent may make a ſufficient Plea, he muſt remember, that by the Letter and Meaning of the Law that enables him to Plead, *viz. Stat.* 25 *Ed.* 3. *c.* 7. he cannot plead that he is Parſon generally, but muſt neceſſarily ſhew of whoſe Preſentment, whereby it may appear to the Court, that the Title he defends is his Patron's, for he muſt as well ſhew and defend his own and Patron's Right, as counterplead his Adverſary's; and therefore he cannot make himſelf *Parſon imperſonee* of the Preſentation of one, and make a Title to another as Patron, *Hellwey*'s and the Archbiſhop of *York*'s Caſe, *Jones* 5. and *Hobart* 321. *Jenkins*, *Cent.* 5. *Caſe* 18. and ſo defend himſelf by the Title of a Stranger, under whom he claims not, though that were ſufficient to deſtroy the Plaintiff's Title, by confeſſing and avoiding it, or the like; therefore when he ſays of whoſe Preſentment he is Parſon, that is traverſable. 16 *Car. B. R.* Sir *John Dryden*, &c. v. *Yates*, 1 *Cro.* 591. Neither can he counterplead the Plaintiff's Title, but muſt alſo make a Title to himſelf, by the Words and Meaning of this Law, that is, his Patron's Title whereupon his own depends; and albeit the Incumbent is inducted, yet if he (being made a Defendant in a *Quare Impedit*) doth reſign hanging the Writ, he hath loſt his Privilege by the Statute of pleading to the Title of the Patron; for it was granted him to defend his Poſſeſſion; ſo when his Poſſeſſion is gone, there is no Cauſe for him to uſe it. 31 *Ed.* 1. *Fitz. Incumbent* 6. And therefore it is not good for him to ſay that he was *Parſon imperſonee*, unleſs he may ſay that he is ſo. *Hill.* 17 *Car. Palmer* v. *Hudde*, *March* 158. And yet the Incumbent that hath reſigned, may plead as he might have pleaded at the Common Law, and if he doth plead otherwiſe, *viz.* according to the Statute, the Plaintiff may reply his Reſigning, hanging the Writ, and by that will defeat him of his Plea. *Paſch.* 17 *Jac.* Sir *William Elvis* v. *The Archbiſhop of York*, *Taylor* and *Biſhop*, *Hobart* 321. But though the Incumbent may plead, as before, the Title of his Patron by this Statute; yet, as is ſaid, the Biſhop cannot otherwiſe plead thereby than he could have done before at the Common Law, but only where he hath collated actually by Lapſe; for though the Incumbent by Preſentation be alſo admitted to plead by the Meaning of the Law under the Words——*Like Caſe*——becauſe the Caſe of being Incumbent upon a Preſentation, is like the Caſe of being Incumbent by Collation only, yet the Ordinary's Caſe before actual Collation is no ways like in Caſe, for he hath gotten no Intereſt for himſelf, or his Clerk, in the Church; and therefore if the Incumbent inſtituted only be not within the Relief of this Law, much leſs ſhall the Ordinary who hath no Intereſt, but only an Office, by which he ought to be indifferent to all Parties, and maintain no Sides. *Paſch.* 17. *Jac.* Sir *William Elvis* v. *The Archbiſhop of York*, *Taylor* and *Biſhop*, *Hobart* 321. The ſame Caſe, *Jones p.* 4.

He muſt ſhew of whoſe Preſentment he is Parſon.

May not plead his Title after Reſignation.

How he may plead.

Biſhop not within the Statute before actual Collation.

Tho' it be ſaid before, that the Incumbent who may plead, muſt not only counterplead the Plaintiff's Title, but muſt alſo make a Title to himſelf, by the Meaning of the aforeſaid Statute; yet when the Queen brought

Quare Impedit by the Queen againſt the Incumbent alone.

Pleas, &c. in Quare Impedits.

brought a *Quare Impedit* againſt the Incumbent alone, who did only counterplead the King's Title, by ſetting forth that the Queen's Anceſtor had made a Leaſe of the ſaid Advowſon to *J. S.* who had the Right of preſenting, and that the Church being void, he was preſented by *J. D.* upon whoſe Preſentment he was inſtituted and inducted, upon a Demurrer thereto, although the Court at firſt was of Opinion againſt the Defendant, becauſe that he had not in his Plea ſhewed any Title in his own Patron, but only counterpleaded the Title of the Queen; and (by *Periam*) the Patron himſelf could not have had ſuch Plea if he had been Party to the Writ, and therefore not the Incumbent; and it is no good Pleading in any Action to diſcover in pleading any Wrong, as Force, Diſſeiſin, Uſurpation, *&c.* yet at length Judgment was given againſt the Queen, becauſe there was not a bare Uſurpation only pleaded againſt the Queen, but alſo an Eſtate, *viz.* a Leaſe of the Advowſon made to him upon whom the Uſurpation was made, ſo that the Queen was encountered with a Leaſe of her Anceſtor, againſt which ſhe could not make Title to preſent without ſpecial Matter. *Mich.* 28, 29 *Eliz. C. B. Queen* and *Middleton*'s Caſe, 1 *Leonard* 45, 46.

And a Preſentment by Uſurpation upon the Leſſee, and allowed.

What Clerks are only aided by the Statute.

Though (as before) an Incumbent of a Church may by the Statute of 25 *E.* 3. *c.* 7. plead his Title, *&c.* yet if he be ſuch a Clerk as is in only by Prayer to be admitted, or otherwiſe without Preſentment, or upon a void Preſentment, which is as none, he is not aided by this Statute to plead in Bar, becauſe the Statute doth require an Incumbent preſented; neither need the Plaintiff name him in his Writ that made ſuch a void Preſentment, *Jenkins, Cent.* 5. *Caſe* 18. and ſo ſuch Clerk hath no way to defend his Title, which was the Caſe of all Incumbents before the Statute, as appears by 18 *Ed.* 3. 23. where the King brought a *Quare Impedit* againſt the Patron and his Incumbent, and claimed by the Grant of the next Avoidance from the ſame Patron to him, which was no Plea without ſhewing it, but the Patron confeſſed it, and the Incumbent demanded Judgment, becauſe the King ſhewed no Deed of the Grant; which Exception was diſallowed; then he pleaded, that the Patron made no ſuch Grant, which the Prior whom it concerned had confeſſed, and both were adjudged againſt him, becauſe he claimed nothing in the Patronage, and ſo could not plead; from which Caſe it ſeems to be, that if a Dean and Chapter, or Maſter and Brothers of an Hoſpital, *&c.* have preſented their Dean, or Maſter to a Church of their own Gift, the Preſentment being void, any Stranger may ſue the Dean or Maſter, and recover againſt them; and ſo it is in the like Caſes: *Quære.* And it hath been held, that when the Maſters and Brothers of an Hoſpital did preſent the Maſter, and the Maſters and Brothers did bring a *Quare Impedit* againſt the Maſter by a ſtrange Name, that the Writ did well lie, and that they ſhould recover, the Preſentment being void. 12 *H.* 8. 12.

Such Incumbent may plead *Ne diſturba pas.*

However, ſuch Incumbents as are not aided by the Statute, as in the Caſe of a void Preſentment, and all others before Incumbency (if made Defendants) may excuſe the Wrong with which they are charged, by pleading the general Iſſue *Ne diſturba pas.* And without making Title to the Patronage, a Man may ſhew as *amicus curiæ*, falſe Latin, or other Matter appearing within the Writ, for that is no Pleading, but rather a remembring the Court of that of which they ſhould take notice of Office; by *Hobart*, in *Colt* and *Glover*'s Caſe, *Hobart* 162.

That the Patron may, yet a *Parſon imperſonee* may not plead Plenarty.

Tho' a Clerk being inducted may plead his Patron's Title as aforeſaid, and being inſtituted only by the Space of ſix Months, his Patron may plead Plenarty againſt all but the King, and thereby, tho' he hath no

Title to the Patronage, bar the Plaintiff, yet a *Parſon imperſonee* cannot in a *Quare Impedit* brought againſt him plead Plenarty, as *Manwood* ſaid, for that the Statute of *Weſtm.* 2. *c.* 5. gave ſuch a Plea to the Patron, *viz.* that the Church is full of his Preſentment by ſix Months before the Writ purchaſed, and did deſtroy the pleading of Plenarty at the Common Law, which was that the Church was full at the Day that the Writ was purchaſed. *Grendon*'s Caſe, *Plowd.* 501. 16 *Ed.* 4. 11. 22 *H.* 6. 14. 38 *H.* 6. 20. *b.* Accordingly, when a Clerk pleaded that he had been Parſon for Three Years, and Plenarty generally by ſix Months of the Preſentation of one not named in the Writ, the Court held the Plea to be inſufficient, becauſe the Parſon ſhewed no Title in him that preſented him, being a Stranger to the Writ. *Brownlow*, 1 *Part* 162.

Verdicts, &c. in Quare Impedits.

But if he had pleaded that he had been in the Church by ſix Months of the Preſentment of the Plaintiff himſelf, or by the Ordinary's Collation for Lapſe, it had been good without making any other Title. *Liſter* v. *Crameel*, *Noy* 30. 10 *Ed.* 4. 11.

When the Defendants have pleaded according to their reſpective Rights and Intereſts, the Plaintiff is to reply according as his Caſe and the Pleas of the Defendants ſhall require, *&c.* and if Iſſue be joined, then the Jury that is to try that Iſſue is alſo to inquire; *Firſt*, If the Church be full; and if ſo, *Secondly*, Of whoſe Preſentment; *Thirdly*, If ſix Months be paſſed from the Time that it became void; *Fourthly*, Of the Value of the Church by the Year. *Mich.* 20 *H.* 7. *Keilway* 57, and *Boſwell*'s Caſe, 6 *Coke* 51, and by *Bracton Lib.* 4. *Tract.* 2. *cap.* 6. *fol.* 296. *Brownlow* and *Gouldsborough*, 1 *Part* 158. And they are to find what the clear yearly Value of the Church is, deducting what is paid out of the ſame. *Trin.* 16 *Car. B. R.* Sir *John Dreyden*, &c. v. *Yates*, 1 *Croke* 592. But if the Jury be not charged, or do not inquire of theſe Points, yet that may be ſupplied by a new Writ of Inquiry, and thoſe Matters inquired of by another Inqueſt. Admitted in *Cheyney*'s Caſe, 10 *Coke* 119. Or if the Jury do not find what Time the Church was void, nor whether the Writ was purchaſed before or after the ſix Months are paſt; yet it is good; for it ſhall be intended that the Writ was timely brought, unleſs a Plenarty be pleaded. *Hill.* 9 *Car. Lort* v. *The Biſhop of St. Davids*, *Jones* 332. And if Coſts be alſo aſſeſſed by the Jury, which ought not to be, yet that ſhall not prejudice the Plaintiff, if no Judgment be given for ſuch Coſts. *Paſch.* 14 *Jac. Grange* v. *Denny*, *B. R. Bulſtrode*, 3 *Part* 174. When the Plaintiff hath replied to the Plea of the Incumbent, if the Incumbent doth not rejoin any Thing, nor join Iſſue, the Plaintiff ſhall have Judgment to recover his Preſentation as againſt him, and a Writ to the Biſhop, *non obſtante Reclamatione*, *&c.* and to remove the Incumbent, but with a *Ceſſet Executio*, until the Plea be determined between the Plaintiff and the other Defendants. *Hill.* 17 *&* 18 *Car.* 2. *B. R.* Sir *John Tufton* v. Sir *Richard Temple*, *Vaughan p.* 6.

What the Jury are to inquire upon Iſſue joined.

Or elſe by another Inqueſt.

Judgment to recover, *&c.* with a *Ceſſet executio.*

And note, that a Biſhop being a Peer of the Realm, he ought always to have a Knight in the Inqueſt between him and any other Perſon, and if no Knight be returned in the Inqueſt, a *Venire facias de novo* ſhall be iſſued forth, if the Inqueſt be challenged for this Default. *Jenkins*, *Cent.* 1. *Caſe* 19.

When a Knight ought to be in the Inqueſt.

CHAP.

Judgments, &c. in Quare Impedits.

CHAP. XXVII.

Judgments in Quare Impedit, *&c. and of Writs to be awarded to the Biſhop upon ſuch Judgments.*

In *Quare Impedit*, Judgment to recover the Preſentment and Advowſon.

AFTER the Jury have given their Verdict, Judgment is to follow, which is, to recover the Preſentment; and if the Recovery be in a *Quare Impedit*, the Advowſon alſo; by *Coke. Trin.* 13 *Jac. B. R. Harris* v. *Auſtin*, 3 *Bulſtrode* 38. *Regiſt.* 30. *a.* & 1 *Brownlow* and *Gouldsborough* 160, but *Bro. Tit. Baron* and *Feme* 28, and 1 *Brownlow* and *Gouldsborough* 158, 159, ſeem to be to the contrary, that the Preſentation and Damages are only recoverable in a *Quare Impedit*.

But before I ſhew the Effects of the Judgment, ſeveral Things are to be noted by the Way; as firſt, That not always he that peradventure may have the beſt Title ſhall have Judgment, and a Writ to the Biſhop, but the contrary Party, in that ſome Error or Miſcarriage doth happen, which prevents the Merits of the Cauſe from being debated.

For the Defendant upon Abatement.

If the Writ doth abate for ſome Fault in the Declaration, the Defendant ſhall have the Writ to the Biſhop to admit his Clerk, 31 *H.* 6. 15, and ſo the Defendant ſhall have it, if he demur to the Plaintiff's Declaration, and upon the Demurrer it be adjudged for him and againſt the Plaintiff. 28 *H.* 8. *Dyer* 24. *b.* Alſo if the Plaintiff doth diſcontinue his Suit, the Defendant ſhall have the Writ to the Biſhop. 31 *H.* 6. 15.

Diſcontinuance.

Nonſuit.

So if the Plaintiff after Appearance be nonſuited, although it be within the ſix Months, the Defendant ſhall have the Writ to the Biſhop, 19 *E.* 4. 9. 22 *H.* 6. 44. 33 *H.* 6. 1, 55. 20 *Ed.* 4. 14. 21 *Ed.* 4. 2. *b. F. N. B.* 38. *k.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. *b.* and ſo it is if the Plaintiff be nonſuited after the Defendant hath pleaded, 38 *Ed.* 3. 8. *b.* but when the Plaintiff is nonſuited, and Judgment is given that the Defendant ſhall recover the Preſentation, yet the Defendant ſhall not have a Writ to the Biſhop before Title made; but if the Defendant at the Day of the Proceſs ſerved doth make Default, the Plaintiff ſhall have a Writ to the Biſhop without other Title made. 22 *H.* 6. 44, 45. And if the Caſe be, that in a *Quare Impedit* the Defendant doth make Title to the Church to himſelf and a Stranger, and after the Plaintiff is nonſuited, the Writ to the Biſhop ſhall be awarded only for the Defendant, and not for the Stranger alſo, becauſe he is not named in the Writ. 13 *Ed.* 3. *Writ to the Biſhop* 20, 25. Or if in a *Quare Impedit* againſt the Clerk and another, the Clerk doth plead that he claims nothing, *&c.* but conveys a Title to the King that preſented him, and the other makes another Title, and then the Plaintiff is nonſuited, the Writ to the Biſhop ſhall be awarded only for the other that was ſued with the Clerk, and not for the Clerk the Preſentee of the King, becauſe his Plea was but in Excuſe of the Wrong, and not to have the Writ. 14 *H.* 4. 16. But if three do bring a *Quare Impedit*, and only two of them be nonſuited, the Defendant ſhall not have a Writ to the Biſhop, becauſe the third may

Upon Nonſuit, Title to be made.

Writ for another ſued with the Clerk.

One brings Two Writs.

may have the Right; or if a Man doth bring two Writs of *Quare Impedit*, and after is Nonſuit in one of them, the Defendant ſhall not have the Writ thereupon, altho' he doth make Title. 12 *R.* 2. *Writ to the Biſhop* 16. Judgments, &c. in Quare Impedits.

In a *Quare Impedit*, if the Defendant doth plead that he did not diſturb the Plaintiff, the Plaintiff ſhall have a Writ to the Biſhop. 17 *Ed.* 3. 17. *a.* So if in a *Quare Impedit* for the Church of *D.* the Defendant doth ſay that there is no ſuch Church in the ſame County, the Plaintiff ſhall have a Writ to the Biſhop, 8 *H.* 6. 37. 9 *H.* 6. 17. *Contra* 45 *E.* 3. 6. for this can be no Damage to the Defendant, for the Writ muſt be to the Church named in the Declaration: If there be none ſuch, the Plaintiff can have no Fruit or Advantage by his Writ; if there be, the Defendant has no Prejudice, for he is ſo far from claiming Title to that Church, that he knows nothing of it; *Quære.* So if the Defendant doth plead that pendant the Writ the Preſentee of the Plaintiff is admitted, inſtituted and inducted: This is no good Plea in Abatement of the Writ, the ſame being the Act of the Biſhop more than of the Plaintiff; but the Plaintiff ſhall have a Writ to the Biſhop becauſe the Defendant doth neither gainſay the Right of the Plaintiff, nor the Diſturbance laid. 11 *R.* 2. *Quare Impedit* 144. But if the Defendant doth abate the Writ, for that the Church was full of the Preſentment of the Plaintiff himſelf before the Writ purchaſed, the Defendant ſhall not have a Writ to the Biſhop without Title made. 13 *H.* 4. 7. *a.* Where Plaintiff ſhall have the Writ to the Biſhop.

If the Action be brought againſt Patron and Incumbent, and the Patron doth make Default, and the Plaintiff and Incumbent be at Iſſue upon a Plea in Abatement of the Writ, *viz.* whether the Plaintiff was made Knight after the laſt Continuance; if it be found for the Defendant, though the Writ ſhall abate, yet the Defendant ſhall not have a Writ to the Biſhop, 7 *H.* 6. 37. *b.* but if ſuch Plea had been found for the Patron, he ſhould have had his Writ, *&c. Brook, Writ to the Biſhop* 30. Upon an Iſſue in Abatement.

If a *Quare Impedit* being brought againſt divers doth abate, for that one of the Defendants was dead before the Writ purchaſed, the Defendant ſhall have his Writ to the Biſhop. 11 *H.* 6. 53. But if the Writ doth abate within the ſix Months for falſe Latin, or Inſufficiency of Form, the ſame is the Fault of the Clerk, and ſhall not be peremptory to the Plaintiff; nor ſhall the Defendant thereupon have a Writ to the Biſhop, but the Plaintiff may have a new Writ of *Quare Impedit*; and therewith agreeth 3 *H.* 6. 3. 31 *H.* 6. 15. *F. N. B.* 38. *b. vide* 38 *Aſſ. Pl.* 9. *Paſch.* 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. *Contra* 13 *H.* 4. 7. So if the Writ doth abate for Miſnoſmer of the Plaintiff or Defendant, if the Plaintiff doth confeſs it, the Defendant ſhall not have a Writ to the Biſhop, for it may be the Fault of the Clerk in writing of it, and therewith agreeth *F. N. B.* 38. *b. vide* 31 *H.* 6. 15. And it is ſaid, that if the Writ doth abate for Form, the Plaintiff ſhall never have a Writ to the Biſhop. *Trin.* 8 *Jac. Wallop* v. *Murrey*, *Brownl.* and *Gouldſb.* 1 *Part* 162. *Quære.* However, generally, if the Writ be not well brought it will abate, and then the Plaintiff will not be only prevented from obtaining any Judgment, and of having a Writ to the Biſhop, but the Defendant ſhall have it. *Paſch.* 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. *Jenkins, Cent.* 2. *Caſe* 85. Where the Writ doth abate for Death, falſe *Latin*, &c. Upon Abatement generally Defendant ſhall have the Writ.

Although the Merits of the Caſe may not ſometimes come into Queſtion thro' Error, Exception, *&c.* and ſo he that hath no good Title may happen to have the Preſentment, yea, and as the Caſe may be, carry thereby the Advowſon alſo; yet *Hobart* ſaith, that a Writ to the Biſhop Where a Title muſt be made before a Writ.

Judgments, &c. in Quare Impedits.

can never be had without a Title appearing to the Court, and particularly that if the Defendant doth never appear, or doth make Default, at the grand Diſtreſs returned, yet the Plaintiff muſt make a Title for Form-ſake, *Colt* and *Glover*'s Caſe, *Hob.* 163. 10 *H.* 6. 4. *b.* and this ſaid to be according to what was practiſed. 7 *Eliz. Dyer* 241. But yet 'tis ſaid, that if one of two Defendants do make Default at the grand Diſtreſs, and the other doth plead in Bar, a Writ to the Biſhop ſhall be awarded for the Plaintiff by the Statute of *Marlb. c.* 12, without Title made. *Jenkins* 2. *Caſe* 85.

Where Biſhop appears, and the others make Default.

However in a *Quare Impedit* againſt the Biſhop, and others, if the others make Default, and the Biſhop doth appear, altho' the Plaintiff ſhall not have a Writ to the Biſhop againſt the others that make Default, without Title, yet if he declares againſt the Biſhop, this ſhall be a ſufficient Title againſt the others. 10 *H.* 6. 4. *b.* Alſo if the Plaintiff be Nonſuit after Appearance, the Defendant muſt make a Title at leaſt for Form-ſake; by *Hobart*, in *Colt* and *Glover*'s Caſe, *Hobart* 163, and by *Coke*, *Paſch.* 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. 9 *H.* 7. 4. *b.* 11 *H.* 6. 8. 2 *H.* 5. 6. Yea, and tho' the Caſe be ſuch, that the Defendant cannot make a Title, becauſe one of the Defendants is alſo Plaintiff, for that he holds in Coparcenary, ſo that if he ſhould make Title, it ſhould be contrary to the Action, which ſhall not be ſuffered; yet if the Plaintiff in ſuch Caſe be Nonſuit, the Defendant ſhall not have a Writ to the Biſhop without Title made. 11 *H.* 6. 8. *a.* So if it appears by the Declaration that the Plaintiffs and Defendants are Tenants in Common, ſo that the Defendant hath Right to the Advowſon, altho' the Action abates thereby, yet a Writ ſhall not go to the Biſhop for the Defendant only, becauſe he cannot make a Title in ſuch Caſe but for both, becauſe the Title appears to be in both. 20 *Ed.* 3. *Quare Impedit* 63. And ſo muſt the Defendant make Title, in caſe the Plaintiff doth diſcontinue his Suit before he can have the Writ. 31 *H.* 6. 15. 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. *b.*

Title upon Nonſuit.

But in a *Quare Impedit* if the Plaintiff doth declare, and the Defendant doth demur upon the Declaration, and it be adjudged againſt the Plaintiff upon the Demurrer, a Writ ſhall be granted for the Defendant without making any Title, if that upon the Declaration the Title of the Defendant doth appear. 28 *H.* 8. *Dyer* 24. *b.* And I conceive, that in all the Caſes aforeſaid, when a Writ is awarded to the Biſhop, the ſame is peremptory, and a good Bar in another *Quare. Impedit*, altho' it be brought within the ſix Months; for ſo it is ſaid to be in the Caſe of the Plaintiff's being Nonſuit after Appearance. 40 *Eliz.* Sir *Hugh Portman*'s Caſe, 7 *Coke* 27. *b.*

Writ to the Biſhop, Bar to another *Quare Impedit.*

Where he that obtains Judgment may not have Execution thereof.

Secondly, As he that hath the beſt Title may not have Judgment given for him, ſo not always he that obtains a Judgment ſhall have Execution thereof; for the Plaintiff may have Judgment againſt ſome of the Defendants, and yet be barred by the reſt, ſo that he ſhall never have a Writ to the Biſhop. And accordingly 'tis ſaid, that if the Incumbent's Plea be found for him, he ſhall never be removed, altho' other Pleas be found for the Plaintiff. *Trin.* 8 *Jac. Wallop* v. *Murrey*, *Brownl.* and *Goldſb.* 1 *Part* 162. And on the other Hand, if it be adjudged againſt the Incumbent upon this Plea, yet the Plaintiff ſhall not have a Writ to the Biſhop, until, and unleſs it be alſo adjudged againſt the Patron. 25 *Ed.* 3. 34. *b.*

Where the Biſhop is Defendant.

So if the Biſhop be made a Defendant, and he pleads that he claims nothing but as Ordinary, the Plaintiff may have Judgment againſt him

preſently, but no Execution until he hath recovered againſt the reſt. 17 *H.* 7. *Keil.* 43. Or if the Plaintiff will not in ſuch Caſe take his Judgment, but will maintain the Biſhop to be a Diſturber, altho' he ſhould recover againſt all other Defendants, yet if he doth not make out a ſpecial Diſturbance by the Biſhop, but that is found againſt him, he ſhall be totally barred; by *Hobart*, *Mich.* 15 *Jac. Brickhead* v. *The Archbiſhop of York*, *Hobart* 198. *Jenkins*, *Cent.* 1. *Caſe* 19. Yet we find, that where the Defendant pleaded that he had not diſturbed, *&c.* the Plaintiff had a Writ to the Biſhop upon that Plea, and yet maintained the Defendant to be a Diſturber, upon the Account to recover Damage. 17 *E.* 3. 71. *a.*

Judgments, &c. in Quare Impedits.

Or made Diſturber.

If there be beſides the Biſhop two Defendants or more, and Judgment be given againſt one upon a *Nihil dicit*, no Writ ſhall go to the Biſhop for the Plaintiff, until he hath Judgment alſo againſt the other. 17 *Ed.* 3. 58. Or if the other Defendants plead ſeveral Pleas in Bar, although the Plea of one of them upon Iſſue joined be found againſt him, and for the Plaintiff, yet if the Plea of the other be tried againſt the Plaintiff, he ſhall never have a Writ to the Biſhop. *Jenkins*, *Cent.* 1. *Caſe* 19, and *Cent.* 2. *Caſe* 58. So if the King doth recover againſt an Incumbent that claims by the Collation of the Biſhop of the Dioceſe, yet if the King hath another *Quare Impedit* depending againſt the Biſhop alone for the ſame Church, the King ſhall not have a Writ to the Biſhop againſt the Incumbent until the Plea be determined betwixt him and the Biſhop, although that the Actions be by ſeveral Originals. 25 *Ed.* 3. 47. And the Reaſon of theſe Caſes ſeems to be, becauſe the Plaintiff by making many Diſturbers in his Writ, *&c.* obligeth himſelf to make Title, and recover againſt them all; and until ſuch Time as he hath ſo done, it appears not that the Title is in him, for that it may be in ſome other of the Defendants againſt whom a Recovery is not had, and if upon Trial he be barred by one alone, his Action is gone as to all. *Mich.* 30 *Jac.* Lord *Say* v. *The Biſhop of Peterborough*, *Brownl.* and *Goulds.* 1 *Part* 161.

Where the Plaintiff makes many Diſturbers, he muſt make Title, and recover againſt them all.

Yet if one of two Defendants do make Default at the grand Diſtreſs, and the other doth plead in Bar, a Writ to the Biſhop ſhall be awarded for the Plaintiff, by the Statute of *Marlb. cap.* 12. (*Stat.* 52 *H.* 3. *cap.* 12.) And if the Bar pleaded by the other Defendant be found for him, he alſo ſhall have a Writ to the Biſhop; and their Clerks being inſtituted and inducted, ſhall try their Rights in an Aſſize, Treſpaſs, *&c.* *Jenkins*, *Cent.* 2. *Caſe* 85. 2 *Inſt.* 126.

One makes Defanlt, the other pleads, &c.

And in Recovery in a *Quare Impedit* the Plaintiff had a Writ of Inquiry of Damages, and alſo a Writ to the Biſhop; but it was adjudged that the Writ to the Biſhop ſhould abate, for that the Writ to the Biſhop ought not to iſſue till the Writ of Inquiry be returned, unleſs the Plaintiff releaſe the Damages, for till then Judgment is not given upon the intire Record. *The Biſhop of Glouceſter* and *al.* v. *Veal*, *Noy* 66.

Writ to the Biſhop, when.

Thirdly, *Note*, That as the Caſe may be, the Judgment may be given againſt the Plaintiff, and yet he may be equally intitled in the Execution of that Judgment, *viz.* to have a Writ to the Biſhop with the Defendant; as if a Tenant in Common doth bring a *Quare Impedit* againſt another that is Tenant in Common of the Advowſon with himſelf, and this doth appear by the Declaration, and the Defendant doth demand Judgment of the Declaration, for that it appears thereby that they are Tenants in Common, upon which the Court doth abate it; yet the Defendant ſhall not have any Writ to the Biſhop, for that he hath not made any Title; for though it appears by the Declaration, that the Defendant hath Right to the Advowſon, yet this is in Common with the Plaintiff,

Where the Plaintiff may have a Writ with the Defendant.

Judgments, &c. in Quare Impedits.

Plaintiff, and ſo, as hath been ſaid, both ought to have the Writ. 20 *Ed.* 3. *Quare Impedit* 67.

Where neither may have Judgment, *&c.* but a third Perſon.

Fourthly, *Note*, That neither Plaintiff, nor Defendant, may have Judgment or Execution, but a third Perſon, that is, no Party to the Suit; for if in the Debate of a Cauſe betwixt a Plaintiff and Defendant, it doth appear to the Court, either by the Declaration of the Plaintiff, or by Pleading, or Confeſſion of the Parties, that neither of them hath Right, but the Preſentation belongs to the King, the Court may, nay they ought to award a Writ to the Biſhop for the King, and without Prayer on the Part of the King; for the Court and Judges are the King's Counſel. But this muſt be where the King's Title appears ſo clear in *allegatis & probatis* to the Court, as that it is infallible both againſt Plaintiff and Defendant; by *Hobart* 163. *Colt* and *Glover*'s Caſe, 9 *H.* 7. 9. *b.* 16 *H.* 7. 12. 12 *H.* 7. 12. 11 *H.* 4. 71. *F. N. B.* 38. *G. Trin.* 31 *Eliz. Norwood* and *Dennis*, 1 *Leon.* 323. *Hill.* 21 *Eliz. Craſhfield* v. *Lord Dacres*, 1 *And.* 53. *Hill.* 6 *Jac. B. R. Cumber* v. *Biſhop of Chicheſter, &c.* 2 *Croke* 216. 2 *Vent. Rep.* 3, admitted. But if the King's Title doth appear to be good againſt the Plaintiff only, or againſt the Defendant only, the Writ to the Biſhop ſhall not be awarded for the King, unleſs the other Party doth confeſs (upon the Demand of the Court, if they have any Thing to ſay why the Writ ought not to be awarded for the King) that they have no Title, and that ſuch Writ ought to be awarded. *Mich.* 14 *Jac. Chancellor and Scholars of Cambridge* v. *Walgrave*, *Hobart* 126. Or if no Title doth appear for the King by the Pleading, although the Jury find the Title to be in the King, when it is out of their Iſſue and Charge, the Court is not to award a Writ to the Biſhop for the King, becauſe the one Party or the other may anſwer to it. *Trin.* 31 *Eliz. C. B. Norwood* v. *Dennis*, 1 *Leon.* 323.

Where not without Party's Confeſſion.

Or if the Jury find Title in the King.

So if in a *Quare Impedit* for the King, the King and Party be at Iſſue, which is found againſt the King, and yet a Title appears for the King by *Nient dedire* of the Party, the Court ſhall not adjudge for the King. *Hill.* 6 *Jac. Cumber* v. *Biſhop of Chicheſter* and *Green*, 2 *Croke* 216. So if Judgment be given in a *Quare Impedit*, and a Writ of Error be brought, and pendant the Writ of Error, the King doth bring a Writ of Right of Advowſon, upon which, by Motion to the Court, the Proceedings in the Writ of Error are ſtopped until Trial in the Writ of Right; and after the Writ of Right doth happen to be abated by Death of one of the Tenants, ſo that the Court doth proceed to examine the Errors, and doth affirm the firſt Judgment, and before the Judgment is drawn up, it is ſhewed that the King had Title, *viz.* by the Death of one of the Tenants, (who were Plaintiffs in the *Quare Impedit*, and held the Advowſon *in Capite*) for which Reaſon it was that the Writ of Right before did abate; yet the Court ought not in ſuch Caſe, *ex Officio*, to award a Writ to the Biſhop for the King, becauſe the Plea is but Matter in Fact, a bare Surmiſe, and not grounded upon any Matter of Record. *Mich.* 16 *Car. B. R. Yates* v. Sir *John Dryden*, 1 *Croke* 589. Neither is it to be awarded for the King, though the Title appear to belong to the King upon Evidence, unleſs it appear to be in him alſo by the Record. *Mich.* 12 *Jac. Rowth* v. *The Biſhop of Cheſter*, *Moor* 872.

Where not for the King, the Plea not being grounded upon a Record, *&c.*

Where the Writ is for a third Perſon, muſt be at the Prayer of the Party.

And *Note*, That it is ſaid generally, that if in an Aſſize of *Darrein Preſentment* it be found that neither the Plaintiff or Defendant hath Right to preſent, but a third Perſon, no Party to the Writ, the Writ to the Biſhop ſhall be awarded for him. 17 *Ed.* 3. 23. *Roll's Abr. Part* 2. *p.* 386. *T.* But it ſeems by the former Caſes, that the Court are not

bound to award it of Office, from the Reaſon that they awarded it for the King, but only at the Prayer of a Party, for the Courts are intruſted with the King's Rights, to take Care they be not prejudiced; but 'tis not ſo of any other Perſon's Right, for they ſhall take no Notice of any Title found for a common Perſon being a Stranger: So it is ſaid by Chief Juſtice *Vaughan*, and Juſtice *Tyrrell*, in the Caſe of *Craw* and *Ramſey*, *Hill.* 21 & 22 *Car.* 2. *Vent.* 2 *Part*, *p.* 3.

Recovery in Quare Impedit.

Laſtly, I may add, That though the Iſſue be found againſt the Plaintiff or Defendant, yet the ſame Perſon againſt whom the Iſſue is found, may have Judgment given for him, and the Writ awarded for him to the Biſhop; therefore in a *Quare Impedit* by the King, when the Iſſue was, whether the King had all the Advowſon or not, and the Jury found that he had but a third Part, but that it was the King's Turn to preſent to the preſent Avoidance, although that the Iſſue was found againſt the King, yet becauſe it appeared that the King had Title, the Writ was awarded for him, for that the Matter that was found was not out of their Iſſue. *Mich.* 14 *Jac. King* v. *The Biſhop of Rocheſter*, *Roll's Abr.* 2. *p.* 386, ſame Caſe, *Hobart* 119.

Where the Perſon againſt whom the Iſſue is found, may have Judgment, &c.

King's Title appearing.

CHAP. XXVIII.

The Effects of a Judgment in Quare Impedit *and* Darrein Preſentment, *and of the Writ awarded to the Biſhop,* &c. *to admit,* &c. *grounded thereupon. What is to be done upon ſuch Writ, and what Return the Biſhop may make thereunto.*

JUdgment being given, the Effects thereof are, That in an Aſſize of *Darrein Preſentment*, he that prevails ſhall recover the Preſentment, and ſix of the Jury who had View of the Church, may put the Plaintiff into Poſſeſſion if he doth recover, *&c.* In a *Quare Impedit* he that recovers, recovers the Advowſon as well as the Preſentment, as hath been ſaid, *Brownl.* and *Golds.* 1 *Part* 158, 159, 160. 3 *Bulſt.* 38. *Reg.* 30. *a.* But in both Writs, by the very Judgment abſolutely given, that is againſt all Parties, there is this Effect of the Judgment, That the Incumbent that was in the Church when the Writ was brought, if named in the Writ, is actually removed; but if not named in the Writ, he ſhall never be removed; by *Doddoridge* and *Coke*. *Trin.* 13 *Jac. B. R. Harris* v. *Auſtin*, 3 *Bulſt.* 38. *Jenkins*, *Cent.* 5. *Caſe* 18. *Brownl.* and *Golds.* 1 *Part* 158. 46 *Ed.* 3. *fo.* 13. *Marſhal's* Caſe, 9 *H.* 6. 56. *b. Cort* and *The Biſhop of St. David's* Caſe, 1 *Croke* 348. And this was one of the Cauſes, that after the Statute of *Weſt.* 2. *cap.* 5. it ſhall be inquired if the Church be full, and of whoſe Preſentment.

What is recovered in *Darrein Preſentment*, and What in *Quare Impedit*.

Upon an abſolute Judgment the Incumbent, if named, is actually removed.

Recovery in Quare Impedit.

Where two Patrons preſent, and one brings *Quare Impedit*, and the other ſues *Duplex Querela*.

If two Patrons do preſent, and the Biſhop doth refuſe both their Clerks, and one of the Patrons doth bring a *Quare Impedit* againſt the Biſhop, and pendant the Writ, the other Patron doth ſue a *Duplex Querela* in the Arches againſt the Biſhop, upon which Proceſs is made, and upon Default of the Biſhop, the Archbiſhop doth receive the Clerk of this Patron, who is inſtituted and inducted, and in by ſix Months; and afterwards the Plaintiff in the *Quare Impedit* doth recover, he ſhall by his Writ to the Biſhop remove the Incumbent of the other Patron that came in pendent the Writ, although not named in the Writ. *Trin.* 41 *Eliz. B. R.* between *Bennet* and *Edwards*, *Roll's Abr.* 2. *p.* 391, and *Moor* 572. And though the Incumbent named in the Writ doth reſign pendent the Writ, and after the Judgment is preſented, inſtituted and inducted into the ſame Church, for which the Action is brought, yet by the Judgment he is ſo removed, that the Clerk of him that recovers ought to be received. *Mich.* 28 *Eliz. C. B. Moor* and *The Biſhop of Norwich*, 3 *Leon.* 138.

Reſignation, and a new Title.

Or if the Incumbent againſt whom the Writ is brought doth reſign *pendente lite*, and then doth come into the ſame Church by a new Title; yet it appearing to the Court, that the Clerk is the Perſon againſt whom the Recovery is had, by the Judgment he ſhall be removed, *L.* 5 *E.* 4. 115, 116, vouched in *Moor* and *The Biſhop of Norwich*'s Caſe, 3 *Leon.* 138. But in this Caſe the Clerk had his new Title upon the Account of a Lapſe *pendente lite*, from the Biſhop, who was alſo made a Defendant in the Writ. And tho' the Biſhop be not made a Party to the Suit, if the Plaintiff be Nonſuit, ſo that the Defendant hath a Writ to the Biſhop, if the Biſhop had collated after the Judgment, tho' before the Writ ſerved, the ſix Months being expired, *Quære*, Whether his Clerk ſhall be removed, the Judgment being had, tho' not executed within the ſix Months? But 'tis ſaid in this Caſe, that the Plaintiff ſhall recover his Damage but for half a Year. 2 *Inſt.* 363.

Where the Incumbent doth not plead Plenarty.

If a Writ be brought againſt Patron and Incumbent after the ſix Months are paſſed, and they do not plead the Plenarty before the Writ brought, but ſome other Matter in Bar, upon which Iſſue is joined, and a Verdict given for the Plaintiff, the Incumbent ſhall be removed by the Judgment given upon this Verdict, becauſe the Incumbent was Party to the Writ, and might have pleaded the Plenarty. And Note, That in this Caſe it was not inquired when the Church became void, but *quod tempus ſemeſtre modo tranſivit*, and yet not material to inquire of it for the Cauſe aforeſaid, and alſo becauſe when the Jury find *quod tempus ſemeſtre modo tranſivit*, and Damages for a half Year, it ſhall be intended that the ſix Months paſſed, pendent the Writ, and not before the Action brought. *Hill.* 9 *Car. B. R. Biſhop of St. Davids* and *Lort*'s Caſe *affirmed in Error*, *Roll's Abr.* 2 *Part* 392. And if the Writ be brought within the ſix Months againſt Patron and Ordinary, tho' the Recovery be after, yet the Incumbent ſhall be removed, 39 *Ed.* 3. 15, but in this Caſe the Biſhop was found to be a Diſturber. And if any that are made Defendants in the Action, do get their Clerk into the Church *pendente lite*, ſuch Clerk by the Judgment is ſo outed, that the Clerk of him that recovereth, may and ought, upon the Writ to the Biſhop, to be received. *Booton* v. *The Biſhop of Rocheſter*, *Hutton* 24. *Mich.* 3 *Jac. Boſwell*'s Caſe, 6 *Coke* 51. *Jenkins*, *Caſe* 7. *Cent.* 7. 14 *H.* 6. 68. *b.*

Clerk received *pendente lite*.

King's Clerk *pendente lite* removed.

If the King doth preſent by Uſurpation, and a Writ is brought againſt his Incumbent, who is only inſtituted, (for the Writ doth not lie againſt the King) and pendent the Writ, the King doth preſent another, who is inſtituted and inducted, if the Plaintiff doth recover,

the ſecond Clerk ſhall be removed by the Judgment, for he comes in under the Title of the Plaintiff. *Mich.* 3 *Jac.* 6. *Boſwell's* Caſe, 6 *Coke* 52. So if pendant a *Quare Impedit* v. *J. S.* the Plaintiff be outlawed, upon which the King doth preſent, and his Clerk is inſtituted and inducted, and after the Outlawry is reverſed, ſo that the Patron doth recover in the *Quare Impedit*, he ſhall by the Recovery out the Incnmbent of the King; for now by the Reverſal of the Outlawry, the Preſentment of the King appears to be without Title, 30 *Eliz. B. R. Cornwall's* Caſe, *Roll's Abr.* 2 *Part* 391. *Goulds.* 44, 105, and ſo the King's Incumbent (the Outlawry being reverſed) ſhall be removed, altho' the Outlawry was before the Writ purchaſed, and altho' the Incumbent was not named in the Writ, for that he was preſented after the Writ brought againſt another Diſturber. *Mich.* 16 *Car. B. R. Reſbie* and *Powle's* Caſe, *Roll's Abr.* 2 *p.* 391.

Recovery in Quare Impedit.

So upon Reverſal of an Outlawry.

And yet when the Queen's Incumbent (being inducted after a Writ brought againſt him) did reſign, and the Queen *pendente lite* preſented another, the Plaintiff recovering; it was held by *Anderſon* and *Windham*, Serjeants of the Queen, Serjeant *Barber*, *Gerrard* Attorney General, and *Broom* Solicitor, that the laſt Incumbent being in by ſix Months, is not removeable upon ſuch Recovery, by a Writ to the Biſhop with a Commandment in it to remove the Clerk named in the Writ of *Quare Impedit*, and every other Incumbent; becauſe he that was laſt admitted was not Party nor Privy to the Judgment, nor to the Writ: But to this *Dyer* ſaith, that it ſeems that this Opinion is not Law, altho' there had been twenty Incumbents ſucceſſively pendent the Writ, *Paſch.* 21 *El. C. B.. Dyer* 364, and *Rolle* ſaith, that he knew it adjudged according to *Dyer's* Opinion, *Harris* and *Auſten's* Caſe, 1 *Roll's Rep.* 213. And therefore *Anderſon* (taking Notice of what is reported as to his Opinion in *Dyer*) doth better explain himſelf in *Beverly* and *Cornwall's* Caſe, *Mich.* 30 & 31 *Eliz. Goulds.* 105, ſaying, that he and *Gerrard* held, as he then alſo ſaid he did, that if a Clerk doth come in under the Title of the Plaintiff, and ſince the ſame, then he ſhall be removed; but if he come in by Title *Paramount*, he ſhall not be removed; by which he ſeems to grant, that if the Queen's ſecond Incumbent doth come in upon the ſame Title that the firſt came in upon, he ſhall alſo be removed.

Where a Clerk comes in by Title *Paramount pendente lite.*

So it is ſaid, That if a Stranger, *viz.* he who is no Defendant in the Writ, doth preſent pendent the ſame, his Clerk ſhall be removed if the Plaintiff doth recover; by *Brownl.* and *Golds.* 1 *p.* 159. But this is to be underſtood if the Plaintiff hath good Title. *Boſwell's* Caſe, 6 *Coke* 51. For if a Stranger to the Writ, who hath good Right, preſenteth his Clerk pendent the Writ, and his Clerk is admitted and inſtituted, he ſhall not be removed, or if he preſent the ſame Clerk that was adjudged a Diſturber; for then by ſuch Device the rightful Patron may be defeated of his Preſentment, and that was one of the Cauſes, that after the Act of *Weſt.* 2. *cap.* 5, it ſhall be inquired by the Jury, if the Church be full, and of whoſe Preſentment, to the End it may appear whether the Plaintiff ſhall recover his Preſentment or not. *Mich.* 3 *Jac. Boſwell's* Caſe, 6 *Coke* 51. 18 *H.* 7. *Keil.* 40. 2 *Cro.* 92.

When a Stranger who hath good Right preſents *Pendente lite.*

But we find it ſaid by *Twiſden* Juſtice, and not denied by any, that where there is an Incumbent who is not Party to the Action, there ſhall not be a Writ awarded to the Biſhop without a *Scire Facias* firſt ſued againſt ſuch Incumbent; for that *res inter alios acta alteri nocere non debet*, and it is inconvenient that one ſhould be ſtript of his Poſſeſſion without any Action brought againſt him; and altho' the Incumbent may have

Scire Facias to the Incumbent, if no Party.

Recovery in Quare Impedit.

have Notice of his Action, yet he hath no Day in Court to defend his Title; and this would be a Means to incourage Persons to bring Actions for to recover Churches against Strangers, which ought not to be suffered. And he said, that *Boswell*'s Case, in 6 *Coke* 48. *b.* had been often denied for Law, and he himself knew that a Writ of Error was brought to reverse it, and the Error assigned in the Point in Law: But that Writ abated, and *Coke* in the End of the Case seems to confute the principal Judgment. *Mich.* 14 *Car.* 2. *B. R. Hall* v. *Broad*, 1 *Sid.* 93. See more fully of this Matter after in this Chapter.

Quare Impedit when full of his own Presentment.

If a Man doth bring a *Quare Impedit* the Church being full of his own Presentment, and the Title is found for the Defendant, yet the Clerk of the Plaintiff shall not be removed, for that he might have abated the Writ upon the Church's being full of the Presentment of the Patron himself at the Day of the Writ purchased. 19 *H.* 6. 68. *b.*

Damages to be recovered.

Another Effect of a Judgment given in a *Quare Impedit*, or *Darrein Presentment*, is, That he for whom the Judgment is given shall recover as well his Damages, as his Presentment and Advowson, as hath been before said: For it hath been enacted, **That in Writs of** Quare Impedit, **and** Darrein Presentment, **Damages shall be awarded, that is, to wit, if the Time of six Months pass by the Disturbance of any, so that the Bishop doth confer to the Church, and the very Patron loseth his Presentation for that Time, Damages shall be awarded for two Years Value of the Church; and if the six Months be not passed, but the Presentment be deraigned within the said Time, then Damages shall be awarded to the half Year's Value of the Church; and if the Disturber have not whereof he may recompence Damages, in case where the Bishop conferreth by Lapse of Time, he shall be punished by two Years Imprisonment: And if the Advowson be deraigned within the half Year, yet the Disturber shall be punished by the Imprisonment of half a Year.** Stat. West. 2. cap. 5. 13 Ed. 1.

Upon Composition to present to a Chantry.

In a *Quare Impedit* for a Chantry, where by Composition, if the Patron presented not within a Month, then the Bishop should present after the Month, altho' the Bishop hath not presented, yet the Patron shall recover his Damages for two Years; for this is not like a Benefice with Cure of Souls, where the Patron may present after Lapse is come to the Bishop, if the Church be not full, for here by Composition after the Month, the Patron hath lost his Presentment. 13 *Ed.* 4. 3.

Where upon a Nonsuit Defendant shall have Damages of half a Year; and where of two Years.

In case the Plaintiff in a *Quare Impedit* be nonsuited after Appearance, by which the Defendant hath a Writ to the Bishop, and so the Court is not informed by the Inquiry of a Jury of the Value of the Church; the Course in such Case is to award a Writ to the Sheriff, to inquire what Time the Church became void, what is the Value thereof, or whether it remain void or not, and if it be full, of whose Presentation, *&c.* And then if the Sheriff doth make Return, that the Church is full by the Collation of the Bishop, tho' the Defendant doth pray to have Damages of the Value of two Years; yet if it appear that the Judgment was given within the six Months, he shall have Damages of the Value of half a Year of the Church only; the Reason is, because the Bishop's Clerk coming in within the six Months shall be removed, and the Defendant's Clerk received: But if the Collation be for Lapse after the six Months expired, and the Judgment was not given within the six Months, Damages of two Years Value of the Church shall be given to the Defendant, because his Turn is lost. 24 *Ed.* 3. 25. 11 *H.* 4. 80. Yet even in this Case, if the Patron will at his Peril pray a Writ to the Bishop, *viz.* when the Bishop hath after the six Months collated

If the Patron pray a Writ to the Bishop.

collated for Lapſe, he ſhall not have Damages of two Years Value of the Church, but only of half a Year, for the Court cannot grant both a Writ to the Biſhop, and Damages for two Years. 39 *Ed.* 3. 15. 11 *H.* 4. 80. Yet 'tis ſaid, that when they were at Iſſue in a *Quare Impedit*, and the Jury found that the Church was void at the Time when they were charged, and that at the Time of the Verdict the Church was full by the Collation of the Biſhop by Lapſe, the Plaintiff recovered his Preſentment and Damages according to the two Years Value of the Church, although that the Defendant alledged that the Plaintiff had recovered Damages to half a Year's Value of the Church in another *Quare Impedit* againſt another Perſon. 43 *Ed.* 3. 10. Albeit the Biſhop hath not collated, yet if he hath *Jus Conferendi*, the Plaintiff ſhall, if he will, recover Double Damages within this Statute; but if the ſix Months be paſt, ſo as the Biſhop hath juſt Title to collate by Lapſe, yet if the Church doth remain void, the Plaintiff may at his Peril pray a Writ to the Biſhop; but then he ſhall not recover Damages but for half a Year only, becauſe he ſhall recover his Preſentation. So it is in the Plaintiff's Election, either to loſe his Preſentation, and have double Damages, or to have his Preſentation and ſingle Damages; for the Plaintiff in no Caſe can have double Damages but where he loſeth his Preſentation. 2 *Inſt.* 363. But we find a Caſe reported, That a *Quare Impedit* being brought againſt three Defendants, two of them demurred, and the third pleaded to Iſſue, which is tried, and found for the Plaintiff; and the Jury who tried the Iſſue inquired, and found the Value of the Church, and that it was *adhuc* vacant, and taxed the Damages for half a Year, and Judgment is given for the Plaintiff as well upon the Demurrer as upon the Iſſue; and it was moved, that the Church continuing void, ſo that the Plaintiff might have the Fruit of his Preſentation, that he ought not to recover Damages for half a Year: And the Prothonotaries ſaid, that it is the conſtant Practice, that the Plaintiff ſhall not recover Damages for half a Year where the Church continues void; and although that the Jury tax Damages, yet they enter a *Remittitur* of the Damages where the Church is void; and that they would have done it in this Caſe of Courſe, without troubling the Court, if the Parties had applied to them. *Trin.* 34 *Car.* 2. *C. B. Holt* v. *Holland*, 3 *Levinz* 59. But *Quære*, If the Report of this Caſe be not miſtaken? ſince by the Statute of *Weſtm.* 2. *cap.* 5. the half Year's Value is given, although the Church remained void and open to the Plaintiff's Preſentation.

Recovery in Quare Impedit.

If the Patron pray a Writ to the Biſhop.

Double Damages only where the Plaintiff loſes his Preſentation.

Q. If Damages for half a Year, the Church remaining open to the Plaintiff's Preſentation.

Notwithſtanding this Statute, if Judgment be to recover the Value of the Church but for half a Year, when the ſix Months are paſt, this is no ſuch Error as the Defendant ſhall take Advantage of; for it is for his Advantage, and therefore is not by him aſſignable for Error. *Jenkins*, *Cent.* 5. *Caſe* 36.

Damages are not to be recovered by this Statute of every Defendant; for if the Biſhop be made a Defendant among others, and in his Plea doth claim nothing but as Ordinary, and the Patron doth not maintain him to be a Diſturber, but prays his Writ to the Biſhop, the Suit betwixt them is at an End; and the Patron having the Effect thereof as to the Biſhop, he ſhall have no Damages againſt him, becauſe the Biſhop is not convicted of any Wrong; by *Hobart*, *Mich.* 15 *Jac.* *Brickhead* v. *The Archbiſhop of York*, *Hobart* 198. But if the Plaintiff be at Iſſue with any other of the Defendants, and the Title is found with the Plaintiff, thoſe other Defendants ſhall alone anſwer the Plaintiff his Damages; for the Inqueſt ſhall not paſs betwixt the Plaintiff and the Biſhop, although

Damages are to be againſt a Diſturber.

Recovery in Quare Impedit.

So if the Patron maintains the Biſhop a Diſturber.

that Iſſue upon the Diſturbance be joined with him alſo. *Jenkins, Cent.* 1. *Caſe* 19. But when the Biſhop doth plead that he claims nothing but as Ordinary, and the Patron doth chuſe to maintain him to be a Diſturber, if it be found againſt the Biſhop, although the Patron doth recover againſt the other Diſturbers as well as the Biſhop, yet he ſhall recover Damages againſt the Biſhop alſo; at leaſt, when the Writ is brought, and a Recovery had againſt the Biſhop only, Damages are to be recovered againſt him: So a Writ being brought only againſt the Biſhop, for that he did refuſe the Patron's Clerk, and a Recovery was had againſt him, the Judgment was, that the Biſhop ſhould be *in Miſericordia*, that is, amerced, and every Amercement of a Biſhop is 5 *l. Hill.* 32 *Eliz. B. R. Specot*'s Caſe, *Coke*, 5 *Part*, 58.

Amercement of a Biſhop 5 *l.*

Upon Iſſue, Able, or Not able, Biſhop inducts the ſame Clerk.

If a *Quare Impedit* be brought againſt the Biſhop, and he ſaith that he claims nothing but as Ordinary; and then the Plaintiff replies, that he preſented his Clerk, and the Biſhop's Officer examined him, and found him able, and that the Biſhop would not admit him, but preſented another within the ſix Months: To which the Biſhop rejoins, that he examined his Clerk, and found him to be illiterate; ſo they are at Iſſue, Able, or Not able; and, pendent the Iſſue, the Biſhop accepts, inſtitutes and inducts the ſame Clerk, the Patron ſhall have Judgment to recover his Preſentment and Damages, becauſe by receiving him he doth admit him to be able at the Time when he refuſed him; and ſo it would be, though the Biſhop ſhould alledge the Clerk is become able at the latter Examination. 4 *Ed.* 3. 25.

Damages.

Q. If the Whole may be levied on one Diſturber?

But whether the whole Damages, or but a Part of them, may be levied upon one of the Diſturbers alone, when there are many, *Quære?* And what is ſaid concerning the Biſhop, as to Damages, I ſuppoſe holds good as to other Diſturbers, when their Caſe is like thereto; and alſo in all Caſes when Judgment is given againſt any one without Inqueſt by the Jury, as upon the Abatement of a Writ, *&c.* becauſe then the Party againſt whom Judgment is given cannot be convicted of any Wrong.

That the Queen ſhall not recover Damages in a *Quare Impedit.*

Notwithſtanding this Statute, it was, ſaith *Coke* in *Boſwell*'s Caſe, *Coke* 6 *Part*, 28. adjudged, *Paſch.* 32 *Eliz. B. R.* between *Buckberd* and *The Queen*, upon a Writ of Error upon a Judgment given in the Common Pleas, that the Queen ſhould not recover Damages in a *Quare Impedit*: Firſt, Becauſe at the Common Law, before the Statute, no Damages were recoverable by any in a *Quare Impedit*, and now none but what are given by the ſaid Statute, for the Clauſe therein which relateth to this Matter hath two Branches; Firſt, If the Time of ſix Months do paſs by the Impediment of any, ſo that the Biſhop doth confer to the Church, and the Patron loſeth his Preſentation, *&c.* and the Queen is not within this Branch to have Damages for two Years, becauſe ſhe cannot loſe her Preſentment by Lapſe: And the ſecond Branch is, **And if the ſix Months be paſſed,** &c. doth depend upon the other; and foraſmuch as the Queen is not within the firſt, ſhe cannot be within the ſecond: And with this agree 3 *H.* 6. *Damages* 17. adjudged, 14 *Ed.* 3. *Quare Impedit* 54. 34 *H.* 6. 12 *Ed.* 3. *Champerty* 9. 18 *Ed.* 3. 2. And yet all Declarations in the Caſe of the King are laid to his Damage, though no Damages are thereby recovered. And *Coke* ſaith, that 13 *Ed.* 3. *Quare Impedit* 181. which ſeems to be to the contrary, was the Error of the Clerk or Reporter: See the Caſe of *Buckberd* v. *The Queen*, *Mich.* 31 *&* 32 *Eliz. C. B.* 3 *Croke* 261. and 1 *Leonard* 142. where it is ſaid by *Wray*, that he had conferred with *Anderſon*, *Manwood*, *Periam* and *Walmſly*, and that all but *Periam*, who doubted, agreed that no Damages were to be given;

and there it is alſo ſaid, (as by *Coke* in *Boſwell*'s Caſe) that the Caſe of Sir *John Thynn*, *Hill.* 7 *Eliz. C. B. Dyer* 236. was but an *adviſare vult*. *Jenkins*, *Cent.* 7. *Caſe* 7. And *Godfrey*, who had ſearched the Roll of that Caſe, affirmed, That he found there, that the Court would adviſe as to Damages: But there ſeems to be a Difference between the Reports of *Croke* and *Leonard*, who both mention this Caſe of *The Queen* and *Buckberd*; and by *Coke* it is ſaid, that the Judgment was reverſed becauſe Damages were given; and the Opinion of the Judges, as reported by *Leonard*, are to that Purpoſe: But when he ſets down the Judgment, he ſays, that the Judgment was, That the Queen ſhould have a Writ to the Biſhop, and Damages. But *Coke* in *Boſwell*'s Caſe agrees with the Report of *Croke*, that the Judgment was reverſed. And the Law and Practice is, as I conceive, agreeable to the Report of *Coke* and *Croke*, that is, that the King recovers no Damages in a *Quare Impedit*.

Recovery in Quare Impedit.

Judgment reverſed becauſe Damages given.

And ſome doubt, if a Biſhop be ſued in a *Quare Impedit*, and the Plaintiff be nonſuited, whether the Biſhop ſhall recover Damages, unleſs he could have a Writ to the Biſhop? But by *Aſhton*, *Danby*, *Newton* and *Porting*, he ſhall recover Damages. 22 *H.* 6. 27.

For Biſhop on a Nonſuit.

Alſo the Incumbent againſt whom the Writ is brought, recovering, ſhall have Damages, for he cannot have a Writ to the Biſhop. *Brownlow* and *Gouldſborough*, 1 *Part* 159. And 'tis ſaid, where Patron and Incumbent plead the ſame Plea, both ſhall recover Damages; and in that Caſe, Judgment being againſt them, both ſhall pay Damages. 46 *Ed.* 3. 15.

For the Incumbent and Patron, *&c.*

Though Damages be given by the aforeſaid Statute of *Weſtm.* 2. *cap.* 5. yet the Plaintiff (it he will) may take the Judgment at the Common Law, and leave the Benefit of Statute. *Hill.* 32 *El. Specot*'s Caſe, *Coke* 5. 58.

Plaintiff may take Judgment at Common Law.

Alſo, there is this Effect of a Judgment given in theſe Writs, that the Plaintiff or Defendant that doth recover, ſhall (as hath been before ſhewed) have a Writ to the Biſhop to admit his Clerk, *Winchcomb* and *Pulleſton*'s Caſe, *Hobart* 103. for the Defendant, if it be found for him, ſhall have the Writ as well as the Plaintiff, had it been found againſt him. *Roll's* 2 *Abr.* 386. *Vaughan* 7. And yet in divers Caſes a Patron may recover his Damages, and yet not have a Writ to the Biſhop to admit his Clerk, as if he whoſe Clerk is inducted be ſued in a *Quare Impedit*, and the Plaintiff is nonſuited, the Defendant ſhall have Damages, yet he cannot have a Writ to the Biſhop, becauſe the Church is full of his own Clerk. So in a *Quare Impedit*, if the Defendant doth intitle himſelf to hold the Church as appropriated, or to hold it as a Donative, free from the Biſhop's Inſtitution, and the Plaintiff be nonſuited, the Law is the ſame. 22 *H.* 6. 27. But when one doth recover in a *Quare Impedit*, although that no Writ be awarded for him to the Biſhop, yet he that doth recover may preſent, 46 *Ed.* 3. 14. but not before he hath recovered, if the Church be full. And if upon a Preſentment made, the Biſhop will admit and inſtitute his Clerk, and he be inducted, it is good; for after Judgment the Incumbent is *Debito modo amotus*, and the Writ is not to remove the former Clerk, but is *Non obſtante reclamatione* of the Incumbent, *&c.* and is but an Execution of the Judgment. *Rudd* v. *The Biſhop of Lincoln*, *Hutton* 66. *Trin.* 13 *Jac. Harris* v. *Auſten*, 3 *Bulſtrode* 38. and *Mich.* 12 *Jac. B. R. Whiſtler* v. *Singleton*, 1 *Roll's Rep.* 62.

That the Recoveror ſhall have a Writ to the Biſhop to admit his Clerk.

If upon the Admiſſion and Inſtitution of the Clerk of him that recovers without a Writ to the Biſhop to remove the preſent Incumbent, the firſt Clerk doth bring a Suit in the Court of Arches or Audience, as for a Super-inſtitution, a Prohibition lies, and is grantable at the Prayer of the Clerk of him that recovered; and this holds good, although that a Writ

Patron may preſent without a Writ to the Biſhop.

Writ to the Biſhop.

Writ of Error was brought upon the former Judgment; for without a Writ to the Biſhop, the Patron may preſent, and the Inſtitution will be no Super-inſtitution: But (as *Coke* ſaid) the firſt Incumbent doth continue Incumbent *de facto* until the laſt Incumbent be inſtituted. *Mich.* 12 *Jac. B. R. Whiſtler* v. *Singleton*, *Roll's* 1 *Reports* 62. And accordingly 'tis ſaid of him, *Mich.* 12 *Jac. B. R.* in *Grange* and *Howlet*'s Caſe, *Roll's* 1 *Rep.* 61. That if the Incumbent be removed in a *Quare Impedit*, the Plaintiff ſhall not have the mean Profits, and that the Law is the ſame in a Writ of Error; and by *Coke*, in *Harris* and *Auſtin*'s Caſe, *Roll's* 1 *Rep.* 212. the Incumbent againſt whom a Recovery is had, before a new Incumbent is admitted, or a Writ ſent to the Biſhop, may reſign, and then the Ordinary ſhall give Notice of ſuch Reſignation to the Patron that hath recovered; or if the Patron that doth recover pleaſeth, it ſeems he may ſuffer the Clerk, againſt whom the Recovery is, to continue Incumbent for Life, notwithſtanding that the Patronage is reveſted in him that recovered by Judgment; by *Coke*, *Dodderidge* and *Haughton*.

How and when the Patron may ſo preſent.

But what is ſaid, that the Perſon that recovers may preſent, *&c.* without a Writ to the Biſhop, is true in the Caſe of the Plaintiff only when he hath Judgment againſt all that he hath made Defendants, 19 *H.* 6. 68. *b.* and in caſe he hath named the Incumbent in the Writ, if he was Incumbent before the Writ brought, for otherwiſe ſuch Incumbent ſhall not be removed; and if the Patron in ſuch Caſe ſhould preſent his Clerk to the Biſhop, and the Biſhop ſhould inſtitute him, *&c.* all is void, the Patron in ſuch Caſe recovering only the Advowſon, not the Preſentment, and ſo the Inſtitution is to a full Church. 9 *H.* 6. 56. *b.*

Writ, to whom to be awarded.

When a Writ is awarded according to the Judgment, it is regularly to be directed to the Biſhop of the Dioceſe in which the Church is; and although the Biſhop be made a Defendant in the Writ, if in his Plea he claims nothing but as Ordinary, upon which Plea Judgment is given againſt him, with a *Ceſſet Executio*; and after Judgment is given alſo againſt the Patron, and a Writ to the Biſhop granted againſt him; yet this Writ may be directed to the ſame Biſhop, although that he be Party to the Action, for that he is not found to be a Diſturber. *Boſwell*'s Caſe, 6 *Coke* 51. *New Entries* 494. Or the Writ in this Caſe may (as it is ſaid) be awarded to the Metropolitan, becauſe the immediate Ordinary is Party to the Action, 8 *H.* 4. 22. *b.* but there it was found that the Biſhop had collated by Lapſe to the Church. *Contra* 5 *H.* 7. 22. And ſo if the Writ be againſt the immediate Ordinary, upon that Reaſon only it ſeems that the Plaintiff is at his Election to have his Writ to him, or to the Metropolitan; for when a Writ was brought againſt the Biſhop, Archbiſhop, and other Defendants, (the Biſhop having admitted the Clerk of the other Defendants before the Writ, and not otherwiſe than according to his Duty) and the Archbiſhop pleaded, that he claimed nothing but as Metropolitan; and the Biſhop, that he claimed nothing but as Ordinary, and ſo the Biſhop no Diſturber, and the Archbiſhop equally charged with him as Party, yet the whole Court, after ſeveral Motions, was clear of Opinion, that the Party was at his Election, and that the Writ (as was done in this Caſe) was well awarded to the Metropolitan, and only upon the Reaſon of the Biſhop's being made Party in the Writ. *Paſch.* 14 *Jac. B. R. Grange* and *Denny*'s Caſe, 3 *Bulſtrode* 174. For which were alſo cited, 8 *H.* 4. *fol.* 22. *Old Book of Entries*, *fol.* 278, and 478, and *New Book of Entries*, *fol.* 898, 501, 507, 505, and 599. 38 *Ed.* 3. *fol.* 12. *Jenkins*, *Cent.* 8. *Caſe* 36.

But

But it ſeems ſtrange that the Biſhop ſhould loſe his Right of Inſtituting, only by being named in the Writ wrongfully, and without Neceſſity. *Quære.*

Writ to the Biſhop, &c.

When he that recovers hath had a Writ to the Metropolitan, he cannot afterwards have a Writ to the immediate Ordinary, and if the Writ be awarded to the Metropolitan, and he doth certify that the Church is out of his Juriſdiction, and that the Biſhop is out of the Realm, and hath conſtituted a Vicar General to do all Things for him, the Judges are not bound to take Notice that he hath made a Vicar General, and till they are ſufficiently certified thereof, they cannot write to him, but to the Biſhop, who is the immediate Officer of the Court; by *Thorp. Br. Ab. Brief al Eveſq.* 12. But if the Biſhop doth plead that he claims nothing but as Ordinary, and the Plaintiff doth not pray Judgment, but doth proceed for a Recovery againſt the Biſhop, and the Biſhop be found a Diſturber, the Writ ought to be granted to the Metropolitan, upon the Prayer of the Plaintiff. *Temp. Ed.* 1. 83. *Contra* 30. 2 *Roll. Abr.* 389.

Q. If the Biſhop ſhall loſe his Right of Inſtituting.

If Metropolitan certifies the Church is out of his Juriſdiction, &c.

Or if the Biſhop hath collated by Lapſe, and a Writ being brought againſt him and his Incumbent, the Biſhop doth plead that he claims nothing but as Ordinary by Lapſe, and the Incumbent doth plead the Biſhop's Title by Lapſe; the Plaintiff recovering ſhall upon his Prayer have the Writ awarded to the Metropolitan. 19 *Ed.* 3. *Quare Impedit* 153. 5 *H.* 7. 22. 8 *H.* 4. 22. *b.* And ſo in all Caſes, when the Biſhop doth in his Plea make a Title to preſent, and Judgment is given againſt him, the Writ ſhall be awarded to the Metropolitan, or Guardian of the Spiritualties at the Prayer of the Plaintiff, *Br. Ab. Brief al Eveſq.* 6. *Temp. Ed.* 1. 13. *Contra* 30, or to the Biſhop that is the Diſturber, if the Party will; by *Coke* and *Dodderidge*, *Paſch.* 14 *Jac. Grange* v. *Denny*, 1 *Roll's Rep.* 363, 397, and upon a Judgment by a *Non ſum informatus*, or *Nihil dicit*, the Writ ſhall iſſue to the Metropolitan, and not to the immediate Ordinary if the Writ be againſt him; by *Brownl.* and *Goulds.* 1 *Part* 159, and by *Hobart* in *Brickhead* and *The Archbiſhop of York's* Caſe, *Hob.* 198. *F. N. B. fol.* 38. But if the Biſhop that doth make Title in his Plea to collate be dead, and a new Biſhop be alſo made before the Plaintiff recovering hath his Writ to the Biſhop, the Writ by the Judgment of the Court may be awarded either to the new Biſhop, or to his Metropolitan, at the Election of him that recovered, *Mich.* 22 & 23 *Eliz. C. B. Dyer* 194, and ſo it may be directed to either, at the Election of the recoveror, if the Biſhop be a Diſturber and not dead. *Grange* and *Denny's* Caſe, *Paſch.* 14 *Jac. B. R.* 3 *Bulſt.* 174. *Jenkins*, *Cent.* 8. *Caſe* 36.

In what Caſes the Writ ſhall be awarded to the Metropolitan.

If the Biſhop be dead, &c.

As the Writ to the Biſhop in theſe Caſes before put, may be awarded to the reſpective Metropolitan, and the Biſhop of the Dioceſe waived; ſo if the Archbiſhop of *York* be found to be a Diſturber, the Writ may iſſue to the Archbiſhop of *Canterbury*. *Trin.* 3 *Jac. Roll's Abr. Part* 2. *p.* 390. 16 *Eliz. Dyer* 327. *Coke's Entry* 496. *a.*

If Archbiſhop of *York* is found a Diſturber.

When a Biſhop's See is void, the Writ is to be directed to the Guardian of the Spiritualties. *Paſch.* 18 *Eliz. C. B. Dyer* 350. *Paſch.* 14 *Jac. B. R.* in *Grange* and *Denny's* Caſe, 3 *Bulſt.* 174. And when the Archbiſhop is Guardian of the Spiritualties of a Church, and the Archbiſhoprick is void, the Writ ſhall be ſent to the Guardian of the Spiritualties of the Archbiſhoprick. *Mich.* 6 *Ed.* 6. *C. B. Henſlow* and *Staneſby* v. *The Biſhop of Sarum* and *Keble*, *Dyer* 76. *b.* And ſo if the inferior Ordinary be a Diſturber, the Archbiſhoprick being void, the Writ is to go to the Guardian of the Spiritualties of the Archbiſhoprick. *Temp.*

When a Biſhop's See, &c. is void.

Writ to the Biſhop, &c.

Ed. 1. 83. *Roll's Abr.* 2. *p.* 390. But if a Biſhoprick being void, the Writ is brought againſt the Archbiſhop as Guardian of the Spiritualties, and the Plaintiff hath Judgment by a *Non ſum Informatus*, and in the mean Time the See where the Church is, happens to be filled, the Writ ſhall be directed to the new Biſhop, for that he is the immediate Ordinary. *Mich.* 5 *Jac. C. B.* Sir *Thomas Pelham*'s Caſe, *Roll's Abr.* 2 *Part* 390, and *Pelham*'s Caſe, *Noy* 148. 22 *Ed.* 3. 13. But when the Writ was directed (the See being void) to the Dean and Chapter, as Guardian of the Spiritualties, the Writ not being returnable, and before the Execution of the Writ, a new Biſhop is made, it being doubted if the Dean and Chapter's Authority to execute the Writ was not ceaſed; it was held, that becauſe nothing was done in the Writ aforeſaid, another Writ might be awarded to the new Biſhop, and that it might be returnable if it pleaſed the Party, *&c. Paſch.* 18 *Eliz. C. B. Dyer* 350.

If Biſhop's See is filled.

To the new Biſhop, and the Writ may be returnable.

When a Perſon doth recover a Benefice that is a Donative, the Writ ſhall go to him that ought to inſtall, or induct in that Caſe, or to the Sheriff, to put the Clerk into Poſſeſſion. *No. Na. Bre.* 48. *a.*

Recovery to a Donative.

If the Writ is awarded to a wrong Ordinary, as if to the Archbiſhop, when it ought to be directed to the immediate Ordinary, or to the Archbiſhop of *Canterbury*, to admit to a Church within the Province of *York*; the Archbiſhop of *York* not being found a Diſturber, this is Error only in the Execution of the Judgment, and the Writ of Error is to be brought as to this only, and thereby the Judgment ſhall not be reverſed, but only *quoad* awarding of the Writ, *&c.* according to *Coke*, in *Grange* and *Denny*'s Caſe, *Paſch.* 14 *Jac. B. R. Bulſt.* 3 *Part* 178. *Trin.* 3 *Jac. B. per Cur. Roll's Abr.* 2 *p.* 390.

Error *quoad* awarding of the Writ.

And *Note*, That if a Trial for the Right of preſenting, be had before the Juſtices of the Grand Seſſions in *Wales*, they have Power to write to the Archbiſhop of *Canterbury*, as well as to the immediate Biſhop, to receive the Clerk of him that recovers, if the Church be within his Province. *Hill.* 9 *Car. Lort* v. *The Biſhop of St. Davids*, *Jones* 232, and 1 *Cro.* 342.

Upon Recovery in *Wales.*

The Writ being awarded and brought to the Biſhop to receive the Clerk of him that recovers, if the Church be void, or full only of a Clerk that was Incumbent before the Writ brought, and who was made a Defendant in the Writ, the Biſhop without doubt ought to admit the Clerk, for the Admiſſion of whom the Writ is brought; and ſo tho' the Incumbent againſt whom the Writ was brought hath reſigned, and be admitted again before the Writ comes to the Biſhop. Accordingly, when upon a Recovery in a *Quare Impedit*, a Writ was awarded to the Biſhop, which was not returned, and an *Alias* thereupon did iſſue forth, upon which the Biſhop did return, that after Judgment given in the *Quare Impedit*, *viz.* after the Awarding of the firſt, and before the Awarding of the ſecond Writ, the ſame Incumbent, againſt whom the Action was brought, was preſented, inſtituted and inducted into the ſame Church, and ſo the Church was full; in this Caſe it was adjudged, that the Return was not good, wherefore the Biſhop was fined Ten Pounds, and a *Sicut alias* awarded upon Pain of One Hundred Pounds. *Mich.* 28 *Eliz. C. B. Moor* and *The Biſhop of Norwich* his Caſe, 3 *Leon.* 138. the ſame Caſe in *Goulds.* 3. And if any that are named in the Writ do get their Incumbent admitted, *&c. pendente lite*, the Clerk of him that recovers ought to be received by the Ordinary, ſuch Preadmiſſion notwithſtanding. *Mich.* 3 *Jac. Boſwell*'s Caſe, *Coke*, *Part* 6. 51. *Jenkins*, *Caſe* 7. *Cent.* 7. *Booton* v. *The Biſhop of Rocheſter*, *Hutt.* 24. And ſo if the Writ be

How the Biſhop ought to admit upon the Writ.

Recoveror's Clerk to be admitted.

brought againſt the King's Incumbent, who is only inſtituted, and pendant the Writ, another is inſtituted and inducted upon the King's Preſentment; yet the Plaintiff having a Writ to the Biſhop, his Clerk ought to be received, becauſe the King's ſecond Clerk cometh in under the Title of the Plaintiff. *Mich.* 3 *Jac. Boſwell*'s Caſe, 6 *Coke* 51. So when (the King having preſented for Simony) a Recovery was had againſt the Simoniacal Patron, and upon a Writ to the Biſhop he returned, that before the Writ accepted, (*viz.* after Judgment) the Church was full by Preſentment out of the Court of Wards, becauſe Livery was not ſued, *&c.* it was ſaid, that if in this Caſe the Ordinary had returned another preſented by Simony, under the Great Seal, and that the former Preſentment was by the latter revoked, it had been good; for it is an Execution of the Judgment, and may be pleaded in Abatement of the Writ. But as this Caſe was, it was agreed by two Judges only then preſent, that the Judgment ought to be executed, and that the Biſhop ſhould have Day to amend his Return, and not that a new Writ ſhould be awarded. *Hill.* 4 *Car. C. B.* Sir *John Hall*'s Caſe, *Hetly* 130.

Recovery in Quare Impedit.

King's Preſentation for Simony.

But if a Stranger, that is, he who is no Party to the Writ, doth preſent his Clerk *pendente lite*, it ſeems, as hath been before ſhewed in this Chapter, that no Writ ſhall be awarded to admit the Clerk of him that recovers, before a *Scire Facias* ſued againſt him that is got into the Church; for when upon a *Quare Impedit* by *A.* againſt *B.* upon the Jury's finding that the Church was full of the Preſentee of a Stranger *pendente lite*, Judgment was given in this Manner——— *Ideo conſideratum eſt quod prædictus* A. *recuperet verſus præfatum* B. *præſentationem ſuam ad Eccleſiam prædictam quæ modo plena exiſtit de præfato* C. *ex præſentatione, pendente Brevi prædicto de* Quare Impedit *inter ipſum* A. *& præfatum* B. *& damna ſua, &c. & habeat Breve præfato Epiſcopo quod non obſtante reclamatione ſua aut reclamatione prædicti* C. *&* B. *ſeu eorum alterius, licet idem* C. *ad Eccleſiam prædictam pendente Brevi prædicto admiſſus, inſtitutus & in eandem Eccleſiam inductus exiſtit, eundem* C. *ab Eccleſia prædicta removeat ac ad Eccleſiam illam ad præſentationem ipſius* A. *idoneam perſonam admittat.*——And upon this Judgment, a Writ of Error was brought by *B.* againſt *A. viz.* by him againſt whom the Judgment was given, againſt him that had the Judgment, becauſe a Writ was awarded to remove him that came in *pendente lite*, that was no Party to the Suit, and that without any *Scire Facias* ſued againſt him; and *Popham*, *Fenner* and *Williams* held it to be Error, for thereby Judgment is given againſt a Stranger who is no Party to the Suit, ſo that he is to be removed without Anſwer. *Mich.* 3 *Jac. B. R. Lancaſter* v. *Lowe*, 2 *Croke* 92. *Mich.* 6 *Ed.* 6. *Dyer* 77. *Contra*, *Co. Ent.* 265. *Mich.* 14 *Car.* 2. *B. R. Hall* v. *Broad*, 1 *Sid.* 93. And according to this, when (the Church being litigious) the Ordinary had refuſed both Clerks, and one Patron, by bringing a *Duplex Querela*, had got his Clerk admitted by the Metropolitan, and pendant the *Duplex Querela*, the other Patron recovered againſt the Biſhop in a *Quare Impedit*, which was brought before the *Duplex Querela* commenced, and upon this Recovery had a Writ to the Metropolitan, whereupon his Clerk alſo was inſtituted and inducted, and takes the Profits of the Glebe; whereupon the firſt Clerk brings his Action of Treſpaſs. And it was firſt agreed, that it was a good Return upon a Writ to the Biſhop of *Quare non admiſit*, that before the Receipt of the Writ the Church was full, and that upon ſuch Return by the Biſhop, a *Scire Facias* ſhall iſſue forth, and then the Trial ſhall be between the Incumbents, upon the Plea in the *Scire Facias*; but where the ſame Biſhop doth not

Where a Stranger preſents *pendente lite*, a *Scire Facias* ought to be to the Incumbent, *&c.*

Error for want of *Scire Facias*.

Church litigious, and both Clerks refuſed.

Return of *Quare non admiſit*.

Recovery in Quare Impedit.

not make any Return upon the Writ, but doth inſtitute and induct the Clerk, there is no Cauſe of a *Scire Facias*, but the two Incumbents in Poſſeſſory Actions may try their Rights at Common Law; and when a Poſſeſſory Action is brought, and it doth appear to the Court in whom the Right is, the Judgment in the Poſſeſſory Action of Treſpaſs, *&c.* ſhall be with the Right; and it was adjudged in this Caſe, upon Conference and Reſolution of all the Juſtices, that the Entry of the ſecond Incumbent was good without a *Scire Facias*. *Hill.* 41 *Eliz. Bennet* v. *Edwards*, *Moor* 572.

Biſhop excuſed having his Warrant by Law.

But as *Coke* reports the Caſe of *Lancaſter* and *Low*, which in his Reports he calls *Boſwell's* Caſe, 'tis ſaid, that when it is found *Ex Officio* that the Church is full of the Preſentment of a Stranger to the Writ pendent the ſame, and it doth not appear whether the Stranger hath a better Title than he that recovers; yet ſuch Perſon ought to have a general Writ to the Biſhop, and the Biſhop ought to execute it, prevail who can, and he cannot return upon the Writ directed to him, that the Church is full of another, for no Iſſue can be joined between the Recoveror and him, for he hath no Day in Court. And altho' that the third Perſon hath Right, yet the Biſhop is excuſed, becauſe he hath his Warrant by Proceſs of Law, and then the Parties may try their Rights as the Law requireth. *Mich.* 13 *Jac. Boſwell's* Caſe, 6 *Coke* 51, and by *Hobart*, *Paſch.* 17 *Jac.* Sir *William Elvis* and *The Archbiſhop of York*, *Taylor* and *Biſhop*, *Hobart* 320. *Hill.* 4 *Car. C. B.* Sir *John Hall's* Caſe, *Hetley* 130. And *Jenkins* following *Coke* in *Boſwell's* Caſe, ſaith, That altho' the Clerk of a Stranger be admitted, *&c. pendente lite*, yet the Clerk of him that recovers ſhall alſo be admitted, and they two in Treſpaſs, Ejectment, or Aſſize ſhall try their Right. *Jenkins*, *Cent.* 7. *Caſe* 7. But *Boſwell's* Caſe in this Point, as hath been before ſhewed, is denied to be Law. 1 *Sid.* 93, and by *Hobart*, if in ſuch Caſe a Writ be awarded to the Biſhop, *Non obſtante reclamatione* of the Defendant, the Biſhop ſhall receive the Clerk of the Plaintiff without diſputing the Right of the Plaintiff, or of him whoſe Clerk was firſt in the Church, and that he that hath the better Right ſhall retain the Benefice, ſo that the other's Inſtitution and Induction ſhall be null, *Brickhead* and *The Archbiſhop of York's* Caſe, *Hobart* 200, 201.

And the Parties may try their Rights.

Clerks to try their Right.

So when a Recovery was had for the King upon the Title of *Simony*, and *pendente lite*, another had got the Living by a Preſentment under the Seal of the Court of Wards, and the Biſhop returned that the Church was full as aforeſaid; it was ſaid, that theſe Returns, that the Church was full before the Receipt of the Writ, are always ruled to be inſufficient, and that the Biſhop ought to execute the Writ when it comes to him. *Hill.* 4 *Car. C. B.* Sir *John Hall's* Caſe, *Hetly* 130. *Jenkins*, *Cent.* 1. *Caſe* 47. *Booton* v. *The Biſhop of Rocheſter*, *Hutton* 24. And yet a Caſe was to this Effect, a *Quare Impedit* was brought againſt the Ordinary, Patron, and *J. S.* Clerk, and found for the Plaintiff; and further *ex Officio Curiæ*, that the Church was full of the ſaid *J. S.* of the Preſentment of the ſaid Patron, as the Defendants had pleaded, upon which the Juſtices of *Niſi prius* gave Judgment for the Plaintiff according to the Statute of *Weſtm.* 2, and awarded a Writ to the Biſhop, requiring him, *quod licet Eccleſia plena ſit de prædicto* J. S. *vel non*, to remove the ſaid *J. S. non obſtante reclamatione*, *&c.* but this Writ was not returnable, as was ſaid, and the Record was removed into the Common Pleas, and there the Plaintiff had another Writ to the Biſhop, *Sicut alias*, and returnable in Bank as it ought, (2 *Inſt.* 424, 425,) upon which ſecond Writ the Biſhop returned,

Of Returns, that the Church was full before Receipt of the Writ.

Record of *Niſi prius* removed into *C. B.* and a new Writ *Sicut alias* made returnable.

returned, that pendant the *Quare Impedit*, and before the Judgment, it was found by Commiſſion *De Melius inquirend'*, that the Advowſon, *&c.* was held of the Queen *in Capite*, and that the Title to preſent was then in her, who had preſented her Clerk to the Church then alſo void, and which had been void by the Space of three Months before the Delivery of the firſt Writ to him, which Clerk he had admitted, *&c.* and the Church is now full, ſo that he could not execute this, nor the other Writ, *&c.* And in this Caſe (being well debated) by the better Opinion of the Court, the Ordinary was not ſtopped to make this Return of the Title of the Queen, and of the Plenarty of the Church of her Incumbent, by any Thing contrary in the Record, becauſe the Biſhop is not Party, nor privy to the Verdict, nor to any Plea that doth acknowledge the Plenarty of the Church, by which, *&c.* But if the Matter be falſe, which the Biſhop doth return for his Excuſe of not ſerving the two Writs, the Plaintiff may have his *Quare non admiſit*; and alſo the Plaintiff may have a *Scire Facias* againſt the firſt Incumbent and him that came in *pendente lite*, to have Execution, and ſo the Title of the Queen ſhall come into Debate. *Paſch.* 9 *Eliz.* *Dyer* 21, 260. In this Caſe, I ſuppoſe, the firſt Clerk was not inducted, and ſo the Church remained open to the King's Preſentee, elſe his Inſtitution, *&c.* muſt be void. And ſee the Opinion of Juſtice *Twiſden* mentioned before, that the Clerk of him who is no Party to the Action, ſhall not be removed by a Writ to the Biſhop, but a *Scire Facias* ought in ſuch Caſe to be awarded againſt ſuch Clerk. *Hall* v. *Broad*, 1 *Sid.* 93.

Recovery in Quare Impedit. Queen's Title returned, and neither of the Writs ſerved.

So 'tis ſaid, that when a Common Perſon doth recover, and hath a Writ to the Biſhop, if the Ordinary doth return, that the Church is full of his Collation before the Writ received, it is good. Sir *John Hall*'s Caſe, *Hill.* 4 *Car. C. B.* *Hetly* 130.

Church full of his own Collation.

Yet when a *Quare Impedit* was brought againſt Parſon, Patron and Ordinary, and pendent the Writ, the Parſon reſigned, and the Ordinary gave Notice to the Patron, and afterwards the Ordinary for Lapſe preſented the ſame Clerk that had reſigned, the Plaintiff in the *Quare Impedit* having Judgment to recover, it was held that the Incumbent ſhould be removed (and by conſequence that the Biſhop ſhould admit the Clerk of him that recovered,) becauſe he is the Perſon againſt whom the Recovery was had, altho' he came in by a new Title by Lapſe. *L.* 5 *Ed.* 4. 115, 116, vouched in *Moor* and the Biſhop of *Norwich*'s Caſe, *Mich.* 28 *Eliz.* *C. B.* 3 *Leon.* 138. But it ſeems to be otherwiſe, as is before ſhewed, if another Clerk had been collated; and yet why the Biſhop, if a Title by Lapſe was in him, ſhould loſe it by collating ſuch Clerk, I ſee not, if there be no Fraud or Practice in the Caſe. And *Hobart* ſaith, that if a Perſon, having Right to preſent to an Advowſon, doth not preſent when the Church is void, nor is any Way diſturbed, and yet either before the ſix Months paſs, or before the Biſhop doth collate, doth bring a *Quare Impedit* againſt the Biſhop, and then the Biſhop doth collate in his due Time for Lapſe (as he holds in this Caſe he may) and pleads *Ne diſturba pas*, or that he claims nothing but as Ordinary, yet when ſuch Patron hath a Writ to the Biſhop, the Biſhop (ſaith he) may perhaps be compellable to admit the Clerk of the Plaintiff in Obedience to the Writ, and yet it ſhall not work a Removal of the Biſhop's Clerk, but he ſhall retain the Benefice, as having the better Right. *Brickhead* and *The Archbiſhop of York*'s Caſe, *Mich.* 15 *Jac.* *Hob.* 200.

Where the Incumbent is the ſame Perſon, tho' a new Title.

Quare Impedit brought and then Biſhop collates.

His Clerk ſhall retain.

So if the Church being litigious, the Biſhop doth refuſe both Clerks, and being made a Defendant in the Writ, doth plead the general Plea,

Quare non admiſit.

Altho' the Biſhop be made a Defendant.

yet if he doth collate for Lapſe *pendente lite*, although the Plaintiff doth pray his Writ to the Biſhop, and recovering hath it, and the Biſhop thereupon doth admit his Clerk, yet the Biſhop's Collatee upon Trial may peradventure hold the Benefice as having good Title, altho' the Biſhop was made a Defendant. See *Chap.* 24.

Adviſable for the Biſhop to execute the Writ.

Upon the whole Matter, altho' the Preſentee of a Stranger be admitted *pendente lite*, or the Biſhop hath collated *pendente lite*, it is adviſable for the Biſhop to execute the Writ when it comes to him, becauſe it is a Queſtion, whether in either Caſe he may refuſe, and no Prejudice can be to him by admitting; whereas if the Biſhop doth refuſe to admit upon the Receipt of the Writ, and doth make a Return of the Writ, with ſuch Reaſon of his Refuſal which ſhall not be allowed by the Court, the Biſhop may be fined, as was done, *Mich.* 28 *Eliz. C. B. Moor* and *The Biſhop of Norwich*'s Caſe, 3 *Leon.* 138. where the Biſhop for making an ill Return upon the Writ not executed, was fined Ten Pounds, and a *Sicut alias* awarded upon Pain of an Hundred Pounds.

A *Quare non admiſit* lies againſt him.

Alſo if the Biſhop doth not admit the Clerk of him that recovers upon the Writ brought, the Writ of *Quare non admiſit* doth lie againſt him. *Hill.* 9 *Car. B. R. Cort* againſt *The Biſhop of St. Davids*, 1 *Croke* 342. So 'tis ſaid, that when the Biſhop did refuſe to admit the King's Clerk upon a Writ directed to him, the King brought a *Quare non admiſit* againſt the Biſhop, who counterpleaded the Title of the King, and pleaded that he (before the King had his Judgment) had collated by Lapſe, the ſix Months being then paſt: Notwithſtanding this Plea, it being found againſt the Biſhop, another Writ was awarded to the Biſhop, and the Temporalties of his Biſhoprick were ſeiſed into the King's Hands for the Contempt. But ſee *Articuli Cleri*, *Stat.* 25 *Ed.* 3. *cap.* 6, by which the Biſhop ſhall be fined, and the Temporalties of the Biſhop ſhall not be ſeized at this Day in ſuch Caſe. 25 *Ed.* 3. 22. *Jenkins*, *Cent.* 1. *Caſe* 47.

That the Church is litigious, a good Plea.

But generally, if a *Quare non admiſit* be brought againſt the Biſhop, for that he doth refuſe to admit the Clerk of the Patron that hath Judgment, it is a good Plea for the Biſhop to ſay, that the Church is litigious betwixt the Plaintiff and a Stranger; for then the Biſhop is not bound to receive the Clerk of either Party, and the Recovery may be without Title, and by Fraud. But it is no Plea for the Biſhop to ſay, that the Church is litigious betwixt the Plaintiff and Defendant in a *Quare Impedit*, for the Recovery determines the Matter betwixt them, of which the Biſhop is to take Notice. 7 *H.* 4. 26. 34 *H.* 6. 41. 47 *Ed.* 3. 11.

Alſo if the Biſhop admit and inſtitute the Clerk, and makes Letters to the Archdeacon to induct him, this being pleaded, is a good Excuſe in a *Quare non Admiſit*, without ſaying that he is inducted, for the Plaintiff ſhall have his Suit in the Spiritual Court againſt the Archdeacon, if he refuſe to induct. 38 *H.* 6. 16.

Quare non admiſit, where.

This Writ of *Quare non admiſit* is to be brought in the County where the Refuſal is, and not where the Church is. 38 *H.* 6. 14.

No Protection.

And in a *Quare non admiſit* a Protection doth not lie, becauſe it is grounded upon a *Quare Impedit*, in which, and in a *Darrein Preſentment*, a Protection doth not lie for the imminent Danger of a Lapſe. 1 *Inſt.* 131. *a.* So it is a good Excuſe for the Biſhop in a Writ of *Quare non admiſit*, to ſay, that the Clerk hath not made any Requeſt to be admitted. *Kelw.* 71.

CHAP. XXIX.

Error in Quare Impedit, &c.

Of Writs of Error upon Judgments in Quare Impedit, *and Aſſize of* Darrein Preſentment.

In Error againſt the King, a Petition ought to be.

After Judgment is given upon a *Quare Impedit*, or an Aſſize of *Darrein Preſentment*, he againſt whom it is given may bring his Writ of Error upon the Judgment, if he be not ſatisfied therewith: But before a Writ of Error be brought againſt the King when he doth recover, a Petition ought to be made to the King by thoſe who would bring the Writ of Error, that they may bring the ſame; and upon Liberty granted, they may proceed to impeach the Judgment. 23 *Ed.* 3. 22. *Jenkins, Cent.* 1. *Caſe* 47. And by *Popham*, the Court ought not to proceed to the Examination of the Errors without ſuch Petition made to the King; and ſaith, that was the Caſe of one *Mordant*, where an Infant levied a Fine to the Queen, and thereupon brought a Writ of Error; and afterwards, by the Reſolution of all the Judges, the Proceedings thereupon were ſtayed. *Trin.* 36 *Eliz. B. R. Queen* and *Buckberd*'s Caſe, 1 *Leon.* 152. See 10 *H.* 4. 4, and *Hurlſton*'s Caſe, 2 *Leon.* 194.

If it be for Error in Subſtance.

But this, as is ſaid, is to be intended where the Writ of Error is for Error in the Subſtance of the firſt Judgment; but if it be for Error in the Meſne Proceſs, or any collateral Matter, and not in the Body and Subſtance of the Judgment, the Attorney General in his Diſcretion may grant Leave to bring a Writ of Error without Petition made to the King. *Savile, Caſe* 203. *fol.* 131.

Error upon Judgment on *Niſi prius* to whom directed.

If a Judgment be given by the Juſtices of *Niſi prius* at the Aſſizes, yet the Writ of Error is to be directed to the Chief Juſtice of the Common Pleas, or King's Bench, *&c.* where the Action was brought, and from whence the Writ of *Niſi prius* iſſued; for the Record after the Judgment given is returned, and is remaining there. *Mich.* 18 *Jac. Shirley* v. *Underhill, Hutt.* 41. *Mich.* 6 *Ed.* 6. *Dyer* 76, 77.

By a Biſhop and another Defendant.

A *Quare Impedit* is brought againſt the Biſhop and another Defendant, the Biſhop pleads that he claims nothing but as Ordinary; upon which Judgment is given againſt the Biſhop, with a *Ceſſet Executio*, for that he claims nothing but as Ordinary, and after that Judgment is given alſo againſt the other Defendant. The Biſhop, in this Caſe may join with the other Defendant in a Writ of Error to reverſe this Judgment, he being Party to the Action: For (ſaith *Wray*) the Biſhop hath Loſs by the Judgment, in that thereby the Writ ſhall be to the Archbiſhop for Admiſſion and Inſtitution, and ſo he is outed of his Juriſdiction in that Part. *Mich.* 29 *&* 30 *Eliz. B. R. The Biſhop of Glouceſter* and *Savacre*'s Caſe, 3 *Croke* 65, and 3 *Leon.* 176. So *Paſch.* 36 *Eliz. B. R. Pipe* v. *The Queen*, 3 *Croke* 324.

Becauſe the Biſhop hath Loſs.

Biſhop and Incumbent ſummoned and ſevered in Error by the Son and Heir, and the Writ of Error did well lie.

If a *Quare Impedit* be brought againſt the Biſhop, Patron and Incumbent, and the Patron doth die *pendente lite*, and yet Judgment is given againſt them all, and then a Writ of Error is brought by the Son and Heir, who is alſo Executor of the Patron, if the Biſhop and Incumbent be

Error in Quare Impedit, &c.

be named with him in the Writ of Error, they may be ſummoned and ſevered; for as Summons and Severance ſhall be in a *Quare Impedit*, ſo in a Writ of Error upon it. And although it was moved in this Caſe, that ſuch Writ of Error was not well brought, for that the Plaintiff in it had no Cauſe to bring a Writ of Error as Heir, or as Executor; for he could not have it as Heir, becauſe the Inheritance was not touched in that Action, for that the Queen being Plaintiff claimed only by Lapſe, and ſo affirmed the Inheritance to be in him; and as Executor he could not bring it, becauſe he had no Damage, for that the Teſtator had preſented, and the Incumbent was in the Church: And here all the Loſs is to the Incumbent, and he could not reverſe the Judgment, for that he was ſevered. But the Court held, that the Writ of Error did well lie, for that it is to maintain the Incumbent in the Church, and the Incumbent, altho' he were ſevered, ſhould of Neceſſity have Judgment to be reſtored; for the Judgment is intirely to be reverſed, and the Incumbent may well enter for that by the Reverſion there is no Record of the Recovery againſt him. *Paſch.* 36 *Eliz. B. R. Pipe* v. *The Queen*, 3 *Cro.* 324.

Judgment in *C. B.* Error in *B. R. Superſedeas* awarded.

If a Judgment be given in the Common Pleas in a *Quare Impedit*, and a Writ is thereupon awarded to the Biſhop for the Party who recovers, and afterwards a Writ of Error is brought in the *King's Bench* upon that Judgment, the Court of Common Pleas may award a *Superſedeas* to the Writ awarded to the Biſhop, and ſo may the *King's Bench* do alſo.

Errors may be aſſigned upon a *Scire Facias* for to have Execution.

And where a Writ of Error is brought, and the Defendants therein do ſue a *Scire Facias* to the Sheriff againſt the Plaintiffs in the Writ of Error to have Execution, for that they were too ſlow in the Aſſignment of Errors, the Plaintiff in the Writ of Error may aſſign Errors upon this *Scire Facias*, as well as upon a *Scire Facias ex parte Querentis ad audiendum Errores*, becauſe this *Scire Facias* brought by the Defendant, is in a Manner in Nature of a *Scire Facias* to aſſign Errors, altho' there be not any ſuch Word in it; and 'tis ſaid, that they have not any other Courſe or Words in ſuch Writs. *Mich.* 6 *Ed.* 6. *Dyer* 76. *b. Jenkins*, *Cent.* 5. *Caſe* 36.

Where in *Darrein Preſentment* a Writ of Error is no *Superſedeas* to the Inquiry of Damages.

But if in an Aſſize of *Darrein Preſentment* Judgment is given for the Plaintiff, and a Writ is thereupon awarded to the Biſhop for him, and alſo a Writ to inquire of the Damages, and after Writ of Error is brought upon the principal Judgment; this is not any *Superſedeas* to the Writ to inquire of the Damages, but the Sheriff may ſerve and return it notwithſtanding. *Roll's Abr.* 2. *p.* 491. But if a Man doth recover in a *Quare Impedit* in the Common Pleas, and after this is removed into the *King's Bench* by a Writ of Error, a *Quare Incumbravit* doth lie, altho' that it doth not lie without a Judgment, for that it is a new Original, and is a common Plea in itſelf. *Roll's Abr.* 1. *p.* 537.

Damages upon Judgment affirmed in Error.

If a Writ of Error be brought, and the firſt Judgment be affirmed, Damages are to be againſt the Plaintiff in the Writ of Error. Accordingly, a Judgment in a *Quare Impedit* being given for the Plaintiff, and the Value of the Church found to be Eighty Pounds *per Annum*, and this Judgment being afterwards affirmed upon a Writ of Error, it was moved according to the Statute 3 *H.* 7. *c.* 10, which appoints Damages and Coſts to be allowed where Writs of Error are brought *pro Dilatione Executionis*. The Court awarded that the Defendant in the Writ of Error ſhould have Damages for a Year (during which Time the Writ of Error was depending) according to the Value of the Church found by the Verdict; and ſo they awarded him Eighty Pounds, beſides Coſts. *Mich.*

4 *Car.*

4 *Car. B. R. Anonymus*, 1 *Croke* 145. *Mich.* 7 *Ed.* 6. *Dyer* 77. But if Judgment be given for the Defendant, and that Judgment be affirmed upon a Writ of Error brought, the Defendant ſhall not have Coſt expended in the Writ of Error, upon the Statute of 3 *H.* 7, for the Statute is, where Judgment is given againſt the Defendant or Tenant, and he to delay Execution brings a Writ of Error, and the Judgment is affirmed, that he ſhall have Coſts for delaying his Execution. But in this Caſe, Judgment is given for the Defendant, and no Execution is to be awarded againſt him, ſo is out of the Statute, *Hill.* 10 *Car. B. R. Bowton* v. *Nicholls*, 1 *Croke* 401, but *Mich.* 19 *Car.* 2. *B. R. Conner* and *Exam*'s Caſe, 2 *Keb.* 266, 287, there the Court ſeemed to be of a contrary Opinion, and that the Statute ought to be liberally expounded. And if the Biſhop and Incumbent do bring a Writ of Error, and do not prevail in it, but the Judgment is affirmed, a *Levari Facias* ſhall be awarded againſt them to the Archbiſhop of the Province, or *Sede Vacante* to the Guardian of the Spiritualties, for the Damages and Coſts given againſt them. *Jenkins, Cent.* 5. *Caſe* 36. But *Note*, that the Plaintiff in the Writ of Error ſhall not recover Damages.

Error in *Quare Impedit*, &c.

Where Judgment for Defendant is affirmed in Error.

If Judgment be given in a *Quare Impedit*, and a Writ of Error is brought, upon which the firſt Judgment is affirmed, altho' that the latter Judgment be erroneous, yet the firſt Judgment remains good and perfect in itſelf, and ſhall not be impeached for any Error in the ſecond Judgment; ſo altho' that the Judgment in a *Quare Impedit*, given by the Statute of *Weſt.* 2, for the Damages, be erroneous and reverſed, yet the Judgment given to have a Writ to the Biſhop, being the Judgment at the Common Law, ſhall ſtand good. *Hill.* 32 *Eliz. B. R. Specot*'s Caſe, 5 *Co.* 57. 1 *Roll's Abr.* 776. But if a Man doth recover in a *Quare Impedit*, and hath a Writ to the Biſhop, and after doth recover againſt the Biſhop in a *Quare non admiſit*, if the Judgment given in the *Quare Impedit* be after reverſed, the Judgment in the *Quare non admiſit* ſhall be reverſed alſo, altho' it ſeems to be for the Contempt to the King, 1 *Roll's Abr.* 777, for that it is grounded upon the firſt Judgment, and cannot ſtand without it.

If firſt Judgment be affirmed, although the latter be erroneous.

If Judgment for Damages be reverſed, Judgment *pro brevi Epiſcopo* ſhall ſtand.

If the Jury give Damages and Coſts where no Coſt ought to be given, becauſe the Statute doth not give them, and after Judgment is entred *Quod nullo habito reſpectu* of the Coſts, the Court doth award that he ſhall recover the Damages without any Releaſe of the Coſts; this ſpecial Entry ſhall aid the Error. *Paſch.* 14 *Jac. B. R. Grange* v. *Denny*, 1 *Roll's Abr.* 784.

Error aided by ſpecial Entry.

Induction refuſed.

CHAP. XXX.

Of Remedies on Refuſal of Induction; and of a Vi Laica removenda, *and Spoliation.*

Remedy againſt the Perſon that ought to induct, and refuſeth.

HAving declared what Remedies, both in the Eccleſiaſtical and Temporal Courts, the Law doth afford a Clerk preſented to a Benefice, in caſe the Biſhop doth refuſe to give him Inſtitution thereunto; Induction being next to follow, as neceſſary to the making of a Clerk compleat Incumbent of his Church, I come to ſpeak of the Remedies the Law doth give him againſt the Perſon that is to induct him, or give him Poſſeſſion of his Benefice, in caſe he doth refuſe to perform what appertains to his Office in that Part.

Remedy in the Spiritual Court without Damages, or by Action on the Caſe.

As to which the Common Law doth declare, that the Clerk may have his Remedy againſt the Archdeacon (whoſe Office it is for the moſt part to give Induction) in the Spiritual Court, to which he is ſubject, 38 *H.* 6. 16. and there may force him to do his Duty, if he cannot ſhew good Cauſe for his Refuſal, but no Damages can there be recovered; but an Action of the Caſe may be brought at the Common Law againſt the Archdeacon, *&c.* if he refuſe to induct. *Parſon's Law*, *c.* 14. *Ford* and *Hoſkin*'s Caſe, *Hill.* 12 *Jac. B. R.* 2 *Croke* 369. 2 *Bulſt.* 366. *Mich.* 12 *Jac. Pole* v. *Godfrey*, *Moor* 835, and by *Haughton* in the ſame Caſe, *Bulſt.* 2 *Part* 264, the ſame Caſe, 1 *Roll's Rep.* 63. *Roll's Abr.* 1. *p.* 108. But by ſuch Action at Common Law, Induction cannot be inforced to be made, but only Damages recovered upon the Neglect or Delay of him that is to induct.

If a Sheriff will not put the Clerk of the King into Poſſeſſion of a free Chapel, it is ſaid that a *Quare Impedit* lies againſt the Sheriff. 14 *H.* 4. 11. *b.*

Where Patron of a Donative has like Remedy by Writ, as Patron Preſentative.

And let it be noted, That the ſame Courſe that is to be taken by Patron of a Benefice Preſentative, when he is uſurped upon, may alſo be taken by the Patron of a Donative, in caſe his Church be filled by Uſurpation; for ſuch Patron may have his *Quare Impedit præſentare ad Eccleſiam*, and declare upon the ſpecial Matter, as is ſhewed before, *Chap.* 22 and 23, or his Writ of Right, as his Caſe ſhall require. 1 *Inſt.* 344. *a.* *Parſon's Counſellor* 205. But I ſuppoſe that theſe Writs are neceſſary to be brought, but at the Election of the Patron, for that a Church Donative cannot be ſo filled by Preſentation, Inſtitution and Induction, as to hinder the Patron to prefer his Clerk to the ſame, for that Inſtitution and Induction in ſuch Caſes are void; and although an Uſurper doth put in his Clerk by Donation, yet that will not prevent the true Patron, but that he may put in his Clerk alſo, and then the two Clerks ſo preferred ſhall try their Rights in an Action of Treſpaſs, or Ejectment: But if the true Patron pleaſe, he may in ſuch Caſes admit himſelf out of Poſſeſſion, and bring (as hath been ſaid) his *Quare Impedit*, or Writ of Right.

Clerks to try their Right, *&c.*

Where the Mandate for Induction is determined.

If the Authority of the Perſon who made the Mandate to the Archdeacon, *&c.* to induct, be determined by Death or Removal, Induction made

made after by Virtue of that Authority is null and void; for it ſo is ſaid to have been held in the Caſe of one *Stainſby*, who was preſented to the Rectory of *Miſſenden*, and admitted and inſtituted by the Archbiſhop, who was then Guardian of the Spiritualties, *ratione vacationis ſedis Gloceſtr'*, and the Archbiſhop alſo directed a Mandate to the Archdeacon for his Induction, who made a Mandate to two Clerks to induct the ſame *Stainſby* into the ſaid Church; but before Induction had, a Biſhop of *Gloceſter* was elected and conſecrated, and then Induction was made by Virtue of thoſe Mandates. It was adjudged that the Induction was void, for that the Authority of the Archbiſhop was determined by the Conſecration of a new Biſhop, and conſequently the Induction made by Virtue of that Authority after it was determined was void. But this Judgment, as 'tis ſaid, was afterwards reverſed by a Writ of Error in the *Exchequer*-Chamber. *Mich.* 29 *Car.* 2. *B. R. Robinſon* v. *Woolley*, Sir *Tho. Jones*, *Rep.* 78. 1 *Vent.* 309, 319. 3 *Keb.* 747, 821. 2 *Lev.* 199.

Vi Laica removenda.

Mandate to Two Clerks.

If an Archdeacon, or other Perſon authorized to give a Clerk Induction, and coming to do his Office be kept out of the Church, or if a Clerk be kept out of the Parſonage-Houſe by Lay-men, the Writ of *Vi Laica removenda* lies for the Clerk, and this Writ is to be obtained in the Court of Chancery, either by the Certificate of the Biſhop within whoſe Dioceſe or Juriſdiction the Church is; or it may be had there, upon a Surmiſe made thereof by the Clerk himſelf without the Biſhop's Certificate. And this Writ is to be directed to the Sheriff of the County to remove the Force, and if need be, to raiſe the *Poſſe Comitatus* to his Aſſiſtance, and to arreſt and impriſon the Perſons that make Reſiſtance, and to make Return of the Writ into the *King's Bench*, in which Court the Offenders ſhall be fined and puniſhed for the Force. But the *King's Bench*, as is ſaid by one Book, cannot award Reſtitution upon any Affidavit of Expulſion by Force, but the Writ in ſuch Caſe ought to be returned into the Chancery, or taken off the File in the *King's Bench*, if returned there, and put upon the File in the Chancery: (*Quære*, How this can be?) And then upon Affidavit there, that the Sheriff by Colour of a Writ hath removed one, and put another into Poſſeſſion, a Writ of Reſtitution is awardable. *F. N. B. fol.* 53. *Reg. of Writs*, *fol.* 59 and 60. *Trin.* 4 *Jac. Bird* v. *Smith*, *Moor* 781. *Hill.* 14 & 15 *Car.* 2. *Le Roy* verſ. *March*, &c. 1 *Sid.* 101. 1 *Keb.* 438. But in *Robins* and *Agmondeſham*'s Caſe, *Moor* 462, there Reſtitution was awarded by the *King's Bench*, the Writ being returned there; and I ſuppoſe the Practice and Experience is to have Reſtitution awarded out of that Court.

Where the Writ *Vi Laica removenda* lies.

Writ of Reſtitution awarded.

After a Clerk hath obtained Admiſſion, Inſtitution and Induction, whether by the free Act of the Ordinary, or by Courſe of Law, either in the Eccleſiaſtical Court, or at Common Law; then to maintain ſuch his Right or Poſſeſſion, the Law in ſome Caſes doth give him Remedy in the Eccleſiaſtical Court, *viz.* a Spoliation. 33 *H.* 6. 24. But this is a Remedy only to be uſed againſt another Incumbent, or pretended Incumbent of the ſame Church, who is admitted and inſtituted upon the Preſentation of the ſame Patron that preſented the former Incumbent, or of ſome other claiming under him; ſo that the Right of Patronage doth not come into Debate in the Spiritual Court. As if a Parſon be created a Biſhop, or hath taken a ſecond Benefice incompatible, and withal hath a ſufficient Diſpenſation to retain his former Benefice, if the Patron doth preſent another to his Benefice, who is inſtituted and inducted, as ſuppoſing

Of Spoliation.

Writ of Spoliation and Sequestration.

Spoliation for first Clerk.

ſing the Church to be open to his Preſentment, a Spoliation lieth for the firſt Clerk. *F. N. B. fol.* 36. But if the Ordinary hath inſtituted and inducted my Clerk, and after doth collate and induct a Clerk of his own, no Spoliation lies for my Clerk, but he ought to try his Right by Aſſize, Treſpaſs, or *Ejectione Firmæ*, at the Common Law. 26 *H.* 8. 3.——Or if Leſſee for Years of an Appropriation doth, when the Vicarage is void, preſent to the Rectory with the Biſhop's Conſent, whereby the Parſonage and Vicarage are united, and ſo remain for ſeveral Years, yet the Appropriator ſhall not be relieved by Spoliation, but at Common Law. 44 *Ed.* 3. 33. And it is ſaid, that Parſon *imperſonee*, or Appropriator, may have a Spoliation as Incumbent, and a Writ of Right of Advowſon as Patron, 38 *H.* 6. 19, yet it ſeems that a Spoliation cannot in any Caſe lie for an Appropriator, for if an Incumbent be preſented by the Appropriator himſelf, he is the only Incumbent, and the Appropriation diſſolved; and if he be preſented by a Stranger, the Right of Patronage muſt then come in Queſtion, becauſe the Appropriator muſt be Patron when the Appropriation is made. 38 *H.* 6. 19.

Proceedings upon a Spoliation ſtayed.

When a Spoliation is brought, and doth not lie in the Caſe, the Proceedings in the Eccleſiaſtical Court may be ſtayed by a Prohibition, 38 *H.* 6. 19, or by *Indicavit*, as the Caſe may be. 44 *Ed.* 3. 33.

Sequeſtration, upon Spoliation.

When a Spoliation is brought to try which of two Perſons inſtituted is the rightful Incumbent of a Parſonage or Vicarage, or after Sentence given againſt one of the Parties, who hath appealed, it is uſual for the Eccleſiaſtical Judge, at the Petition of either of the Parties, alledging that Controverſy and Oppoſition is about the collecting the Profits, to Decree, that the Fruits of the Church be ſequeſtred, and to commit the Power of collecting them to the Church-wardens, or ſome others of the ſame Pariſh, firſt taking Bond of ſuch Perſons, whereby they ſhall be obliged to collect and keep the Tithes for the Uſe of him that ſhall be found to have the Right, and to render a juſt Account when called thereunto. And the Judge is alſo wont to appoint ſome Miniſter to ſerve the Cure for the Time that the Controverſy ſhall depend, and to command thoſe to whom the Sequeſtration is committed, to allow ſuch Salary as he ſhall aſſign out of the Profits of the Church to the Parſon that he Orders to attend the Cure; and thoſe to whom this Sequeſtration is committed, are to cauſe the ſame to be publiſhed in the reſpective Churches in the Time of Divine Service. After the Suit is determined, the Sequeſtration is to be taken off, and the Profits collected to be reſtored to him that prevails at Law, *viz.* in Specie, if they remain ſo, or if not, the Value of them. If the Sequeſtrators refuſe to do this, they are to be compelled to do the ſame by the Eccleſiaſtical Court; and if they ſhall, being called thereunto, delay to give an Account, the Judge uſeth to deliver to the Party grieved the Bond given, with a Warrant of Attorney to ſue for the Penalty thereof to his own Uſe at the Common Law.

A Sequeſtration committed to the Church-wardens, &c.

If the Sequeſtrators refuſe to account, &c.

CHAP.

CHAP. XXXI.

Common Prayer.

The Miniſter's Duty in reading the Common Prayers, adminiſtring the Sacraments, &c.

HItherto hath been ſhewed by what Means a Perſon may make himſelf the lawful Incumbent of an Eccleſiaſtical Benefice. The following Chapters are to declare the Effects of ſuch Incumbency, that is, to what Duties the Clerk thereby is obliged by Inſtitution, and what Benefits he is to receive by Induction.

He that is Incumbent of a Benefice with Cure (though it be only by Admiſſion and Inſtitution) hath thereby not only the Authority, but is alſo under an Obligation to perform all the Offices of a Miniſter to the People belonging thereunto. And it is enacted by 14 *Car.* 2. *c.* 4. **That all and ſingular Miniſters in any Cathedral, Collegiate, or Pariſh Church or Chapel, or other Place of Publick Worſhip, within this Realm of** England, **Dominion of** Wales, **and Town of** Berwick **upon** Tweed, **ſhall be bound to ſay and uſe the Morning Prayer, Evening Prayer, Celebration and Adminiſtration of both the Sacraments, and all other the Publick and Common Prayer, in ſuch Order and Form as is mentioned in the ſaid Book annexed and joined to this preſent Act, and intitled,** The Book of Common Prayer, and Adminiſtration of the Sacraments, and other Rites and Ceremonies of the Church, according to the Uſe of the Church of *England*; together with the Pſalter or Pſalms of *David*, pointed as they are to be ſung or ſaid in Cnurches: And the Form or Manner of Making, Ordaining and Conſecrating of Biſhops, Prieſts and Deacons: **And that the Morning and Evening Prayers therein contained, ſhall upon every Lord's Day, and upon all other Days and Occaſions, and at the Times therein appointed, be openly and ſolemnly read by all and every Miniſter or Curate, in every Church, Chapel, or other Place of Publick Worſhip, within this Realm of** England, **and Places aforeſaid.**

14 *Car.* 2. *c.* 4. An Incumbent with Cure by Inſtitution only, is to perform all Offices of a Miniſter.

As mentioned in the Book of Common Prayer, *&c.*

Provided, That the Penalties in this Act ſhall not extend to the Foreigners or Aliens of the Foreign Reformed Churches, allowed or to be allowed by the King's Majeſty, his Heirs and Succeſſors, in England.

Foreigners, *&c.* excepted.

This Clauſe of this Statute doth make it the Duty of every Miniſter, obliged to officiate in any Place of Publick Worſhip, to ſay and uſe the Morning and Evening Prayer; as to which, from the ſaid Clauſe, theſe Things may be noted:

As to reading the Common Prayers.

Firſt, That if the whole Morning and Evening Prayer, or all the Prayers appointed to be read by the Book of Common Prayer on every *Sunday* and *Holy-day*, and upon any Occaſion, both in the Morning and Afternoon of ſuch Days, without the Omiſſion of any one, or Part of any one of them, *&c.* be not read, the Offender is puniſhable by this Statute, and *Stat.* 1 *El. cap.* 2.

If one, *&c.* be omitted, Offender puniſhable.

Common Prayer.

He muſt read both Morning and Evening Prayers.

Secondly, That not only the Morning, or the Evening, but both Morning and Evening Prayers, at the Time appointed, are to be read by every Miniſter obliged to officiate in every Church, Chapel, and Place of Publick Worſhip, every *Sunday* and *Holy-day*, *&c.* From which it follows, That no Miniſter that hath two Benefices, can by himſelf alone ſupply both his Cures; or if he hath but one Benefice, can ſerve that with another as Curate; or if his Benefice hath a Chapel of Eaſe belonging to it, in which he is bound to ſay Divine Service, or to provide one to ſay it, can by himſelf in Perſon officiate in both; nor can any one Perſon be a Curate in two Churches, unleſs ſuch may ſatisfy the Law by reading both Morning and Evening Prayers at each Place, which cannot well be done; nor may a Miniſter read Morning Prayer at one Church, and evening Prayer at another Church or Chapel, by the Allowance of the Ordinary, for he cannot diſpence with Acts of Parliament; neither can he ſerve one Cure on one *Sunday*, and another Cure on the next; nor can he, ſtrictly ſpeaking, at any Time neglect to read either Morning or Evening Prayer in his Church; however, not unleſs his Neglect be neceſſary, but ſhall be ſubject to Puniſhment by this Statute, and *Stat.* 1 *El. cap.* 2.

The Ordinary cannot diſpence with Acts of Parliament.

Quære, concerning the ſaying Forms of Prayer occaſionally preſcribed for Solemn Faſtings, *&c.* But note, the Stat. 1 *El.* is only penal where the Miniſter ſhall wilfully or obſtinately ſtanding in the ſame, uſe any other, *&c.* *Vid. poſt.*

Thirdly, Every Miniſter in any Church, as it ſeems, is as much bound to ſay Morning and Evening Prayers on every Holy-day, and on the Fifth of *November*, the Thirtieth of *January*, and on the Twenty-ninth Day of *May*, as on the Lord's Day; but *Quære*, for thoſe Forms of Prayer appointed to be read on thoſe Days, are no Part of the Book of Common Prayer, but added to it by the King's Order: And the Obligation of Miniſters to read ſuch Forms of Prayer, as have been, or ſhall be occaſionally preſcribed for any Solemn Days of Faſtings or Thankſgiving, ſeems to be founded, not ſo much on any expreſs Law or Statute, as on the Equity and Reaſon of the Thing, that extraordinary Occaſions ſhould be ſupplied with ſpecial and extraordinary Forms, which may be ſaid to be *Appointed* but not *Enacted*, and rather *Allowed* than *Ordered*. Yet they may not only be ſafely uſed, without Treſpaſs upon any Act of Uniformity, but being drawn up by the Biſhops of the Church, and recommended by the King's Authority, and containing nothing contrary to the Eſtabliſhed Forms of Divine Service, they ought to be uſed at the proper Times by every Miniſter: And though there is no Statutable Penalty for ſuch Neglect or Omiſſion, yet ſuch Contempt of Authority may undoubtedly be puniſhed by other legal Ways. Some have thought that there is a Proviſo made for authorizing ſuch extraordinary Forms of Prayer in the Rubrick after the *Nicene* Creed, where it is ordered, that *Nothing ſhall be proclaimed or publiſhed in the Church during the Time of Divine Service, but by the Miniſter; nor by him any Thing but what is preſcribed in the Rules of the Book, or enjoined by the King, or by the Ordinary of the Place:* This latter Part of the Exception does imply, that any Thing in itſelf Lawful and Honeſt, injoined by the King, or Ordinary, ſhall be, or at leaſt may be Publiſhed, or Read; and eſpecially ſuch Forms, as by joint Authority of King and Ordinary are appointed on ſuch particular Occaſions. And further, the very Acts of Parliament which ordain a Publick Thankſgiving on the ſtated Days, do imply that ſome Proviſion ſhall be made for a proper Form adapted to the Occaſion of the Day; as in the Act for a *Publick Thankſgiving to Almighty God every Year on the Fifth of* November, it is enacted, That *all and ſingular Miniſters in every Cathedral, and Pariſh Church, ſhall always upon the Fifth Day of* November *ſay Morning Prayer, and give unto Almighty God Thanks for this moſt happy Deliverance.* But how ſhall the Miniſter give Thanks? in any arbitrary Form

Implication what Things may be publiſhed or read.

Thankſgiving on the 5th Day of *November.*

or

or Manner of his own deviſing, or not rather in ſuch common Form as his lawful Superiors ſhall preſcribe to him?

Sacraments.

Celebration of the Sacraments.

Fourthly, Note, That a Miniſter is bound to ſay and uſe the Morning and Evening Prayer, and the Celebration and Adminiſtration of both the Sacraments, in ſuch Order and Form as is mentioned in the Book of Common Prayer; ſo that, ſtrictly ſpeaking, if in reading the Morning and Evening Prayers, he ſhall ſtand or ſit when he is directed to kneel, or kneel or ſit when he ſhould ſtand, or ſhall read them in other Order than is appointed, or ſhall omit any Thing that is appointed to be read on certain Days, or miſplace the Prayers in reading them, or read in one Day what is appointed to be read on another, or do not celebrate and adminiſter the Sacraments in ſuch Order and Form as is appointed, he is puniſhable by this Law.

Miniſters officiating in Cathedral or Collegiate Churches, &c. puniſhable.

Fifthly, Not only Miniſters of Parochial Churches, but alſo all Miniſters, that by their Places are to officiate in any Cathedral, or Collegiate Churches or Chapels, or other Places of Publick Worſhip, (excepting ſuch Proteſtant Diſſenters as are provided for by the Statute of 1 *W. & M.*) if Morning and Evening Prayer be not read by them, or ſuch of them whoſe Part is to read the ſame, *&c.* in ſuch Order and Form as is appointed, are puniſhable by this Law. And alſo all, as well Biſhops as others, that do read Morning and Evening Prayers in any of them, celebrate the Sacraments, Confirm, give Orders, Marry, *&c.* although that they do any of theſe Things for others obliged by their Places to do the ſame, if they perform them not in ſuch Order and Form as is appointed by the Book of Common Prayer, *&c.* are Tranſgreſſors of this Law. And in Churches where there is a Vicar indowed that is Preſentative, and a Parſon alſo that is Preſentative, it is ſaid that the Vicar, and not the Parſon, hath the Cure of Souls, 5 *Ed.* 2, *Quare Impedit* 105, *per Paſt.* But I conceive, that the Parſon hath alſo the Cure habitually, although the Vicar actually, who is *in Subſidium Rectoris*, and is to perform the Duty, and puniſhable upon a Neglect: And ſo are Curates of beneficed Miniſters lawfully abſent from their Charges, if (being duly admitted to be Curates of a Church by the Ordinary) they, whilſt they remain Curates, neglect duly to read both Morning and Evening Prayers; for ſuch Curates are Miniſters in the Churches where they ought to ſerve, and are expreſly named in the Statute. And in ſuch Caſe, I ſuppoſe, that the Incumbent of the Church is not puniſhable, if Divine Service be neglected by the Curate, whilſt he remains ſuch; but *Quære*, for that the Charge of the Souls remains upon the Incumbent. However, if the Curate doth read the Prayers, the Incumbent is excuſed, that is, unleſs the Miniſter doth reſide on his Benefice, as will be ſhewed.

Alſo Biſhops may be Tranſgreſſors.

Curates of beneficed Miniſters.

Note; The Canons, which preſcribe the Qualification and Duty of Curates, are chiefly theſe two.

Canons relating to Curates.

CAN. XLVII. Abſence of beneficed Men to be ſupplied by Curates that are allowed Preachers.

Every beneficed Man licenſed by the Laws of this Realm, upon urgent Occaſions of other Service, not to reſide upon his Benefice, ſhall cauſe his Cure to be ſupplied by a Curate, that is, a ſufficient and licenſed Preacher, if the Worth of the Benefice will bear it. But whoſoever hath two Benefices, ſhall maintain a Preacher licenſed, in the Benefice where he doth not reſide, except he preach himſelf at both of them uſually.

CAN.

Sacraments.

CAN. XLVIII. None to be Curates, but allowed by the Biſhop.

No Curate, or Miniſter, ſhall be permitted to ſerve in any Place, without Examination, and Admiſſion of the Biſhop of the Dioceſe, or Ordinary of the Place having Epiſcopal Juriſdiction, in Writing under his Hand and Seal, having Reſpect to the Greatneſs of the Cure, and Meetneſs of the Party. And the ſaid Curates, and Miniſters, if they remove from one Dioceſe to another, ſhall not be by any Means admitted to ſerve, without Teſtimony of the Biſhop of the Dioceſe, or Ordinary of the Place, as aforeſaid, whence they came, in Writing, of their Honeſty, Ability, and Conformity to the Eccleſiaſtical Laws of the Church of England. *Nor any ſhall ſerve more than one Church or Chapel upon one Day, except that Chapel be a Member of the Pariſh Church, or united thereunto; and unleſs the ſaid Church or Chapel, where ſuch a Miniſter ſhall ſerve in two Places, be not able, in the Judgment of the Biſhop or Ordinary, as aforeſaid, to maintain a Curate.*

The Defendant libelled againſt the Plaintiff, Vicar of *N.* for that, that whereas by Cuſtom, Time whereof, *&c.* he was obliged by himſelf, or ſome other Perſon, to ſay Divine Service in the Chapel of *Chalbury*, for which he received ſuch a Recompence; nevertheleſs, he had neglected to do it, *&c.* The Plaintiff, to have a Prohibition, ſuggeſts, that all Cuſtoms and Preſcriptions are triable by the Common Law; but does not deny, nor traverſe, the Cuſtom. And Mr. *Harcourt* for the Plaintiff argued, that the Vicar is not compellable of Common Right to ſay Divine Service in any Place but the Mother Church; and therefore this being a Cuſtom, to charge the Vicar againſt Common Right, it ought to be tried at Common Law. If in Fact ſuch a Cuſtom be found, the King's Bench will grant a Conſultation.

Holt, Chief Juſtice, ſaid, that he was not of Opinion, that this being a Duty incumbent upon the Plaintiff by Preſcription barely of itſelf is ſufficient Ground for a Prohibition, eſpecially ſince the Preſcription is not traverſed in the Suggeſtion; for it is an Eccleſiaſtical Right, to bind an Eccleſiaſtical Perſon to an Eccleſiaſtical Duty: And if the Eccleſiaſtical Duty be neglected, the Parſon who is guilty of the Neglect may be ſued for it in the Spiritual Court, though the Duty began by Cuſtom. And it is the very Point of *William*'s Caſe, 5 *Co.* 72. *b.* 73. *a. b.* where the Vicar of *Alderbury* was obliged upon a Cuſtom to celebrate Divine Service, by himſelf or ſome other Perſon, in the Chapel of *St. John* within the Manor of *Woolaſton*, for the Lord of the Manor and his Tenants; and the Lord brought Caſe againſt the Vicar for Negligence in celebrating Divine Service in his Chapel for ſuch a Time; and it was held, that it would not lie; but that the Remedy was, to ſue the Vicar in the Court Chriſtian, becauſe Eccleſiaſtical Perſons are more ſubject to the ſaid Courts than Laymen are. If this was a Preſcription to affect Laymen, perhaps it might have another Conſideration; but it is a mere Eccleſiaſtical Duty, and might have a legal Commencement by the Conſent of all Parties, as by Compoſition. If the Vicar for a Sum of Money undertook to do Divine Service, and an Act was made in the Eccleſiaſtical Court by the Conſent of all Parties; that would have bound the Vicar and his Succeſſors before the 1 *Eliz. cap.* 2. And therefore, becauſe it may have commenced by an Eccleſiaſtical Act, the Defendant may have his Remedy for the Neglect in the Court Chriſtian. And it is upon the ſaid Reaſon, that notwith-

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ſtanding the Opinion of *Coke*, 2 *Inſt.* 491. where a Suit was in the Eccleſiaſtical Court againſt a Parſon, *&c.* for a Penſion by Preſcription, no Prohibition is grantable, though the Preſcription was denied. See 1 *Vent.* 3, 120, 265.

Gould, Juſtice, agreed, and ſaid, that he would cite a ſtronger Caſe, *W. Jones* 230. *Halſey* v. *Halſey*, where a Preſcription was alledged for a Way to carry his Tithes through a Cloſe called *S.* and for ſtopping of it the Defendant libelled againſt the Plaintiff in the Eccleſiaſtical Court; whereas in fact the Way by Preſcription was through a Cloſe called *W.* and for that, that Preſcriptions for Ways ought to be tried at Common Law, *&c.* and upon Demurrer to the Declaration, a Conſultation was awarded, by the Opinion of the whole Court. So a Parſon may ſue for a *Modus* in the Spiritual Court. *Holt*, Chief Juſtice, ſaid, that if the Caſe in *Jones* had now come in Judgment in this Court, it would be queſtionable, becauſe it charges the Freehold of another Man. The Caſe of a *Modus* is, as Juſtice *Gould* ſays, if the *Modus* is admitted; but if the Defendant ſays that it is leſs, and inſiſts upon it, it muſt be tried at Common Law. The Rule made to ſhew Cauſe why a Prohibition ſhould not be granted was diſcharged. *Ex relatione m'ri Jacob.* 1 *Ld Raym.* 578, 579. *David Jones* v. *Stone.*

That the Ordinary may puniſh for Neglect.

Sixthly, Note, That though by the aforeſaid Clauſe of the Statute, every Miniſter in every Church, Chapel, and Place of Publick Worſhip, is bound openly, and ſolemnly, to read the Morning and Evening Prayer contained in the Book of Common Prayers, *&c.* upon every Lord's Day, and upon all other Days and Occaſions, and at the Time therein appointed, for the Neglect of which alſo the Ordinary may puniſh, though the antient Service be altered, 1 *Inſt.* 95. *b.* yet by the ſaid Clauſe, no Miniſter is obliged to adminiſter either of the Sacraments, to ſolemnize Marriages, viſit the Sick, bury the Dead, church Women; nor is any Biſhop obliged thereby to confirm the Baptiſed, or to conſecrate, or ordain any one to be a Biſhop, Prieſt or Deacon, and therefore not puniſhable by this Statute for the Neglect of any of theſe Offices, but only when he doth perform, celebrate or adminiſter either of the Sacraments, he is to celebrate and adminiſter them in ſuch Order and Form as is mentioned in the Book of Common Prayer; and when he doth perform any of the other Duties, to ſay and uſe ſuch Prayers as are appointed by the ſaid Book to be uſed at the Performance of any of them, in ſuch Order and Form, as the ſaid Book doth appoint.

To what Matters the Biſhop and Miniſters are not obliged upon Penalties.

Canons for the Celebration of *Sundays* and Holy-days.

Note; The Celebration of *Sundays* and Holy-days, and the Form of Divine Service to be uſed on them, are alſo provided for by theſe wholeſome Canons of the Church.

CAN. XIII. Due Celebration of *Sundays* and Holy-Days.

All manner of Perſons within the Church of England *ſhall from henceforth celebrate and keep the Lord's Day, commonly called* Sunday, *and other Holy-Days, according to God's holy Will and Pleaſure, and the Orders of the Church of* England *preſcribed in that Behalf; that is, in hearing the Word of God read and taught, in Private and Publick Prayers, and acknowledging their Offences to God, and Amendment of the ſame; in reconciling themſelves charitably to their Neighbours, where Diſpleaſure hath been;*

Lord's Supper. *in oftentimes receiving the Communion of the Body and Blood of Chriſt; in viſiting of the Poor and Sick, uſing all godly and ſober Converſation.*

CAN. XIV. The preſcript Form of Divine Service to be uſed on *Sundays* and Holy-Days.

The Common Prayer ſhall be ſaid or ſung diſtinctly and reverently upon ſuch Days as are appointed to be kept Holy by the Book of Common Prayer, and their Eves, and at convenient and uſual Times of thoſe Days, and in ſuch Place of every Church as the Biſhop of the Dioceſe, or Eccleſiaſtical Ordinary of the Place, ſhall think meet for the Largeneſs or Straitneſs of the ſame, ſo as the People may be moſt edified. All Miniſters ſhall likewiſe obſerve the Orders, Rites and Ceremonies preſcribed in the Book of Common Prayer, as well in reading the Holy Scripture, and ſaying of Prayers, as in Adminiſtration of the Sacraments, without either diminiſhing, in regard of Preaching, or in any other Reſpect, or adding any Thing in the Matter or Form thereof.

14 *Car.* 2. *c.* 4. As to an Incumbent reſident who keeps a Curate.

And as concerning an Incumbent of a Church who is reſident, and keeps a Curate, it is farther enacted by the Authority aforeſaid, **That in all Places where the proper Incumbent of any Parſonage, or Vicarage or Benefice with Cure, doth reſide on his Living, and keeps a Curate, the Incumbent himſelf in Perſon (not having ſome lawful Impediment to be allowed by the Ordinary of the Place) ſhall once (at the leaſt) in every Month, openly and publickly, read the Common Prayers and Service, in and by the ſaid Book preſcribed, and (if there be Occaſion) adminiſter each of the Sacraments, and other Rites of the Church, in the Pariſh Church or Chapel, of or belonging to the ſame Parſonage, Vicarage or Benefice, in ſuch Order, Manner and Form, as in and by the ſaid Book is appointed, upon Pain to forfeit the Sum of Five Pounds, to the Uſe of the Poor of the Pariſh for every Offence, upon Conviction, by Confeſſion, or Proof of two Credible Witneſſes upon Oath before two Juſtices of the Peace of the County, or Town Corporate where the Offence ſhall be committed, (which Oath the ſaid two Juſtices are hereby impowered to adminiſter) and in Default of Payment within ten Days, to be levied by Diſtreſs and Sale of the Goods and Chattels of the Offender, by the Warrant of the ſaid Juſtices, by the Church-wardens or Overſeers of the Poor of the ſaid Pariſh, rendring the Surpluſage to the Party.** Stat. 14 Car. 2. c. 4.

To adminiſter the Sacraments once a Month, *&c.*

So that though in other Caſes the Statute doth not oblige Miniſters of Churches to adminiſter the Sacraments, and uſe other Rites appointed in the Book of Common Prayer, but ſeems only to direct the Miniſter; yet by this Clauſe, the Miniſter that is reſident upon his Cure, is bound as well to adminiſter the Sacrament once every Month, as alſo to perform all other Rites, as to Marry, Bury, *&c.* if there be Occaſion, as to read the Prayers; otherwiſe he is ſubject to the Penalty mentioned in this Clauſe.

To whom he is to adminiſter the Sacraments.

Though not by the aforeſaid Statute, yet by the Rubrick, a Miniſter muſt ſay and uſe the Celebration and Adminiſtration of both the Sacraments, as is mentioned; and yet thereby he is not bound to adminiſter the Lord's Supper to all Perſons whatever they be: For firſt, none are to be admitted to the Holy Communion, until ſuch Time as they be confirmed, or be ready and deſirous to be confirmed: *See Rubrick, in the Order for the Adminiſtration of the Lord's Supper, or Holy Communion.*

For

For by the Order for the Adminiſtration of the Lord's Supper it is Ordered, *That if any one be an open and notorious evil Liver, or hath done any Wrong to his Neighbour by Word or Deed, ſo that the Congregation be thereby offended, the Curate having Knowledge thereof, ſhall call him, and advertiſe him, that in any wiſe he preſume not to come to the Lord's Table, until he hath openly declared himſelf to have truly repented, and amended his former naughty Life, that the Congregation may thereby be ſatisfied, which before were offended, and that he hath recompenced the Parties to whom he hath done Wrong, or at leaſt declare himſelf to be in full Purpoſe ſo to do, as ſoon as he can conveniently.* Lord's Supper.

The ſame Order ſhall the Curate uſe with thoſe betwixt whom he perceiveth Malice and Hatred to reign, not ſuffering them to be Partakers of the Lord's Table, until he know them to be reconciled: And if one of the Parties ſo at Variance be content to forgive, from the Bottom of his Heart, all that the other hath treſpaſſed againſt him, and to make Amends for that he himſelf hath offended, and the other Party will not be perſuaded to a godly Unity, but remain ſtill in his Frowardneſs and Malice, the Miniſter in that Caſe ought to admit the penitent Perſon to the Holy Communion, and not him that is obſtinate. Provided that every Miniſter ſo repelling any, as is ſpecified in this or the next precedent Paragraph of this Rubrick, ſhall be obliged to give an Account of the ſame to the Ordinary within fourteen Days after at the fartheſt; and the Ordinary ſhall proceed againſt the offending Perſon according to the Canon. Not to the Malicious and Hateful, &c.

The Canons which provide for the more regular Adminiſtration of the Lord's Supper are theſe, of which the Titles follow: Canons relating to the Lord's Supper.

CAN. XX. *Bread and Wine to be provided againſt every Communion.*
CAN. XXI. *The Communion to be thrice a Year received.*
CAN. XXII. *Warning to be given before-hand for the Communion.*
CAN. XXIII. *Students in Colleges to receive the Communion Four Times a Year.*
CAN. XXIV. *Copes to be worn in Cathedral Churches by thoſe that adminiſter the Communion.*
CAN. XXVI. *Notorious Offenders not to be admitted to the Communion.*
CAN. XXVII. *Schiſmaticks not to be admitted to the Communion.*
CAN. XXVIII. *Strangers not to be admitted to the Communion.*
CAN. XXIX. *Fathers not to be Godfathers in Baptiſm, nor Children not Communicants.*

There ſeems to be a common Error in Perſons to be qualified for any Office by receiving the Sacrament of the Lord's Supper, according to the Order of the Church of *England*, to challenge an abſolute Right of Admiſſion to it, and to pretend that an Action upon the Caſe may be brought againſt thoſe Miniſters who refuſe to adminiſter unto them, and will not allow the Miniſter a Liberty to inquire into their Fitneſs to receive it. The Perſons to be thus qualified preſent themſelves to communicate, either, 1*ſt*, More regularly to their own Pariſh Prieſt; or, 2*dly*, To ſome Parochial Miniſter. If to their own Pariſh Prieſt, he has as much Right by Rubrick, to ſuſpend his Miniſtration to any Magiſtrate, or Officer Elect, as to any of his meaneſt and moſt private People, if he can give the ſame Reaſon for rejecting of him. Or if the Perſon to be qualified offer to communicate with ſome other Parochial Miniſter, ſuch Miniſter may perhaps more juſtly refuſe to admit him, becauſe, 1*ſt*, No Prieſt

Errors in Perſons to be qualified for Offices by receiving the Sacrament. *See* 1 *Sid.* 34, 35. Sed. 1 *Keb.* 947, *contra* where a Man is bound to receive under a Penalty.

Lord's Supper.

That a Parochial Miniſter may decline admitting a Foreigner or Stranger.

Prieſt is obliged to adminiſter the Sacraments to any but his own People committed to his peculiar Charge, and may decline admitting any Foreigner or Stranger; beſides, ſome faithful and conſciencious Miniſters have much doubted, whether they ought to admit thoſe Perſons to the Holy Sacraments for a legal Qualification, who come only to ſerve that Turn, and who at other Times live in a negative Separation, abſenting themſelves from the Church, and the holy Offices of it; or perhaps in a poſitive Schiſm, joining themſelves to ſome ſeparate Congregation. This is certainly a moſt ſcandalous Practice in theſe Lay-perſons, who can thus dare to mock God, and play with the *Holy of Holies* in Religion. And even thoſe Clergymen who connive at this Hypocriſy of Communicants, may be thought in ſome meaſure Partakers of thoſe other Mens Sins, and help to proſtitute Sacraments. To prevent this and other Miſchiefs, it is highly expedient, that the good Rule in Rubrick ſhould be better obſerved; *So many as intend to be Partakers of the Holy Communion, ſhall ſignify their Names to the Curate, at leaſt ſome Time the Day before.*

Notice by the Miniſter.

When a Miniſter doth intend to adminiſter the Lord's Supper, he is to give Warning for the Celebration thereof upon the *Sunday*, or ſome *Holy-day* immediately preceding, which he is to do after his Sermon, or Homily ended: And then alſo he is to read one of thoſe Exhortations, as the Rubrick in the Communion-Service doth direct to be read at ſuch Time, according as he ſhall ſee Cauſe.

Not to be denied without lawful Cauſe.

When the Day prefixed by the Miniſter for his adminiſtring of the Sacrament doth come, the Miniſter ſhall not without lawful Cauſe deny the ſame to any Perſon that will devoutly and humbly deſire it. *Stat.* 1 *Ed.* 6. *cap.* 1.

Yet it is ordered by the Rubrick in the Communion-Service, *That there ſhall be no Celebration of the Lord's Supper, except there be a convenient Number to communicate with the Prieſt according to his Diſcretion; and if there be not above Twenty Perſons in the Pariſh, of Diſcretion to receive the Communion, yet there ſhall be no Communion, except four (or three at the leaſt) communicate with the Prieſt.*

To be adminiſtred in both Kinds.

When the Sacrament is adminiſtred by any Prieſt, it is to be adminiſtred in both Kinds, that is to ſay, of Bread and Wine, except Neceſſity otherwiſe require. *Stat.* 1 *Ed.* 6. *cap.* 1. And the Bread and Wine for the Communion ſhall be provided by the Curate, and the Church-wardens, at the Charges of the Pariſh; and to take away all Occaſion of Diſſention, and Superſtition which any Perſon hath or might have concerning the Bread and Wine, it ſhall ſuffice that the Bread be ſuch as is uſual to be eaten, but the beſt and pureſt Wheat Bread that conveniently may be gotten. And if any of the Bread and Wine remain unconſecrated, the Curate ſhall have it to his own Uſe; but if any remain of that which was conſecrated, it ſhall not be carried out of the Church, but the Prieſt, and ſuch other of the Communicants as he ſhall then call to him, ſhall immediately after the Bleſſing reverently eat and drink the ſame.

For the Communion of the Sick.

It is moſt regular, and expedient, that the Sacrament of the Lord's Supper be received by Perſons that are to receive the ſame in their Pariſh-Church, or other Place of publick Worſhip, and not in Private Houſes: But if a ſick Perſon be not able to come to the Church, and yet is deſirous to receive the Communion in his Houſe, then he muſt give timely Notice to the Curate, ſignifying alſo how many there are to communicate with him, (which ſhall be three, or two at the leaſt) and having a convenient Place in the ſick Man's Houſe, with all Things

neceſſary, ſo prepared that the Curate may reverently miniſter, he ſhall there celebrate the Holy Communion. *Rubrick for the Communion of the Sick.* Baptiſm.

From which note, That if the ſick Perſon be able to come to the Church, or doth not ſignify how many are prepared to communicate with him, or if there be not two at the leaſt to communicate with him, or if he have not Things neceſſary for the Celebration thereof in reverent Manner, the Curate is not bound to adminiſter it, yea, he is bound not to adminiſter it, which alſo may be collected from other Words in the Rubrick. Yet in the Time of Plague, Sweat, or other like contagious Times of Sickneſs or Diſeaſes, when none of the Pariſh or Neighbours can be gotten to communicate with the Sick in their Houſes, for fear of the Infection, upon ſpecial Requeſt of the Diſeaſed, the Miniſter may only communicate with him. *Rubrick for the Communion of the Sick.* When not due Notice, &c.

Note; This Duty of adminiſtring the Holy Sacrament only in Churches or Chapels, except to ſick Perſons in Private Hauſes, is thus ordered by the Canon. Canon for adminiſtring in Time of Neceſſity.

No Miniſter ſhall preach, or adminiſter the Holy Communion in any private Houſe, except it be in Times of Neceſſity, when any being either ſo impotent as he cannot go to Church, or very dangerouſly ſick, are deſirous to be Partakers of the Holy Sacrament, upon pain of Suſpenſion for the firſt Offence, and Excommunication for the ſecond, &c. *Can.* 71.

Alſo, though by the Rubrick every one having Cure of Souls is bound to ſay, and uſe, the Celebration and Adminiſtration of the Sacrament of Baptiſm to all the Infants of baptized Parents; yet in ſome Caſes, he may ſuſpend, at the leaſt, to baptize Perſons brought to him for that purpoſe. Sacrament of Baptiſm may be ſuſpended.

As if they be not brought to the Place of publick Worſhip, and to the Font there, on ſome *Sunday*, or *Holy-day*, immediately after the laſt Leſſon at Morning Prayer, or elſe immediately after the laſt Leſſon at Evening Prayer, as the Curate by his Diſcretion ſhall appoint; or if there be not ready at the ſaid Time and Place, for every Malechild to be baptized, two Godfathers and one Godmother, and for every Female, one Godfather and two Godmothers. *Rubrick.* For what Cauſes.

But in caſe of Neceſſity, as if a Child be ſick, *&c.* the Curate is bound to baptize it on any Day, and in a private Houſe, and without Godfathers or Godmothers, and then the Child (if it afterwards live) regularly ought to be brought into the Church in the Preſence of the Congregation there, that if the Miniſter of the ſame Pariſh did baptize it, he may certify the Congregation that it was duly baptized; or if the Child was baptized by any other, that he may examine whether the Child was lawfully baptized, that is, whether by a lawful Miniſter, by proper Water, and in the Name of the Father, and of the Son, and of the Holy Ghoſt; ſo if it was done with improper Matter, as Milk or Wine, or other Liquid, inſtead of Water, or not in the Name of the Father, and of the Son, and of the Holy Ghoſt, the Miniſter may baptize it according to the Form appointed for publick Baptiſm; or if, upon Examination of the Matter, he doth find that all Things were done as they ought to be, that he may certify as much to the Congregation, at which Time Godfathers and Godmothers are to be preſent, and to undertake for the Child. *Rubrick.* Private Baptiſm in caſe of Neceſſity.

Baptiſm.

Sufficient Baptiſm, tho' not by lawful Prieſt, &c.

And *Note*, That a Child baptized with Water in the Name of the Father, and of the Son, and of the Holy Ghoſt, is ſufficiently baptized, although not baptized by a lawful Prieſt, as may be collected from the Rubrick; and ſo it is if the Child be baptized by other Form, yet the Perſon baptizing not being a lawful Prieſt is puniſhable, like as a lawful Prieſt baptizing by other Form than is ſet down by the Book of Common Prayer is puniſhable.

Formerly Superſtition in Baptiſm.

In former Times the Neceſſity of Baptiſm to new-born Infants was ſo rigorouſly taught, that for this Reaſon they allowed Lay People, and even Women, to baptize the declining Child, where a Prieſt could not be immediately found; ſo fondly ſuperſtitious in this Matter, that in hard Labours the Head of the Infant was ſometimes baptized before the whole Delivery. This Office of Baptizing in ſuch Caſes of Neceſſity was commonly performed by the Midwife; and 'tis very probable, this gave firſt Occaſion to Midwives being licenſed by the Biſhop, becauſe they were to be firſt examined by the Biſhop or his delegated Officer, whether they could repeat the Form of Baptiſm, which they were in Haſte to adminiſter upon ſuch extraordinary Occaſion. But we thank God our Times are reformed in Senſe, and in Religion.

Baptiſm of Perſons of Years of Diſcretion.

Alſo if a Miniſter hath in his Pariſh any unbaptized Perſon that is of Years of Diſcretion, and which doth deſire to be baptized, it ſeems the Miniſter ought to ſuſpend the Baptizing of him until Notice of ſuch Perſon's Purpoſe ſhall be given to the Biſhop, or to whom he ſhall appoint to take Cognizance of ſuch Matters, and until ſuch Time as he ſhall be examined, and found to be ſufficiently inſtructed in the Principles of Chriſtian Religion. *Rubrick.* And yet he is to baptize (even as Infants) thoſe not baptized in their Infancy, that be brought to him before they come to Years of Diſcretion, that is, either by the Form of publick or private Baptiſm, as Neceſſity ſhall require, and without Notice given to the Biſhop, or precedent Examination. *Rubrick.*

Viſitation of the Sick, &c. 1 *Rol. Abr.* 110.

He that hath the Cure of any People, is not only bound by Law to ſay Divine Service, and adminiſter the Sacraments to them, but alſo of them within his Cure to viſit the Sick, bury the Dead, church Women after Child-birth, to ſolemnize Matrimony betwixt Perſons to be married, and to inſtruct them all in Things to be believed and done in order to their Salvation; the Youth by Catechizing them (who are afterwards to be confirmed by the Biſhop,) and alſo by preaching God's Word unto them. *Rubrick.*

Whom he ought not to bury.

But though it be his Duty, generally ſpeaking, to bury thoſe that die within his Pariſh, yet he ought not to bury the Corps of any Perſon dying unbaptized, excommunicated, or who hath laid violent Hands upon himſelf. *Rubrick.*

Banes of Matrimony.

And though it be his Part to ſolemnize Matrimony betwixt thoſe of his Pariſh that are to be married, yet the Banes of all that are to be married together muſt before their Marriage be publiſhed in the Church three ſeveral *Sundays* or *Holy-Days*, in the Time of Divine Service, immediately before the Sentences for the Offertory, in the very Form of Words appointed in the *Rubrick.* And if the Perſons that are to be married dwell in divers Pariſhes, the Banes muſt be aſked in both Pariſhes; and the Curate of the one Pariſh ſhall not ſolemnize Matrimony betwixt them, without a Certificate of the Banes being thrice aſked, from the Curate of the other Pariſh; and at their Day of Marriage, if any Man do alledge and declare any Impediment, why they may not be coupled together in Matrimony by God's Laws, or the Laws of this Realm, and will

will be bound, and ſufficient Sureties with him, to the Parties, or elſe put in a Caution to the full Value of the Charges as the Perſons to be married do thereby ſuſtain, to prove his Allegation, then the Solemnization muſt be deferred until ſuch Time as the Truth be tried. *Rubrick.* Catechiſing and Confirmation.

And as to a Curate's Catechiſing the Youth within his Pariſh, it is to be noted, that he is to inſtruct and examine upon *Sundays* and *Holy-Days* after the ſecond Leſſon at Evening Prayer, openly in the Church, ſo many Children of his Pariſh ſent unto him as he ſhall think convenient, in ſome Part of the Catechiſm in the Common-Prayer Book. *Rubrick.* Catechiſing Youth.

And ſo ſoon as Children are come to a competent Age, and can ſay in their Mother Tongue the Creed, the Lord's Prayer, and the Ten Commandments, and alſo can anſwer to the other Queſtions in the ſaid ſhort Catechiſm, they ſhall be brought to the Biſhop, and every one ſhall have a Godfather, or a Godmother, as a Witneſs of their Confirmation. *Rubrick.* Confirmation.

And whenſoever the Biſhop ſhall give Knowledge for Children to be brought unto him for their Confirmation, the Curate of every Pariſh ſhall either bring, or ſend in Writing with his Hand ſubſcribed thereunto, the Names of all ſuch Perſons within his Pariſh, as he ſhall think fit to be preſented to the Biſhop to be confirmed; and if the Biſhop approve them, he ſhall confirm them according to the Form in the Book of Common Prayer preſcribed. *Rubrick.* Names to be given in by the Curate.

In the Performance of which Offices, as appears by the foreſaid Clauſe of the Statute 14 *Car.* 2. *c.* 4, a Miniſter is bound to ſay and uſe all other Publick and Common Prayer in ſuch Order and Form as is mentioned in the ſaid Book, that is, all thoſe Prayers that are therein appointed to be read upon any Occaſion, *viz.* at the Solemnization of Matrimony, Viſitation of the Sick, Burial of the Dead, Churching of Women, Confirmation of the Baptized, and at the Conſecration or Ordination of Biſhops, Prieſts and Deacons; ſo that if he who doth perform the ſaid Rites or Offices doth not uſe the Prayers, and all the Prayers according as they are appointed by the Book of Common Prayer, he is an Offender againſt this Law. Prayers to be uſed in performing theſe Rites and Offices.

And it is further enacted by the Authority aforeſaid, That no Form or Order of Common Prayers, Adminiſtration of Sacraments, Rites or Ceremonies, ſhall be, i. e. where the People in common may reſort to it, openly uſed in any Church, Chapel, or other publick Place, or in any College or Hall in either of the Univerſities, the Colleges of Weſtminſter, Wincheſter, **or** Eaton, **or any of them, other than what is preſcribed and appointed to be uſed in and by the ſaid Book.** 14 *Car.* 2. *c.* 4. No other Form to be openly uſed.

Provided always, That it ſhall and may be lawful to uſe the Morning and Evening Prayers, and all other Prayers and Service preſcribed in and by the ſaid Book, in the Chapels or other publick Places of the reſpective Colleges and Halls in both the Univerſities, in the Colleges of Weſtminſter, Wincheſter, **and** Eaton, **and in the Convocations of the Clergy of either Province,** in Latin; **any Thing in this Act contained to the contrary notwithſtanding.** To be uſed in Colleges, *&c.* in *Latin.*

Provided always, and be it enacted by the Authority aforeſaid, That the Biſhops of Hereford, **St.** David's, Aſaph, Bangor, **and** Landaff, **and their Succeſſors, ſhall take ſuch Order among themſelves, for the Souls health of the Flock committed to their Charge within** Wales, **that the Book hereunto annexed be truly and exactly tranſlated into the** Britiſh **or** Welſh **Tongue; and that the ſame ſo tranſlated,** To be tranſlated into the *Welſh* Tongue.

Common Prayers, &c.

translated, and being by them, or any three of them at the least, viewed, perused and allowed, be imprinted to such Number at least, so that one of the said Books so translated and imprinted, may be had for every Cathedral, Collegiate and Parish Church, and Chapel of Ease in the said respective Dioceses and Places in Wales, where the Welsh is commonly spoken or used, before the First Day of May 1665.

And that from and after the Imprinting and Publishing of the said Book so translated, the whole Divine Service shall be used and said by the Ministers and Curates throughout all Wales within the said Dioceses where the Welsh Tongue is commonly used, in the British or Welsh Tongue, in such Manner and Form as is prescribed according to the Book hereunto annexed, to be used in the English Tongue, differing nothing in any Order or Form from the said English Book.

Prayers relating to the King, Queen, &c.

Provided always, That in all those Prayers, Litanies and Collects, which any Way relate to the King, Queen, or Royal Progeny, the Names be altered and changed from Time to Time, and fitted to the present Occasion, according to Direction of lawful Authority. 14 Car. 2. cap. 4.

A Pulpit Prayer not excluded or forbid.

Note, That from the aforesaid Clauses, it is unlawful for any Minister to use any Form of Prayer, other than what is appointed in the Book of Common Prayer in Place of publick Worship, and therefore it might seem that any Person using any other Form before his Sermon (which is most common) is against this Statute. Now the Statute 1 *Eliz. c.* 2, is expounded to extend to such other Prayers only as are used in Hindrance of, or Opposition to, the Common Prayer; therefore the Prayers used in the Pulpit before Sermon are said not to be within the Meaning of that Law, nor to be forbidden by it, because they are tolerated by those in Authority, and so cannot be said to be *wilfully or obstinately used*, according to the Words of that Statute, *Cawley's Laws against Recusants* 21; and although no such Words are in the Statute 14 *Car.* 2. Yet the Proviso of using no other Form, *&c.* must be meant of the proper Divine Service in the Desk, which is not to be interrupted or mixed with any arbitrary Forms of private Persons. But after the publick Order of Common Prayers is regularly observed, and fully absolved, a Pulpit Prayer preparatory to the Sermon is not excluded or forbid by this or any other Law. See *Pasch.* 1 *Jac.* 2. *B. R. The King* v. *Sparks*, 3 *Mod. Rep.* 79.

A Prayer for Christ's Holy Catholick Church.

And by the 55th Canon it is thus directed. *Before all Sermons, Lectures and Homilies, the Preachers and Ministers shall move the People to join with them in Prayer in this Form, or to this Effect, as briefly as conveniently they may. Ye shall pray for Christ's Holy Catholick Church,* &c. *See the Canon.*

Preachers running into Extreams of Praying.

But as some have transgressed this Canon by a long and profuse Way of praying before Sermon; so others have run into another Extream, by affecting Brevity, and using only the Lord's Prayer, or some short Collect with it, which gave Occasion to his Grace the Archbishop of *Canterbury*, in his *Letter to the Right Reverend the Lords Bishops of his Province*, July 16. 1695, to give them this particular Advice. *It seems very fit, that You require your Clergy, in their Prayers before Sermon, to keep to the Effect of the 55th Canon, it being commonly reported, that it is the Manner of some in every Diocese, either to use only the Lord's Prayer (which the Canon prescribes as the Conclusion of the Prayer, and not the*

whole Prayer), *or at leaſt to leave out the King's Titles, and to forbear to pray for the Biſhops as ſuch.*

Church Ornaments, &c.

And *Note*, That all Rites and Ceremonies appointed in and by the Book of Common Prayer, are ſtrictly to be uſed, and none other; and the Party offending is puniſhable by Indictment upon the Statute 14 *Car.* 2. *c.* 4, or upon Statute 1 *Eliz. cap.* 1, or by the Ordinary.

1 *Eliz. c.* 2. Ornaments to be retained in Uſe, until, &c.

And it is enacted, That ſuch Ornaments of the Church, and of the Miniſters thereof, ſhall be retained and be in Uſe, as was in this Church of England **by Authority of Parliament in the ſecond Year of the Reign of King** Edward **the Sixth, until other Order ſhall be therein taken by the Authority of the Queen's Majeſty, with the Advice of her Commiſſioners appointed and authorized under the Great Seal of** England **for Cauſes Eccleſiaſtical, or of the Metropolitan of this Realm. And alſo, That if there ſhall happen any Contempt or Irreverence to be uſed in the Ceremonies or Rites of the Church, by the miſuſing of the Orders appointed in this Book,** (which is to be underſtood now of the preſent Book of Common Prayer) **the Queen's Majeſty may, by the like Advice of the ſaid Commiſſioners or Metropolitan, ordain or publiſh ſuch further Ceremonies or Rites as may be moſt for the Advancement of God's Glory, the Edifying of his Church, and due Reverence of Chriſt's holy Myſteries and Sacraments.** Stat. 1 Eliz. cap. 2.

As King *James* the Firſt did by Virtue of this Proviſo.

Note; It was by Virtue of this Proviſo, that King *James* I. in the firſt Year of his Reign, gave Directions to the Archbiſhop, and other High Commiſſioners, to review the Common Prayer Book; and they did make ſeveral material Alterations and Inlargements of it, as in the Office of Private Baptiſm, and in ſeveral Rubricks and other Paſſages, and added five or ſix new Prayers and Thankſgivings, and all that Part of the Catechiſm which contains the Doctrine of the Sacraments. And yet the Powers, ſpecified in that Proviſo, ſeem not to extend to the Queen's Heirs and Succeſſors, but to be only lodged perſonally in the Queen; yet the Book of Common Prayer ſo altered, ſtood in Force from the firſt of King *James* to the 14th of King *Charles* II. when upon a better Review, it was again altered and confirmed by Parliament. And upon this Clauſe of the Statute, **That ſuch Ornaments of the Church, and of the Miniſters thereof at all Times of their Miniſtring, ſhall be retained, and be in Uſe, as were in the Church of** England **by Authority of Parliament, in the ſecond Year of the Reign of King** Edward **the ſixth**; It is ſaid, that the Dean of *Chriſt-Church* was convened before the Ordinary for Schiſm, becauſe he would not uſe a Surplice, and that therefore he was condemned as a Schiſmatick, and deprived of his Deanery in the Time of Queen *Elizabeth*. *Specot*'s Caſe, *Mich.* 30 *Eliz.* 3 *Leon.* 199.

A Dean deprived for not uſing a Surplice.

Statutes of Uniformity.

CHAP. XXXII.

Statutes for Uniformity of Prayers. Of Holy-Days to be observed. Ministers bound by Tenure or Covenant to say Divine Service in a Chapel, and of Chapels of Ease, &c.

Enacted for establishing the Book of Common Prayer.

ALthough upon the aforesaid Statutes, Persons, as hath been said, are punishable by Indictment that neglect to read the Morning and Evening Prayer, or that do not read them, or other publick Prayers, or administer the Sacraments in such Order and Form as is mentioned in the Book of Common Prayer, or use other Forms of Prayer, or Administration of Sacraments, Rites or Ceremonies, than what is appointed, *&c.* or in any Respect offend against the same; yet for the further establishing of the Book of Common Prayer, it is further enacted by 14 *Car.* 2. *c.* 4.

Stat. 14 *Car.* 2. *c.* 4.

That the several good Laws and Statutes of this Realm, which have been formerly made, and are now in Force for the Uniformity of Prayer and Administration of the Sacraments within this Realm of England, **and Places aforesaid, shall stand in full Force and Strength, to all Intents and Purposes whatsoever, for the establishing and confirming of the said Book, intitled,** The Book of Common Prayer, and the Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the Use of the Church of *England*; together with the Psalter or Psalms of *David*, pointed as they are to be sung or said in Churches, and the Form and Manner of Making, Ordaining and Consecrating of Bishops, Priests and Deacons, **herein before-mentioned to be joined and annexed to this Act; and shall be applied, practised, and put in ure, for the punishing of all Offences contrary to the said Laws, with relation to the Book aforesaid, and no other.**

Statutes continued and applied by 14 *Car.* 2. *c.* 4.

The Statutes that were in Force for the Uniformity of Prayer and Administration of the Sacraments before this Statute, and which are continued by the aforesaid Clause to be applied to this new Book of Common Prayer, are these that follow, 2 & 3 *Ed.* 6. *c.* 1. 5 & 6 *Ed.* 6. *c.* 1. 1 *Eliz. c.* 1. 13 *Eliz. c.* 12.

The Statutes of the 2 & 3 *Ed.* 6. *c.* 1, and the 5 & 6 *Ed.* 6. *c.* 1, although they be in Force, so that an Offender against the same may thereupon be indicted, yet because that there is not any Thing in them but what is contained in the Statute of 1 *Eliz. c.* 2. I shall only set down the said 1 *Eliz. c.* 2, and but so much of it in this Place as doth touch the Minister's Duty.

A Motion was made for a Prohibition to the Spiritual Court, the Plaintiff being prosecuted there, for saying, *he would not be of the Communion of the Church of England, upon any Consideration, for he believed if he was, he should be damned*; and the Reason offered for the Prohibition was, because

cauſe the Libel was for a Contempt againſt the Common Prayer-Book, whereas this was not ſuch an Offence. Statutes of Uniformity.

The Court was of Opinion, that tho' 'tis not an Offence againſt the Common Prayer-Book, yet 'tis certainly of Spiritual Cognizance, therefore the Prohibition was denied. *Mod. Ca. L. & E.* 338.

Sect. 1. **Where at the Death of our late Sovereign Lord King** Edward **the Sixth, there remained one uniform Order of Common Service and Prayer, and of the Adminiſtration of Sacraments, Rites and Ceremonies in the Church of** England, **which was ſet forth in one Book, intitled, The Book of Common Prayer and Adminiſtration of Sacraments, and other Rites and Ceremonies in the Church of** England, **authorized by Act of Parliament, holden in the fifth and ſixth Years of our ſaid late Sovereign Lord King** Edward **the Sixth, intitled, An Act for the Uniformity of Common Prayer and Adminiſtration of the Sacraments, the which was repealed and taken away by Act of Parliament in the firſt Year of the Reign of our late Sovereign Lady Queen** Mary, **to the great Decay of the due Honour of God, and Diſcomfort to the Profeſſors of the Truth of Chriſt's Religion.** *Stat.* 1 *Eliz. c.* 2.

Sect. 2. **Be it therefore enacted by the Authority of this preſent Parliament, That the ſaid Eſtatute of Repeal, and every Thing therein contained, only concerning the ſaid Book, and the Service, Adminiſtration of the Sacraments, Rites and Ceremonies, contained or appointed in or by the ſaid Book, ſhall be void and of none Effect, from and after the Feaſt of the Nativity of St.** John Baptiſt **next coming; and that the ſaid Book with the Order of Service, and of the Adminiſtration of the Sacraments, Rites and Ceremonies, with the Alteration and Additions therein added and appointed by this Eſtatute, ſhall ſtand and be from and after the ſaid Feaſt of the Nativity of St.** John Baptiſt **in full Force and Effect, according to the Tenour and Effect of this Eſtature; any Thing in the aforeſaid Eſtatute of Repeal to the contrary notwithſtanding.** Repeal of the Statute of Queen *Mary*, *&c.*

Sect. 3. **And further, be it enacted by the Queen's Highneſs, with the Aſſent of the Lords and Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That all and ſingular Miniſters in any Cathedral or Pariſh Church, or other Place within this Realm of** England, Wales, **and the Marches of the ſame, or other the Queen's Dominions, ſhall from and after the Feaſt of the Nativity of St.** John Baptiſt **next coming, be bound to ſay and uſe the Mattens, Even-Song, Celebration of the Lord's Supper, and Adminiſtration of each of the Sacraments, and all the Common and Open Prayer, in ſuch Order and Form as is mentioned in the ſaid Book ſo authorized by Parliament in the ſaid fifth and ſixth Years of the Reign of King** Edward **the Sixth.** King *Edward*'s Common Prayer to be uſed.

Sect. 4. **And if any Manner of Parſon, Vicar, or other whatſoever Miniſter, that ought or ſhould ſing or ſay Common Prayer mentioned in the ſaid Book, or miniſter the Sacraments, from and after the Feaſt of the Nativity of St.** John Baptiſt **next coming, refuſe to uſe the ſaid Common Prayers, or to miniſter the Sacraments in ſuch Cathedral or Pariſh Church, or other Places as he ſhould uſe to miniſter the ſame, in ſuch Order and Form, as they be mentioned and ſet forth in the ſaid Book; or ſhall wilfully or obſtinately, ſtanding in the ſame, uſe any other Rite, Ceremony, Order, Form, or Manner of Celebrating the Lord's Supper, openly or privily,** Penalty for uſing any other Rites or Ceremonies, *&c.* by a Parſon or Vicar, *&c.*

Statutes of Uniformity.

privily, or Mattens, Even-Songs, Administration of the Sacraments, or other open Prayers than is mentioned and set forth in the said Book, [Open Prayer in and throughout this Act, is meant that Prayer which is for others to come unto, or hear, either in common Churches or private Chapels or Oratories, commonly called the Service of the Church;] or shall preach, declare, or speak any Thing in the Derogation or Depraving of the said Book, or any Thing therein contained, or of any Part thereof, and shall be thereof lawfully convicted, according to the Laws of this Realm, by Verdict of Twelve Men, or by his own Confession, or by the notorious Evidence of the Fact, shall lose and forfeit to the Queen's Highness, her Heirs and Successors, for his first Offence, the Profit of all his Spiritual Benefices or Promotions coming or arising in one whole Year next after his Conviction: And also, that the Person so convicted shall for the same Offence suffer Imprisonment for the Space of six Months without Bail or Mainprise.

Sect. 5. And if any such Person once convict of any Offence concerning the Premisses, shall after his first Conviction eftsoons offend, and be thereof in Form aforesaid lawfully convicted, that then the same Person shall for his second Offence suffer Imprisonment by the Space of one whole Year, and also shall therefore be deprived ipso facto of all his Spiritual Promotions, and that it shall be lawful to all Patrons or Donors of all and singular the same Spiritual Promotions, or of any of them, to present or collate to the same, as though the Person or Persons so offending were dead.

Sect. 6. And that if any such Person or Persons, after he shall be twice convicted in Form aforesaid, shall offend against any of the Premisses the Third Time, and shall be thereof in Form aforesaid lawfully convicted, that then the Person so offending, and convicted the third Time, shall be deprived ipso facto of all his Spiritual Promotions, and also shall suffer Imprisonment during his Life.

If the Person be not beneficed.

Sect. 7. And if the Person that shall offend, and be convicted in Form aforesaid, concerning any of the Premisses, shall not be beneficed, nor have any Spiritual Promotion, that then the same Person so offending and convict, shall for the first Offence suffer Imprisonment during one whole Year next after his said Conviction, without Bail or Mainprise.

And if any Person not having any Spiritual Promotion, after his first Conviction shall eftsoons offend in any Thing concerning the Premisses, and shall in Form aforesaid be thereof lawfully convicted, that then the same Person shall for his second Offence suffer Imprisonment during his Life.

Charge to the Ordinaries.

Sect. 8. And for the due Execution hereof, the Queen's most excellent Majesty, the Lords Temporal, and all the Commons in this present Parliament assembled, do in God's Name earnestly require and Charge all the Archbishops, Bishops, and other Ordinaries, that they shall indeavour themselves, to the uttermost of their Knowledges, that the due and true Execution hereof may be had throughout their Diocese and Charges, as they will answer before God for such Evils and Plagues wherewith Almighty God may justly punish his People for neglecting this good and wholsome Law.

Sect. 9. And for their Authority in this Behalf, be it further enacted by the Authority aforesaid, That all and singular the said Archbishops, Bishops, and all other their Officers exercising Ecclesiastical Juris-

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Punishment by Censures.

diction, as well in Places exempt as not exempt within their Diocese, shall have full Power and Authority by this Act to reform, correct, and punish, by the Censures of the Church, all and singular Persons which shall offend within any their Jurisdictions or Diocese, after the said Feast of the Nativity of St. John Baptist next coming, against this Act and Statute; any other Law, Statute, Privilege, Liberty or Provision, heretofore made, had or suffered to the contrary notwithstanding.

Justices Authority.

Sect. 10. And it is ordained and enacted by the Authority aforesaid, That all and every Justices of Oyer and Determiner, or Justices of Assize, shall have full Power and Authority in every of their open and general Sessions, to inquire, hear and determine all and all Manner of Offences that shall be committed or done contrary to any Article contained in this present Act within the Limits of the Commission to them directed, and to make Process for the Execution of the same, as they may do against any Person being indicted before them of Trespass, or lawfully convicted thereof.

Bishop associated.

Sect. 11. Provided always, and be it enacted by the Authority aforesaid, That all and every Archbishop and Bishop, shall and may at all Time and Times, at his Liberty or Pleasure, join and associate himself, by Virtue of this Act, to the said Justices of Oyer and Determiner, or to the said Justices of Assize, at every of the said open and general Sessions to be holden in any Place within his Diocese, for and to the Inquiry, Hearing and Determining of the Offences aforesaid.

Sect. 12. And be it further enacted by the Authority aforesaid, That no Person or Persons shall be at any Time impeached, or otherwise molested, of or for any of the Offences above-mentioned, hereafter to be committed or done contrary to this Act, unless he or they so offending be thereof indicted at the next general Sessions to be holden before any such Justices of Oyer and Determiner, or Justices of Assize, next after any Offence committed or done contrary to the Tenor of this Act.

Sect. 13. Provided always, and be it ordained and enacted by the Authority aforesaid, That all and singular Lords of the Parliament, for the Third Offence above-mentioned, shall be tried by their Peers.

Sect. 14. Provided also, and be it ordained and enacted by the Authority aforesaid, That the Mayor of London, and all other Mayors, Bailiffs, and other Head-Officers of all and singular Cities, Boroughs, and Towns Corporate within this Realm, Wales, and the Marches of the same, to the which Justices of Assize do not commonly repair, shall have full Power and Authority, by Virtue of this Act, to inquire, hear and determine the Offences abovesaid, and every of them, yearly, within Fifteen Days after the Feast of Easter, and St. Michael the Archangel, in like Manner and Form as Justices of Assize, and Oyer and Determiner may do.

Sect. 15. Provided always, and be it ordained and enacted by the Authority aforesaid, That all and singular Archbishops and Bishops, and every of their Chancellors, Commissaries, Archdeacons, and other Ordinaries, having any peculiar Ecclesiastical Jurisdiction, shall have full Power and Authority by Virtue of this Act, as well to inquire in their Visitation, Synods, and elsewhere within their Jurisdiction, as any other Time and Place, to take Accusations and Informations of all and every the Things above-mentioned done, committed, or perpetrated within the Limits of their Jurisdictions and

Protestant Dissenters.

Authority, and to punish the same with Admonition, Excommunication, Sequestration, or Deprivation, and other Censures and Process, in like Form as heretofore hath been used in like Cases by the Queen's Ecclesiastical Laws.

Sect. 16. Provided always, and be it enacted, That whatsoever Persons offending in the Premisses, shall for their Offences first receive Punishment of the Ordinary, having a Testimonial thereof under the said Ordinary's Seal, shall not for the same Offence eftsoons be convicted before the Justices: And likewise receiving for the said first Offence Punishment by the Justices, shall not for the same Offence eftsoons receive Punishment of the Ordinary; any Thing contained in this Act to the contrary notwithstanding. Stat. 1 Eliz. cap. 2.

How the Title of this Act is mistaken.

Note, That the Title of this Act in the printed Book is mistaken, which must be regarded in framing an Indictment upon it; and it hath been a great Question when this Parliament of 1 *Eliz.* began. *Poulton* saith, the 23d of *January*; *Dyer*, the 25th of *January*, *Dyer* 203; *Coke*, the 25th of *February*, 4 *Instit.* 7. And for the Incertainty when it commenced, an Information was brought upon this Statute against Sir *Edward Walgrave* and his Wife, without any special Recital of the Statute, only supposing the Offence to be *contra formam & effectum cujusdam statuti in Parliamento tent. apud Westmonasterium anno primo, &c.* for this being a general Statute need not to be particularly recited. *Cawley's Laws against Recusants* 24.

Deprivation by Ecclesiastical Judge, *&c.*

Note also, That although this Act hath inflicted a Punishment for depraving or not observing the Book of Common Prayer, yet the same being allowed and commanded to be observed for Uniformity of Common Prayer, and the Unity and Peace of the Church, the Ecclesiastical Judge may deprive such Parson, Vicar, *&c.* as shall deprave and not observe the said Book, as well for the first Offence, as he might have done by the Censures of the Church, and the Ecclesiastical Laws, if no Form of Punishment had been inflicted by this Act; and this doth evidently appear by the Proviso in this Act, for thereby, notwithstanding any Thing in the Act contained, they may punish such Offenders by Admonition, Excommunication, Sequestration or Deprivation, and other Censures and Process, in like Form as heretofore hath been used in like Cases by the Queen's Ecclesiastical Laws, and are not bound to pursue the Form prescribed by the said Act; which is to punish the Offender according to the Temporal Law. *Mich.* 33 *Eliz. Cawdry*'s Case, *Coke* 5. *de Jure Ecclesiastico*, *fol.* 5, 6.

By *Stat.* 10 *Ann. ch.* 2. There were some Provisions made against Occasional Conformity by Officers Civil or Military; but the Clauses against such Conformity are replealed by *Stat.* 5 *Geo.* 1. *cap.* 4. the following Clauses of *Stat.* 10 *Ann. ch.* 2. remaining in Force, viz. **That the Toleration granted to Protestant Dissenters by** Stat. 1 William **and** Mary, **intituled,** An Act for exempting their Majesties Protestant Subjects, dissenting from the Church of *England*, from the Penalties of certain Laws, **shall be ratified, and inviolably observed, for the exempting such Protestant Dissenters as are thereby intended, from the Pains and Penalties therein mentioned.**

And for the rendring the said last mentioned Act more effectual, according to the true Intent and Meaning thereof, it is further enacted and declared, That if any Person dissenting from the Church of England, **(not in Holy Orders, or pretending to Holy Orders, nor**

nor any Preacher or Teacher of any Congregation) who should have been intitled to the Benefit of the said last mentioned Act, if such Person had duly taken, made and subscribed the Oaths and Declaration, or otherwise qualified him or herself, as required by the said Act, and now is or shall be prosecuted upon or by Virtue of any of the Penal Statutes, from which Protestant Dissenters are exempted by the said Act, shall at any Time during such Prosecution, take, make and subscribe the said Oaths and Declaration, or being of the People called Quakers, shall make and subscribe the aforesaid Declaration, and also the Declaration of Fidelity, and subscribe the Profession of their Christian Belief according to the said Act, or before any two Justices of the Peace (who are required to take and return the same to the next Quarter-Sessions, to be there recorded) such Person shall be intitled to the Benefit of the said Act, as fully as if he had duly qualified himself within the Time prescribed by the said Act, and shall be thenceforth exempted and discharged from all the Penalties and Forfeitures incurred by Force of any the aforesaid Penal Statutes. Protestant Dissenters.

And whereas it is or may be doubted whether a Preacher or Teacher of any Congregation of dissenting Protestants, duly in all Respects qualified according to the said Act, be allowed by Virtue of the said Act, to officiate in any Congregation in any County, other than that in which he so qualified himself, although in a Congregation or Place of Meeting duly certified and registred, as is required by the said Act; it is declared and enacted, That any such Preacher, &c. so duly qualified according to the said Act, shall be and is hereby allowed to officiate in any Congregation, although the same be not in the County wherein he was so qualified; provided that the said Congregation, or Place of meeting, hath been before such officiating, duly certified and registred or recorded, according to the said Act; and such Preacher, &c. shall, if required, produce a Certificate of his having so qualified himself, under the Hand of the Clerk of the Peace for the County or Place where he so qualified himself, which Certificate such Clerk of the Peace is to make; and shall also before any Justice of the Peace of such County, &c. where he shall so officiate, make and subscribe such Declaration, and take such Oaths as are mentioned in the said Act, if thereunto required.

Here are two Clauses to oblige Lawyers in *Scotland* to take the Oaths, *&c.* *Stat.* 12 *Ann. sess.* 2. *ch.* 7. (after mentioned) now repealed. See the next following Paragraph.

Stat. 5 *Geo.* 1. *ch.* 4. repeals the former Part of *Stat.* 10 *Ann. ch.* 2. and *Stat.* 12 *Ann. sess.* 2. *ch.* 7. commonly called the Schism Act; and then enacts, **That if any Mayor, Bailiff, or other Magistrate, in that Part of** Great Britain **called** England, **the Dominion of** Wales, **or the Town of** Berwick **upon** Tweed, **or the Isles of** Jersey **or** Guernsey, **shall knowingly or wilfully resort to, or be present at any publick Meeting for religious Worship, other than of the Church of** England **as by Law established, in the Gown or other peculiar Habit, or attended with the Ensign or Ensigns belonging to such his Office, that every such Mayor,** &c. **being thereof convicted by due Course of Law, shall be disabled to hold such Office or Employment, and be incapable to bear any publick Office or Employment within** England, Wales, &c.

By

Holy-Days. By *Stat.* 5 *Geo.* 1. *ch.* 6. the Oath againſt taking up Arms, &c. and the Declaration againſt the Solemn League and Covenant, are aboliſhed, and then this Act recites, that by the ſaid Act 13 *Car.* 2. it is enacted, That no Perſon ſhall be placed, &c. in or to any the Offices or Places relating to or concerning the Government of any City, &c. or any other Offices in the ſaid recited Act mentioned or expreſſed, that ſhall not have, within one Year next before ſuch Election or Choice, taken the Sacrament of the Lord's Supper, according to the Rites of the Church of England, and that in Default thereof, every ſuch Placing, &c. ſhall be void: It is further enacted, That every the now Member of any Corporation, and every Perſon now in actual Poſſeſſion of any Office, that were required by the ſaid above recited Act to take the Sacrament of the Lord's Supper, according to the Rites of the Church of England, within one Year next before his Election or Choice into ſuch Office, ſhall be confirmed in their Offices and Places, notwithſtanding their Omiſſion to take the Sacrament of the Lord's Supper, and ſhall be indemnified, &c. from all Incapacities, &c. ariſing from ſuch Omiſſion; and that none of their Acts, nor the Acts not yet avoided, of any who have been Members of any Corporation, or in actual Poſſeſſion of ſuch Offices, ſhall be queſtioned or avoided for or by Reaſon of ſuch Omiſſion; but that all ſuch Acts ſhall be as good and effectual as if every ſuch Perſon had taken the Sacrament of the Lord's Supper in Manner as aforeſaid; nor ſhall any Perſon or Perſons who ſhall be hereafter placed, &c. in or to any the Offices aforeſaid, be removed by the Corporation, or otherwiſe proſecuted, for or by Reaſon of ſuch Omiſſion; nor ſhall any Incapacity, &c. be incurred by Reaſon of the ſame, unleſs ſuch Perſon be ſo removed, or ſuch Proſecution be commenced within ſix Months after ſuch Perſon's being placed or elected into his reſpective Office, and that in Caſe of a Proſecution the ſame be carried on without wilful Delay.

Every Almanack, and particularly that in the Book of Common Prayer, doth declare what thoſe Holy-Days be, on which Perſons, as aforeſaid, obliged to ſay Morning and Evening Prayers, are to ſay the ſame, and moſt of thoſe Days are appointed to be kept Holy by *Stat.* 5 & 6 *Ed.* 6. *cap.* 3. which is as followeth. —— Foraſmuch as at all Times Men be not ſo mindful to laud and praiſe God, ſo ready to reſort and hear God's Holy Word, and to come to the Holy Communion, and other laudable Rights which are to be obſerved in every Chriſtian Congregation, as their bounden Duty doth require: Therefore to call Men to Remembrance of their Duty, and to help their Infirmity, it hath been wholeſomely provided, that there ſhould be ſome certain Times and Days appointed, wherein the Chriſtian ſhould ceaſe from all other Kind of Labours, and ſhould apply themſelves only and wholly unto the aforeſaid holy Works, properly pertaining unto true Religion, that is, to hear, to learn, and to remember Almighty God's great Benefits, his manifold Mercies, his ineſtimable gracious Goodneſs, ſo plenteouſly poured upon all his Creatures, and that of his infinite and unſpeakable Goodneſs without any Man's Deſert. And in Remembrance thereof, to render unto him moſt high and hearty Thanks, with Prayers and Supplications for the Relief of all our daily Neceſſities; and becauſe theſe be the chief and principal Works wherein Man is commanded to worſhip God, and do properly pertain unto the firſt Table, therefore

therefore as these Works are both most commonly, and also may well be called God's Service, so the Times appointed especially for the same, are called Holy-Days, not for the Matter or Nature either of the Time or Day, nor for any of the Saints Sake whose Memories are had on those Days (for so all Days and Times considered are God's Creatures, and all of like Holiness,) but for the Nature and Condition of those godly and holy Works, wherewith only God is to be honoured, and the Congregation to be edified, whereunto such Times and Days are sanctified and hallowed; that is to say, separated from all prophane Uses, and dedicated and appointed, not unto any Saint, or Creature, but only unto God and his true Worship; neither is it to be thought, that there is any certain Time or definite Number of Days prescribed in Holy Scripture, but that the Appointment both of the Time, and also of the Number of the Days, is left by the Authority of God's Word to the Liberty of Christ's Church, to be determined and assigned orderly in every Country, by the Discretion of the Rulers and Ministers thereof, as they shall judge most expedient to the true setting forth of God's Glory, and the Edification of their People. Be it therefore enacted by the King our Sovereign Lord, with the Assent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the Authority of the same, that all the Days hereafter mentioned shall be kept, and commanded to be kept Holy-Days, and none other; that is to say, all Sundays in the Year, the Days of the Feast of the Circumcision of our Lord Jesus Christ, of the Epiphany, of the Purification of the Blessed Virgin, of Saint Matthew the Apostle, of the Annunciation of the Blessed Virgin, of Saint Mark the Evangelist, of Saint Philip and Jacob the Apostles, of the Ascension of our Lord Jesus Christ, of the Nativity of Saint John Baptist, of Saint Peter the Apostle, of Saint James the Apostle, of Saint Bartholomew the Apostle, of Saint Matthew the Apostle, of Saint Michael the Archangel, of Saint Luke the Evangelist, of Saint Simon and Jude the Apostles, of All-Saints, of Saint Andrew the Apostle, of Saint Thomas the Apostle, the Nativity of our Lord, of Saint Stephen the Martyr, of Saint John the Evangelist, of the Holy Innocents, Monday and Tuesday in Easter-Week, Monday and Tuesday in Whitsun-Week; and that none other Days shall be kept and commanded to be kept Holy-day, or to abstain from lawful bodily Labour.

Holy-Days. Wherefore so called.

What Holy-Days.

And it is also enacted by the Authority aforesaid, That every Even or Day next going before any of the aforesaid Days of the Feasts of the Nativity of our Lord, of Easter, of the Ascension of our Lord, Pentecost, and the Purification, and the Annunciation of the aforesaid Blessed Virgin, of All-Saints, and of all the said Feasts of the Apostles (other than of Saint John the Evangelist, and Philip and Jacob) shall be fasted, and commanded to be kept and observed, and none other Even or Day shall be commanded to be fasted.

Fasting Evens.

And it is enacted by the Authority aforesaid, That it shall be lawful to all Archbishops and Bishops in their Dioceses, and to all other having Ecclesiastical or Spiritual Jurisdiction, to inquire of every Person that shall offend in the Premisses, and to punish every such Offender by the Censures of the Church, and to injoin him or them such Penance as shall be to the Spiritual Judge by his Discretion thought meet and convenient.

Punishment of Offenders.

Holy-Days. Lent, &c.

Provided always, That this Act, or any Thing therein contained, shall not extend to abrogate or take away the Abstinence from Flesh in Lent, **or on** Fridays **and** Saturdays, **or any other Day which is already appointed so to be kept, by Vertue of an Act made and provided in the third Year of the Reign of our Sovereign Lord the King's Majesty that now is, saving only of those Eves or Days whereof the Holy-Day next following is abrogated by this Statute; any Thing above-mentioned to the contrary in any wise notwithstanding.**

Q. If the Statute be in Force?

But this Act being repealed by 1 *Mar. cap.* 2. and after revived by 1 *Jac. cap.* 25. to continue until the End of the first Sessions of the next Parliament, and not having been by any Parliament since continued or revived, some Questions are made of the Continuance of it. See *Wingate's Abridgment*, the 5 & 6 *Ed.* 6. *c.* 3. 15. by the 1 *Mar. Parl.* 1. repealed, and afterwards by 1 *Jac.* 25. again repealed; and therefore *Quære*, Whether it be now in Force, unless it had been revived by special Words? but it seems to be well revived by *Coke*, 2 *Instit.* 686.

Liturgy Calendar of Feasts, &c.

But grant the Statute for Observance of *Holy-Days* to be not now in full Force and Vertue, yet since the Calendar prefixed to the Liturgy, and the several Rules and Directions relating to the Use of it, are now received and established with the said Book of Common Prayer by the Act of Uniformity, 14 *Car.* 2. the Observance of our Moveable and Immoveable Feasts, together with the Days of Fasting and Abstinence, may be called the Law of the Land, as well as the Order of the Church. See annexed to our Liturgy Calendar, *A Table of all the Feasts that are to be observed in the Church of* England *throughout the Year.*

Also other Days are by special Acts of Parliament ordained to be kept Holy, as Days of Thanksgiving; which Acts are these that follow.

Stat. 3 Jac. 1. cap. 1. *An Act for a Publick Thanksgiving to Almighty God every Year on the Fifth Day of* November.

An Act for the Fifth of *November.*

Forasmuch as Almighty God hath in all Ages shewed his Power and Mercy in the miraculous and gracious Deliverance of his Church, and in the Protection of Religious Kings and States; and that no Nation of the Earth hath been blessed with greater Benefits than this Kingdom now enjoyeth, having the true and free Profession of the Gospel under our most gracious Sovereign Lord King JAMES, **the most great, learned and religious King that ever reigned therein, inriched with a most hopeful and plentiful Progeny proceeding out of his Royal Loins, promising Continuance of this happiness and Profession to all Posterity; the which many malignant and devilish Papists, Jesuits and Seminary Priests much envying and fearing, conspired most horribly, when the King's most excellent Majesty, the Queen, the Prince, and all the Lords Spiritual and Temporal, and Commons, should have been assembled in the Upper House of Parliament upon the Fifth Day of** November **in the Year of our Lord** 1605, **suddenly to have blown up the said whole House with Gun-powder: An Invention so inhuman, barbarous and cruel, as the like was never before heard of, and (as some of the principal Conspirators thereof confess) purposely devised and concluded to be done in the said House, that where sundry necessary and religious Laws for Preservation of the**

Holy-Days.

Church and State were made, which they falsly and slanderously term Cruel Laws, enacted against them and their Religion, both Place and Persons should be all destroyed and blown up at once, which would have turned to the utter Ruin of this whole Kingdom, had it not pleased Almighty God, by inspiring the King's most excellent Majesty with a Divine Spirit, to interpret some dark Phrases of a Letter shewed to his Majesty above and beyond all ordinary Construction, thereby miraculously discovering the hidden Treason not many hours before the appointed Time for the Execution thereof: Therefore the King's most excellent Majesty, the Lords Spiritual and Temporal, and all his Majesty's faithful and loving Subjects, do most justly acknowledge this great and infinite Blessing to have proceeded merely from GOD his great Mercy, and to his most holy Name do ascribe all Honour, Glory and Praise: And to the End that this unfeigned Thankfulness may never be forgotten, but be had in a perpetual Remembrance, that all Ages to come may yield Praise to his Divine Majesty for the same, and have in Memory THIS JOYFUL DAY OF DELIVERANCE;

Be it therefore enacted by the King's most excellent Majesty, the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the Authority of the same, That all and singular Ministers in every Cathedral and Parish Church, or other usual Place for Common Prayer, within this Realm of England, and the Dominions of the same, shall always upon the Fifth Day of November say Morning Prayer, and give unto Almighty God Thanks for this most happy Deliverance: And that all and every Person and Persons inhabiting within this Realm of England, and the Dominions of the same, shall always upon that Day diligently and faithfully resort to the Parish Church or Chapel accustomed, or to some usual Church or Chapel where the said Morning Prayer, Preaching, or other Service of God shall be used, and then and there to abide orderly and soberly during the Time of the said Prayers, Preaching, or other Service of God there to be used and ministred.

And because all and every Person may be put in mind of his Duty, and be then better prepared to the said holy Service, be it enacted by the Authority aforesaid, That every Minister shall give Warning to his Parishioners publickly in the Church at Morning Prayer, the Sunday before every such Fifth Day of November, for the due Observation of the said Day: And that after Morning Prayer or Preaching upon the said Fifth Day of November, they read publickly, distinctly and plainly this present Act.

A Form of Prayer.

For the more effectual solemnizing this Annual Festival, by the King's Order there was drawn up by the Bishops of the Church, *A Form of Prayer with Thanksgiving to be used yearly upon the Fifth Day of* November, *for the happy Deliverance of the King and the three Estates of the Realm, from the most traiterous and bloody intended Massacre by Gunpowder.* Printed and prescribed at the End of our Common Prayer.

Stat.

Holy-Days. Stat. 12 Car. 2. 14. *An Act for a perpetual Anniversary Thanksgiving on the Nine and Twentieth Day of* May.

An Act for a Thanksgiving on the 29th of *May*.

FOrasmuch as Almighty God the King of Kings, and sole Disposer of all earthly Crowns and Kingdoms, hath by his all-swaying Providence and Power miraculously demonstrated in the View of all the World his transcendent Mercy, Love and Graciousness towards his most excellent Majesty CHARLES the Second, by his especial Grace, of England, Scotland, France and Ireland, King, Defender of the true Faith, and all his Majesty's Loyal Subjects of this his Kingdom of England, and the Dominions thereunto annexed, by his Majesty's late most wonderful, glorious, peaceable and joyful Restauration to the actual Possession and Exercise of his undoubted Hereditary, Sovereign and Legal Authority over them (after sundry Years forced Extermination into Foreign Parts, by the most traiterous Conspiracies and Armed Power of Usurping Tyrants, and execrable perfidious Traitors,) and that without the least Opposition, or Effusion of Blood, through the Unanimous, Cordial, Loyal Votes of the Lords and Commons in this present Parliament assembled, and passionate Desires of all other his Majesty's Subjects: Which unexpressible Blessing (by God's own most wonderful Dispensation) was compleated on the Twenty-ninth Day of May last past, being the most memorable Birth-day, not only of his Majesty both as a Man and Prince, but likewise as an actual King, and of this and other his Majesty's Kingdoms, all in a great measure new born and raised from the Dead on this most joyful Day, wherein many Thousands of the Nobility, Gentry, Citizens, and other his Lieges of this Realm, conducted his Majesty unto his Royal Cities of London and Westminster, with all possible Expressions of their Joy and loyal Affections, in far greater Triumph than any of his most victorious Predecessors Kings of England returned thither from the Foreign Conquests, and both his Majesty's Houses of Parliament, with all dutiful and joyful Demonstrations of their Allegiance, publickly received, and cordially congratulated his Majesty's most happy Arrival, and Investiture in his Royal Throne, at his Palace at Whitehall: Upon all which Considerations, this being the Day which the Lord himself hath made and crowned with so many publick Blessings and signal Deliverances, both of his Majesty and his People, from all their late most deplorable Confusions, Divisions, Wars, Devastations, and Oppressions, to the End that it may be kept in perpetual Remembrance in all Ages to come, and that his Sacred Majesty with all his Subjects of this Realm, and the Dominions thereof, and their Posterities after them, might annually celebrate the perpetual Memory thereof, by sacrificing their unfeigned, hearty, publick Thanks thereon to Almighty God, with one Heart and Voice, in a most Devout and Christian Manner, for all these Publick Benefits received and conferred on them upon this most joyful Day: Be it therefore enacted by the King's most excellent Majesty, the Lords and Commons in this present Parliament assembled, and by the Authority of the same, that all and singular Ministers of God's Word and Sacraments in every Church, Chapel, and other usual Place of Divine Service and Publick Prayer, which now are, or hereafter shall be within this Realm of England, and

the

the reſpective Dominions thereof, and their Succeſſors, ſhall in all ſucceeding Ages annually celebrate the Twenty-ninth Day of May, by rendring their hearty publick Praiſes and Thankſgivings unto Almighty God, for all the fore-mentioned extraordinary Mercies, Bleſſings and Deliverances received, and mighty Acts done thereupon, and declare the ſame to all the People there aſſembled, and the Generations yet to come, that ſo they may for ever praiſe the Lord for the ſame, whoſe Name alone is excellent, and his Glory above the Earth and Heavens. Holy-Days.

And be it further enacted, That all and every Perſon and Perſons inhabiting within this Kingdom, and the Dominions thereunto belonging ſhall upon the ſaid Day annually reſort with Diligence and Devotion to ſome uſual Church, Chapel, or Place where ſuch publick Thankſgivings and Praiſes to God's moſt Divine Majeſty ſhall be rendred, and there orderly and devoutly abide during the ſaid publick Thankſgiving, Prayers, Preaching, Singing of Pſalms, and other Service of God there to be uſed and miniſtred.

And to the End that all Perſons may be put in Mind of their Duty therein, and be the better prepared to diſcharge the ſame with that Piety and Devotion as becomes them, be it further enacted, That every Miniſter ſhall give Notice to his Pariſhioners publickly in the Church at Morning Prayers the Lord's Day next before every ſuch Twenty-ninth Day of May, for the due Obſervation of the ſaid Day, and ſhall then likewiſe publickly and diſtinctly read this preſent Act to the People. Stat. 12 Car. 2. c. 14.

And to make the Obſervance of this Feſtival more Solemn and Uniform, by the King's Order there was drawn up by the Biſhops, *A Form of Prayer with Thankſgiving to be uſed yearly upon the 29th Day of* May, *being the Day of his Majeſty's Birth, and happy Return to his Kingdoms.* A Form of Prayer.

There is likewiſe an Act of Parliament for the yearly keeping a Faſt on the 30th of *January*, the Day of the execrable Murder of King *Charles* the Firſt, but the Act not appointed to be read in Churches. For the more regular Obſervation of this Faſt, there was compiled by the Biſhops at the Appointment of the King, *A Form of Common-Prayer to be uſed upon the 30th Day of* January, *being the Day of the Martyrdom of King* Charles *the Firſt.* An Act for a Faſt on the 30th of *January*.

Note; Theſe three Forms of publick Service are not expreſly confirmed by any Act of Parliament, but are authorized by this Order of the King. Not confirmed by Parliament.

Charles R.

OUR Will and Pleaſure is, That theſe three Forms of Prayer and Service made for the 5th of November, *the 30th of* January, *and the 29th of* May, *be forthwith Printed and Publiſhed, and for the future annex'd to the Book of Common-Prayer and Liturgy of the Church of* England, *to be uſed yearly on the ſaid Days, in all Cathedrals and Collegiate Churches and Chapels, in all Chapels of Colleges and Halls within both our Univerſities, and of our Colleges of* Eaton *and* Wincheſter, *and in all* But authorized by the King's Order.

Chapels, &c. *Pariſh-Churches and Chapels within our Kingdom of* England, *Dominion of* Wales, *and Town of* Berwick *upon* Tweed.

Given at Our Court at *Whitehall* the Second Day of *May* in the Fourteenth Year of Our Reign.

And divers like Orders have been for the Reading of particular Forms of Prayer on certain Days; as that of the eighth of *March*, being the Day of Queen *Anne*'s Acceſſion to the Throne, *&c.*

Notice to be given. Miniſters are not only bound to give Notice of the aforeſaid ſpecial Days appointed to be kept Holy, but alſo they are on the *Sunday* before-going any *Holy-day*, or *Faſting-day*, after the Communion-Service, to declare to the People what Days are in the Week following to be obſerved as *Holy-days* or *Faſting-days*. *Rubrick.*

Offenders to be tried and puniſhed by Fine. *Note*, That no Penalty is appointed for thoſe that do not celebrate Divine Service on the Days appointed to be obſerved by the aforeſaid Acts, nor is any Penalty ſet by *Stat.* 14 *Car.* 2. *c.* 4. for thoſe that neglect to ſay Divine Service on any *Sunday* or *Holy-day*; and therefore ſuch as are negligent muſt be puniſhed in the ordinary way of Trial by Jury, *&c.* and the Juſtices are to impoſe a reaſonable Fine, or elſe they may be puniſhed in the Eccleſiaſtical Court by the Ordinary, as I conceive. *Quære*, as to the Ordinary's Power to puniſh for the Neglect of the keeping the Days ſpecially appointed by the three laſt Acts; but I think, that however he may puniſh the Neglect of Divine Service on *Sundays*, and other *Holy-days*, by the Statute 14 *Car.* 2. *c.* 4. with Statute 1 *Eliz.* 1. and by the Statute 14 *Car.* 2. *c.* 4. every Miniſter is bound to read the Morning and Evening Prayers, in the Book of Common-Prayer contained, upon every Lord's-Day, and upon all other Days, and Occaſions, and at the Times therein appointed, *&c.* And thereby alſo the Statute of 1 *Eliz.* 2. is to be applied to this Book of Common-Prayer now in force, which gives to the Ordinary an Authority to puniſh all Offences againſt the ſaid Act, unleſs it may be objected, that the ſaid Act of 1 *Eliz.* 2. doth not injoin the Reading of the Prayers but only the Reading of them in ſuch Order and Form as is mentioned in the ſaid Book, at ſuch Times when they are read, and then the Ordinary hath not Power thereby to puniſh the Neglect of reading Prayers on *Sundays* or other *Holydays*; *Quære.* However, ſuch Neglecters may be puniſhed in Temporal Courts as before is ſaid.

Chapel Parcel of a Manor. See 1 *Roll. Abr.* 110. If *A.* be ſeiſed of a Manor whereof a Chapel is Parcel, and a Spiritual Corporation doth covenant by Deed indented with *A.* and his Heirs to celebrate Divine Service weekly in the ſaid Chapel for the Lord of the Manor and his Servants; in this Caſe, the Aſſignees of *A.* ſhall have an Action of Covenant, albeit they are not named in the Deed, for that the Remedy by Covenant doth run with the Land to give Damages to the Party grieved, and is as Appurtenant to the Manor. But if the Covenant had been with a Stranger, and not with the Lord of the Manor, to celebrate Divine Service in the Chapel of *A.* and his Heirs, there the Aſſignee ſhall not have an Action of Covenant, for the Covenant cannot be annexed to the Manor, becauſe the Covenantee was not ſeiſed of the Manor. 1 *Inſt.* 385. *a.* And if a Lord of a Manor hath a Chapel within any Pariſh, that is private for himſelf and his Servants within the ſaid Manor, in which, Time whereof the

Memory of Man is not the contrary, the Parſon or Vicar of the Pariſh in which ſuch Chapel or Manor is, have uſed to ſay Divine Service, and to adminiſter the Sacraments, *&c.* either by himſelf, or ſome Chaplain provided by him; if the ſaid Parſon or Vicar, neither by himſelf, nor other Perſon, doth celebrate Divine Service, and adminiſter the Sacraments, *&c.* according to the Preſcription, an Action upon the Caſe by reaſon of the Preſcription ſhall be maintainable by the Lord of the Manor, and he himſelf only, and none of his Servants ſhall have the Action: For although that the Divine Service be Spiritual, yet foraſmuch as the ſame by Preſcription doth belong to a private Perſon, and is to be celebrated for his Eaſe within his Manor, which ſhall be intended to begin at firſt by Covenant, the Action for not performing of the Service doth well lie, and Damages ſhall be recovered for the Neglect; and therewith agreeth 22 *H.* 6. 46, in the Prior of *Woodburn*'s Caſe, *Co.* 5. *William*'s Caſe 73. *Roll's Abr.* 1. 110. But when the Chapel is not private to the Lord and his Family, but publick and common to all his Tenants of the ſame Manor, which may be many, and of great Number, there no Action upon the Caſe lieth by the Lord, for then every one of his Tenants may have his Action upon the Caſe as well as the Lord himſelf, and ſo infinite Actions might be brought for one Default, and the Offender puniſhed without End, which the Law will not allow, as being unreaſonable. And yet they ſhall not be without Remedy in ſuch Caſe, for they may ſue in the Spiritual Court for the Default, and there the ſame ſhall be redreſſed. *Litt. lib.* 2. *cap.* . . . . . *Frankalmoign, Sect.* 136. *Mich.* 34 & 35 *Eliz. B. R. William*'s Caſe, 5 *Co.* 73. *Vide* 27 *H.* 8. 27. *a.* 5 *Ed.* 4. 2. 2 *Ed.* 4. 9. *a. Roll's Abr.* 1. *p.* 110. 1 *Inſt.* 96. *a.* An Action of the Caſe was brought, wherein the Plaintiff declared, that the Sacrament of the Lord's Supper was to be adminiſtred to the Pariſhioners upon ſuch a *Sunday*, and that the Defendant Parſon, *&c.* refuſed to admit the Plaintiff to the ſaid Sacrament; and a Verdict was found for the Plaintiff, but it was moved in Arreſt of Judgment, that the Action in this Caſe would not lie, becauſe it was a meer Eccleſiaſtical Offence, and puniſhable by Cenſures of the Church, and is not proper for a Jury to judge what Damage the Plaintiff hath ſuſtained by being refuſed this Spiritual Food: And if the Plaintiff may maintain this Action, then every other of the Pariſhioners may bring the like Action, and the Law allows not Multiplicity of Actions; but the Judgment was arreſted upon an Exception to the Form of the Declaration, and the Court gave no Opinion whether the Action would lie or not. *Paſch.* 13 *Car.* 2. *Clovel* v. *Cardinal*, 1 *Sid.* 34.

Chapels.

Action upon the Caſe.

Aliter if not private to the Lord's Family.

If Action lies for refuſing Admiſſion to the Sacrament.

And tho' the Liturgy, or Book of Common Prayer, and of celebrating Divine Service be altered, yet this Alteration notwithſtanding, where any Tenements be held in Frankalmoign, the Tenure in Frankalmoign remaineth, and ſuch Prayers and Divine Service ſhall be ſaid and celebrated as now are authorized; yea, and though the Tenure be in particular, as to ſing a Maſs, or a Placebo, or Dirige, yet ſaying the Prayers now authorized ſufficeth; for the changing of Spiritual Services into other Spiritual Services altereth neither the Name, nor the Effect of the Tenure; and albeit the Tenure in Frankalmoign is now reduced to a Certainty contained in the Book of Common Prayer; yet ſeeing the Original Tenure was in Frankalmoign, and the Change is by general Conſent, by Authority of Parliament, whereunto every Man is Party, the Tenure remains as it was before. 1 *Inſt.* 95. *b.* From which it ſeems to appear, that the Eccleſiaſtical Judge may correct, if Divine Service

Tenure not altered by changing the Common Prayer.

Chapels.

Service be neglected in any Church or Chapel, although no Authority be given by any Statute to enable him thereunto; and I conceive, that the Altering the ancient Form of Divine Service, or rather the Confirmation of the Alteration of it, by Act of Parliament, doth not take from the Ordinary his *Curam animarum*, and therefore not his ancient Authority he had by the Common Law, and Common Right, to ſee that Divine Offices be performed by thoſe under his Charge, and to puniſh Offenders in that reſpect by the Cenſures of the Church.

Where Divine Service is put in certain by the Tenure.

But if any hold Land by a certain Divine Service to be done, as to ſing a Maſs every *Friday* in the Week, or every Year ſuch a Day to ſing a Placebo or Dirige, *&c.* or to find a Chaplain to ſing a Maſs, *&c.* or to diſtribute in Alms an Hundred Pence to an Hundred poor People on ſuch a Day; in this Caſe, if ſuch Divine Service be not done, the Lord may diſtrain, becauſe the Divine Service is put in certain by the Tenure; and if the Lord doth diſtrain for not doing Divine Service which is certain,

Damages to be recovered.

he ſhall upon his Avowry recover Damages at the Common Law, that is, in the King's Temporal Court, for the not doing of it; and if Iſſue be taken upon the Performance of the Divine Service, it ſhall be tried by a Jury of Twelve Men; becauſe albeit the Service be Spiritual, yet the Damages and Loſs are Temporal, and ſo is the Seigniory alſo, and in this Caſe the Lord ſhall have Fealty, *&c.* and ſuch Tenure ſhall not be ſaid to be Tenure in Frankalmoign, but is called Tenure by Divine Service; for none can hold in Frankalmoigne if there be expreſſed any particular Manner of Service that he ought to do. 1 *Inſt.* 96. *b.* 97. *b.* But if a Grant be made by Fine to find a Chaplain in a certain Chapel of the Conuſee to ſay Divine Service there, and when the ſaid Chapel is become ruinous and decayed, a *Scire Facias* is brought upon the Fine; if the Conuſor doth plead that the Chapel is ruinated, and decayed, ſo that no Prieſt can ſay Divine Service therein, although that the Covenant by ſuch Plea is confeſſed, and it be prayed on the behalf of the Plaintiff, that therefore Judgment may be given, but that Execution ſhould ceaſe until the Chapel be rebuilt, yet no Judgment ſhall be given, for that this is a good Bar for the Time; for during the Time that there is no Chapel, Divine Service ſhall ceaſe, in that it ought to be done in a decent and reverent Manner, and not at large; but if the Chapel be rebuilt in the Place where the old Chapel ſtood, Divine Service ought to be ſaid there again, and a Chaplain ought to be found for that Purpoſe as formerly. But it was ſaid, that if the Chapel be built in another Place than where the old Chapel ſtood, the Grantor is not tied to ſay Divine Service in it. 10 *H.* 7. 13. 16 *H.* 7. 9, 10. *Trin.* 30 *Eliz. B. R. Wade* and *Preſthall's* Caſe, 1 *Leon.* 331. *Paſch.* 43 *Eliz. Cottel* v. *Lutterell's* Caſe, *B. R.* 4 *Coke* 86. And this I ſuppoſe holds as to a Pariſh-Church, *&c.* when the Caſe is the ſame.

Chapel of Eaſe.

And *Note*, That where there is a Chapel of Eaſe in a Pariſh, the Incumbent of the Mother-Church being bound to find a Chaplain there, he himſelf may ſerve in the Chapel as well as his Curate or Chaplain. *The Caſe of the Parſon of* Aſhton *and* Caſtle Burnidge *Chapel, Hobart* 66, 67.

Here we may add, That, I. *Of Chapels ſubject to a Mother-Church, ſome are meerly Chapels of Eaſe*, others are *Chapels of Eaſe and Parochial.* A Chapel meerly of Eaſe, is ſuch as is not allowed a Font, Sacraments or Burials, but is uſed only for the Eaſe of ſome Part of the Pariſhioners in Prayers and Preaching, and commonly the Curate thereof is removable at the Pleaſure of the Parochial Miniſter; though, as *Lyndwood* obſerves,

Kennet's Antiq. 595. 2 *Roll.* 126.

it may have the Rights of a Parochial Chapel by Cuſtom: But where a Chapel is inſtituted, though with Parochial Rights, there is uſually (if not always) a Reſervation of repairing to the Mother-Church on a certain Day or Days, in Order to preſerve the Subordination. But

Chapels.

4 *Leon.* 24.

II. *A Chapel may preſcribe for Tithes againſt the Mother-Church*; ſo ſays *Lyndwood*. And in the Caſe of *Saer* and *Bland*, when the Parſon libelled for Tithes againſt the Inhabitants of a Hamlet, where was a Chapel of Eaſe; and 'twas ſhewn on the other Side, that Time out of Mind, the ſaid Hamlet had found a Clerk to do Divine Service in the ſaid Chapel, with Part of their Tithes, and (what was an uſual Compoſition upon the Erection of a Chapel) paid a certain Sum to the Parſon and his Predeceſſors for all Tithes; the Preſcription was held good, and a Prohibition granted.

III. *The Repairs of a Chapel are to be by Rates on the Landholders within the Chapelry, in the ſame Manner as the Repairs of a Church, and ſuch Rates are alſo to be inforced in like Manner.* But Repairing the Chapel is of itſelf no Diſcharge from repairing the Mother-Church, which though at the firſt View it may ſeem hard, yet has this Reaſon to ſupport it, that all Chapels and Diſcharges from attending Service at the Mother-Church were originally Matters of Grace and Favour; and the Eaſe or Convenience of particular Inhabitants ought not to be purchaſed with Inconvenience and Damage to the Mother-Church.

IV. *If the Patron of a Chapel do preſent to that Chapel, it ſhall become a Church, and be preſentative.* This was affirmed by *Dodderidge* and aſſented to by *Coke* in *B. R.* 12 *Jac.* 1. agreeable to what is ſaid elſewhere of Donatives, that if the true Patron preſents, and his Clerk is admitted and inſtituted, it is become preſentable, and ſhall never be Donative after; yet if one is Patron of two Churches, and preſents to one only as the Mother-Church *cum Capella de* (naming the other) that other having been originally a diſtinct Pariſh Church ſhall ſo remain, notwithſtanding ſuch Preſentment, and that ever ſo often repeated.

2 *Roll.* 126.
1 *Inſt.* 344.

Saville, Caſe 46.

V. *A Chapel or no Chapel ought to be tried by the Spiritual Judge:* For a Chapel dependant on a Mother-Church cannot be founded but with Licence to the Ordinary; and the Opinion of my Lord *Coke*, that a Chapel is Spiritual as well as a Church; and where two Spiritual Things are to be tried, no Prohibition ſhall go, even as it goes not when a *Modus* is pleaded in a Diſpute between two Spiritual Perſons, (*viz.* the Rector and Vicar) about Tithes.

1 *Roll.* 126.

VI. If a Queſtion be depending, whether it be a Chapel of Eaſe or a Pariſh Church, it ſhall be tried (as to the Rights, the Limits, *&c.*) in the Temporal Court: and ſo if the Queſtion be, whether a Chapel of Eaſe or a Parochial Chapel; and ſo are the Bounds of Pariſhes, *&c.* to be there tried.

Alſo, Of Free Chapels.

I. *The Diſtinction of Free Chapels is grounded on their Freedom or Exemption from all ordinary Juriſdiction:* Other Reaſons have been aimed at, but that this is the true one ſeems plain from the Form of the Writ in the Regiſter 40. *b.*

Codex 235.

II. *Free Chapels may continue ſuch in Point of Exemption from ordinary Viſitation, tho' the Head or Members receive Inſtitution from the Ordinary.* This appears from the King's Preſentation of a Prebend of the Free Chapel

Preaching. of *Haſtings*, made to the Biſhop of *Chicheſter*, and a royal Mandate reciting the Admiſſion and Inſtitution. *Vide Codex* 236.

III. *The King may erect a Free Chapel, and exempt it from the Juriſdiction of the Ordinary.*

CHAP. XXXIII.

Miniſters Duty in Preaching.

Miniſters preaching without Licence. See the *Rubrick.*

ANother Duty incumbent upon every Miniſter that hath Cure of Souls is, To declare, by Preaching, the Will of God to his People. And note, every Perſon, when he is ordained Prieſt, doth thereby receive Authority to preach the Word of God; and when he is inſtituted, the Biſhop doth commit to him the Cure of Souls. *Shephard*, in his *Sure Guide for Juſtices of the Peace*, ſaith, that the Clauſe in the Statute 14 *Car.* 2, concerning Lecturers, ſeems to extend to all Miniſters that preach any where without Licence. The Words of which are, **And be it further enacted by the Authority aforeſaid, That no Perſon ſhall be, or be received as a Lecturer, or permitted, ſuffered or allowed to preach as a Lecturer, or to preach or read any Sermon or Lecture in any Church,** &c. **unleſs he be firſt approved, and thereunto licenſed,** &c. And altho' (as I conceive) this Clauſe was only deſigned for ſuch who are to preach in the Quality of Lecturers; yet it may be extended to all Miniſters preaching in any Church, Chapel, or other Place of publick Worſhip, of which the Preacher hath not the Cure, though he be not a ſettled and conſtant Lecturer. And even before this Statute was made, it was lawful for Church-wardens to reſtrain any Stranger not licenſed, from preaching in their Church or Chapel, which ſeems to be allowed in *Creſwick* and *Rokeſby*'s Caſe, *Hill.* 10 *Jac. B. R.* 2 *Bulſt.* 49, where the Church-wardens were committed to Gaol by the Juſtices of the Peace upon the Statute of 1 *Mar.* and the Commitment in that Caſe allowed to be good, although the Miniſter (who in Truth was licenſed) did not ſhew his Licence (as it ſeems) to the Church-wardens. And if one be Curate in a free Chapel or Donative, yet he ought not to preach without Licence, but the Biſhop may cite him to take a Licence to preach. *Allain* v. *Exton*, *Hill.* 23 & 24 *Car.* 2. 2 *Keb.* 876. 1 *Mod. Rep.* 90. *Vide ibid.* 11, 12, 22. And ſince the Act of Uniformity, if the Biſhop denies to grant a Licence to a Parſon who is fit to preach, *B. R.* will grant a *Mandamus* to him to grant one; by *Powell* Juſtice. 2 *Ld. Raym.* 1206. in the Caſe of *Colefatt* v. *Newcomb.*

Stat. 14 *Car.* 2.

Curate ought to take Licence to preach.

13 *El. c.* 12. According to the Doctrine of the Thirty-nine Articles.

But whether a Miniſter doth preach with or without Licence, he is not to preach what Doctrine he pleaſes, and therefore it hath been enacted, ——**That if any Perſon Eccleſiaſtical, or which ſhall have Eccleſiaſtical Living, ſhall adviſedly maintain or affirm any Doctrine directly contrary or repugnant to any of the Thirty-Nine Articles, and being convented before the Biſhop of the Dioceſe, or the Ordinary, or before the Queen's Highneſs Commiſſioners in Cauſes Eccleſiaſtical, ſhall perſiſt therein, or not revoke his Error, or after ſuch Revoca-**

tion eftſoons affirm ſuch untrue Doctrine, ſuch maintaining or affirming, and perſiſting, or ſuch eftſoons affirming, ſhall be juſt Cauſe to deprive ſuch Perſon of his Eccleſiaſtical Promotion; and it ſhall be lawful to the Biſhop of the Diocefe, or the Ordinary, or the ſaid Commiſſioners, to deprive ſuch Perſon ſo perſiſting, or lawfully convicted of ſuch eftſoons affirming, and upon ſuch Sentence of Deprivation pronounced, he ſhall be indeed deprived. Stat. 13 Eliz. c. 12. Preaching.

Neither may any Miniſter preach, declare, or ſpeak any Thing in Derogation or Depraving of the Book of Common Prayer, or of any Thing therein contained, or of any Part thereof; and if he offend in this Particular, he is to forfeit for the firſt Offence one whole Year's Profit of all his Spiritual Benefices or Promotions ariſing after his Conviction, and ſuffer ſix Months Impriſonment; for the ſecond Offence twelve Months Impriſonment, and Deprivation *ipſo facto* of all his Spiritual Promotions; and for the third Offence the like Deprivation, and Impriſonment during Life: And if he hath no Spiritual Promotion, he ſhall for the firſt Offence be impriſoned ſix Months, and for the ſecond during Life. *Stat.* 1 *Eliz. c.* 2. Penalty for depraving the Book of Common Prayer. *Stat.* 1 *Eliz.* c. 2.

Neither may he in his Preaching, or at other Time, deprave, deſpiſe, or contemn the moſt Bleſſed Sacrament of the Lord's Supper by any contemptuous Words, or by any Words of depraving, deſpiſing or reviling, or adviſedly in any otherwiſe contemn, deſpiſe, or revile the ſaid Sacrament, upon the Penalty of ſuffering Impriſonment, and of making Fine and Ranſom at the King's Will. *Stat.* 1 *Ed.* 6. *c.* 1. A Miniſter may be alſo bound to his good Behaviour for uſing ſcandalous and reflecting Words in his Preaching. *Trin.* 16 *Car.* 2. Juſtice *Tyrel* v. *Hatch*, 1 *Keb.* 751. Or the Sacrament. *Stat.* 1 *Ed.* 6. *c.* 1.

And it is enacted, by 1 *Eliz. c.* 1. *Sect.* 27, *&c.* That for the utter Extinguiſhment of all foreign and uſurped Power and Authority, may it pleaſe your Highneſs, that it may be enacted by the Authority aforeſaid, That if any Perſon or Perſons dwelling or inhabiting within this your Realm, or in any other your Highneſs's Realms or Dominions, of what Eſtate, Dignity or Degree ſoever he or they be, after the End of thirty Days next after the Determination of this Seſſions of this preſent Parliament, ſhall by Writing, Printing, Teaching, Preaching, expreſs Words, Deed or Act, adviſedly, maliciouſly and directly affirm, hold, ſtand with, ſet forth, maintain or defend the Authority, Preheminence, Power or Juriſdiction, Spiritual or Eccleſiaſtical, of any Foreign Prince, Prelate, Perſon, State or Potentate whatſoever, heretofore claimed, uſed or uſurped within this Realm, or any Dominion or Country being within or under the Power, Dominion or Obeyſance of your Highneſs; or ſhall adviſedly, maliciouſly and directly put in ure, or execute any Thing for the Extolling, Advancement, ſetting forth, Maintenance or Defence of any ſuch pretended or uſurped Juriſdiction, Power, Preheminence and Authority, or any Part thereof; that then every ſuch Perſon and Perſons ſo doing and offending, their Abettors, Aiders, Procurers and Counſellors, being thereof lawfully convicted and attainted, according to the true Order and Courſe of the Common Laws of this Realm, for his or their firſt Offence, ſhall forfeit and loſe unto your Highneſs, your Heirs and Succeſſors, all his and their Goods and Chattels, as well real as perſonal. 1 El. c. 1. Againſt Maintenance of foreign Uſurpation.

And if any Perſon ſo convicted or attainted ſhall not have, or be worth of his proper Goods and Chattels, to the Value of Twenty Pounds Impriſonment for a Year.

Preaching.

Pounds at the Time of his Conviction or Attainder, that then every such Person so convicted and attainted, over and besides the Forfeiture of all his said Goods and Chattels, shall have and suffer Imprisonment by the Space of one whole Year, without Bail or Mainprize.

Benefices thereupon to be void.

And that also all and every the Benefices, Prebends, and other Ecclesiastical Promotions and Dignities whatsoever, of every Spiritual Person so offending, and being attainted, shall immediately after such Attainder be utterly void to all Intents and Purposes, as though the Incumbent thereof were dead, and that the Patron and Donor of every such Benefice, Prebend, Spiritual Promotion and Dignity, shall and may lawfully present unto the same, or give the same in such Manner and Form, as if the said Incumbent were dead; and if any such Offender or Offenders, after such Conviction or Attainder, do eftsoons commit or do the said Offences, or any of them, in Manner and Form aforesaid, and be thereof duly convicted and attainted as is aforesaid, that then every such Offender and Offenders shall for the same second Offence incur into the Dangers, Penalties and Forfeitures ordained and provided by the Statute of Provision and Præmunire, made in the Sixteenth Year of the Reign of King Richard the Second. 16 R. 2. c. 5.

High Treason.

And if any such Offendor or Offendors, at any Time after the second Conviction and Attainder, do the third Time commit and do the said Offences, or any of them, in Manner and Form aforesaid, and be thereof duly convicted and attainted as is aforesaid, that then every such Offence or Offences shall be deemed and adjudged High Treason; and that the Offendor or Offendors therein being thereof lawfully convicted and attainted, according to the Laws of this Realm, shall suffer Pains of Death, and other Penalties, Forfeitures and Losses, as in case of High Treason by the Laws of this Realm.

Prosecution within the Year.

And be it enacted, That no manner of Person or Persons shall be molested or impeached for any of the Offences so committed or perpetrated only by Preaching, Teaching, or Words, unless he or they be thereof lawfully indicted within the Space of one whole Year next after his or their Offences so committed: And in case any Person or Persons shall Fortune to be imprisoned for any of the said Offences committed by Preaching, Teaching, or Words only, and be not thereof indicted within the Space of one half Year next after his or their such Offence so committed and done, that then the said Person so imprisoned shall be set at Liberty, and be no longer detained in Prison for any such Cause or Offence. Vide Stat. 1 Eliz. 1. Sect. 27, &c.

5 El. c. 1. Against maintaining the Authority of the Bishop or See of Rome.

And it was afterwards enacted by 5 Eliz. c. 1. Sect. 2. &c. That if any Person and Persons dwelling, inhabiting, or resiant within this Realm, or within any other the Queen's Dominions, Seigniories, or Countries, or in the Marches of the same, or elsewhere within or under her Obeisance and Power, of what Estate, Dignity, Preheminence, Order, Degree or Condition soever he or they be, after the first Day of April, which shall be in the Year of our Lord God 1563. shall by Writing, Ciphering, Printing, Preaching or Teaching, Deed or Act, advisedly and wittingly hold or stand with, or extol, set forth, maintain or defend the Authority, Jurisdiction or Power of the Bishop of Rome, or of his See, heretofore claimed, used

used or usurped within this Realm, or in any Dominion or Country, being of, within, or under the Queen's Power or Obeisance, or by any Speech, open Deed or Act, advisedly and wittingly attribute any such Manner of Jurisdiction, Authority, or Preheminence to the said See of Rome, or to any Bishop of the same See for the Time being, within this Realm, or in any of the Queen's Dominions or Countries; that then every such Person or Persons so doing or offending, their Abettors, Procurors, and Counsellors, and also their Aiders, Assistants and Comforters, upon Purpose, and to the Intent to set forth, further, and extol the said usurped Power, Authority or Jurisdiction of any of the said Bishop or Bishops of Rome, and every of them, being thereof lawfully indicted or presented within one Year next after such Offences by him or them committed, and being lawfully convicted or attainted at any Time after, according to the Laws of this Realm, for every such Default and Offence, shall incur into the Dangers, Penalties, Pains and Forfeitures, ordained and provided by the Statute of Provision and Præmunire, made in the Sixteenth Year of the Reign of King Richard the Second. Preaching.

Power and Duty of Justices therein.

Sect. 3. And it is also enacted by the Authority aforesaid, That as well Justices of Assise in their Circuits, as Justices of Peace within the Limits of their Commission and Authorities, or two of every such Justices of Peace at the least, whereof one to be of the Quorum, shall have full Power and Authority by Virtue of this Act, in their Quarter and Open Sessions, to inquire of all Offences, Contempts and Transgressions, perpetrated, committed, or done contrary to the true Meaning of the Premisses, in like Manner and Form as they may of other Offences against the Queen's Peace, and shall certify every Presentment afore them or any of them had or made concerning the same, or any Part thereof, before the Queen, her Heirs and Successors, in her or their Court, commonly called the King's Bench, within 40 Days next after such Presentment had or made, if the Term be then open; and if not, at the first Day of the full Term next following the said 40 Days; upon Pain that every of the Justices of Assize, or Justices of the Peace, before whom such Presentment shall be made, making Default of such Certificate contrary to this Statute, to lose and forfeit for every such Default One Hundred Pounds to the Queen's Highness, her Heirs and Successors.

Justices of B. R. how to determine.

Sect. 4. And it was enacted by the Authority aforesaid, That the Justices of the King's Bench, as well upon every such Certificate as by Inquiry before themselves, within the Limits of their Authorities, shall have full Power and Authority to hear, order, and determine every such Offence done or committed contrary to the true Meaning of this present Act, according to the Laws of this Realm, in such like Manner and Form to all Intents and Purposes, as if the Person or Persons, against whom any Presentment shall be had upon this Estatute, had been presented upon any Matter or Offence expressed in the said Estatute made in the said Sixteenth Year of King Richard the Second.

Second Offence in maintaining Bishop of Rome.

Sect. 10. And for stronger Defence and Maintenance of this Act, it is further ordained, enacted, and established as aforesaid, That if any such Offendor or Offendors, as is aforesaid, of the first Part or Branch of this Estatute, that is to say, by Writing, Ciphering, Printing,

Preaching. Printing, Preaching or Teaching, Deed or Act, advisedly and wittingly hold or stand with, to extol, set forth, maintain or defend the Authority, Jurisdiction or Power of the Bishop of Rome, or of his See, heretofore claimed, used, or usurped within this Realm, or in any Dominion or Country, being of, within, or under the Queen's Power or Obeisance: Or by any Speech, Deed or Act, advisedly and wittingly attribute any such Manner of Jurisdiction, Authority, or Preheminence to the said See of Rome, or to any Bishop of the same See for the Time being within this Realm, or in any the Queen's Dominions or Countries, or be to any such Offendor or Offendors abetting, procuring or counselling, or aiding, assisting or comforting, upon Purpose, and to the Intent to set forth, further, and extoll the said usurped Power, Authority or Jurisdiction, after such Conviction and Attainder, as is aforesaid, do eftsoons commit or do the said Offences, or any of them, in Manner and Form aforesaid, and be thereof duly convicted and attainted, as is aforesaid; That then every such Offendor or Offendors, for the same second Offence and Offences, shall forfeit, lose, and suffer such like and the same Pains, Forfeitures, Judgment and Execution, as is used in Cases of High Treason. But no Corruption of Blood, Forfeiture of Dower, &c. Vide 5 Eliz. c. 1. sect. 10, 11, 12.

High Treason.

That eating of Fish, &c. is not of Necessity.

Also it is enacted by 5 Eliz. c. 5. sect. 40. **That whosoever shall by Preaching, Teaching, Writing or open Speech, notify that any Eating of Fish, or Forbearance of Flesh, mentioned in the Statute, is of any Necessity for the Saving of the Soul of Man, or that it is the Service of God, otherwise than other publick Laws are and be; that then such Persons shall be punished as Spreaders of false News are and ought to be.**

Canons which regulate Preaching.

Note; The Canons of the Church which regulate the Exercise of Preaching, are those whose Titles be here recited, and which may at large be easily consulted.

CAN. XLIII. *Deans and Prebendaries to preach during their Residence.*

CAN. XLV. *Beneficed Preachers being resident upon their Livings to preach every* Sunday.

CAN. XLVI. *Beneficed Men not Preachers to procure Monthly Sermons.*

CAN. XLVII. *Absence of beneficed Men to be supplied by Curates that are allowed Preachers.*

CAN. XLIX. *Ministers, not allowed Preachers, may not expound.*

CAN. L. *Strangers not admitted to preach without shewing their Licence.*

CAN. LI. *Strangers not admitted to preach in Cathedral Churches without sufficient Authority.*

CAN. LII. *The Names of Strange Preachers to be noted in a Book.*

CAN. LIII. *No publick Opposition between Preachers.*

CAN. LIV. *The Licences of Preachers refusing Conformity to be void.*

CAN. LV. *The Form of a Prayer to be used by all Preachers before their Sermons.*

CAN. LVI. *Preachers and Lecturers to read Divine Service, and administer the Sacraments twice a Year at the least.*

CAN. LXXI. *Ministers not to preach or administer the Communion in private Houses.*

CHAP. XXXIV.

Disturbance in Churches, &c.

Disturbances in the Church in the Time of Divine Service, or Striking, Brawling, &c. in the Church or Church-yard, how punished.

AS an Incumbent of a Church is obliged to perform the Offices of a Minister to the People belonging thereunto, so the Law doth secure him from all Disturbance in the Performance thereof; to which Purpose it is enacted by 50 *E.* 3. *c.* 5. as followeth,——— Punishment for Disturbances in the Church. Stat. 50 E. 3. c. 5.

Because that Complaint is made to our Lord the King by the Clergy of his Realm of England, that as well diverse Priests bearing the sweet Body of our Lord Jesus Christ to sick People, and their Clerks with them, as otherwise diverse Persons of Holy Church, whiles they attend to Divine Services in Churches, Church-yards, and other Places dedicated to God, be sundry Times taken and arrested by Authority Royal, and Commandment of other Temporal Lords, in Offence of God, and of the Liberties of Holy Church, and also in Disturbance of Divine Services aforesaid: The same our Lord the King, who would be sore displeased, if any did in such Manner, will and granteth, and defendeth upon grievous Forfeiture, that none do the same from henceforth; so that Collusion or feigned Cause be not found in any of the said Persons of Holy Church in this Behalf.

And it was afterwards enacted by Stat. 1 R. 2. c. 15. Because that Prelates do complain themselves, that as well beneficed People of Holy Church, as other, be arrested and drawn out, as well of Cathedral Churches, as of other Churches and their Church-yards, and sometimes when they be intended to Divine Services; and also in other Places, although they be bearing the Body of our Lord Jesus Christ to sick Persons, and so arrested and drawn out, be bound and brought to Prison against the Liberty of Holy Church; it is ordained, That if any Minister of the King or other do arrest any Person of Holy Church by such Manner, and thereof be duly convict, he shall have Imprisonment, and then be ransomed at the King's Will, and make gree to the Parties so arrested. *1 R. 2. c. 15.* Arresting in the Churches, &c.

Provided always, That the said People of Holy Church shall not hold them within the Churches or Sanctuaries by Fraud or Collusion in any Manner, and therefore we command that thou cause all the said Statutes to be cried and published, and firmly kept through thy Baylywick according to the Form and Tenor thereof, and that do not omit in any Wise. Given under the Witness of our Great Seal the first Day of February in the first Year of our Reign. Sanctuaries disallowed.

And *Coke* saith, That he saw a Report in the Time of Queen *Mary* upon the aforesaid Statutes, where it was held, that they are but an Affirmance of the Common Law, and in Maintenance of the Liberties of Holy Church, as appears by the Preamble of the same Statutes, and that *Eundo*, *redeundo* Priest ought not to be arrested *eundo, redeundo & morando.*

Diſturbance in Churches, &c.

redeundo & morando for to celebrate Divine Service, the Prieſt ought not to be arreſted, nor any who aid in it, and that the Party grieved may have his Action upon the Statute 50 *Ed.* 3. *c.* 5. For when any Thing is prohibited by an Act of Parliament, the doing whereof would be prejudicial, and a Damage to any particular Perſon, there an Action doth lie upon ſuch Statute by the Party damnified, although no Action be given by expreſs Words of ſuch Statute. 10 *Co.* 75. 12 *Co.* 100, 103. 2 *Mod. Rep.* 152, 162, 165.

Contempt not excuſed.

And if an Arreſt be made contrary to the ſaid Statutes, and the Perſon arreſting doth preſently diſcharge the Perſon arreſted, upon Pretence of Ignorance, *&c.* this will not excuſe the Contempt in making the Arreſt. *Hill.* 16 *Car. B. R. Prinſor*'s Caſe, 1 *Croke* 602.

Arreſt good, eſpecially of Perſons having abſconded.

And it is to be noted, That the aforeſaid Statutes extend both to Prieſts, and Lay-men. *Paſch.* 7 *Jac. C. B. Brownl.* and *Goulds.* 2 *p.* 301. *Paſch.* 10 *Jac. B. R. Pit* v. *Webley*, 2 *Bulſt.* 72. *Hill.* 16 *Car. B. R. Prinſor*'s Caſe, 1 *Croke* 602, and it ſeems on Week-days as well as on *Sundays*, and Holy-days. *Paſch.* 11 *Jac. Pit* v. *Webley*, 2 *Croke* 321. However, if ſuch undue Arreſt be made, the Arreſt is good, ſo that if a Reſcous be made, and thereby any Perſon killed, the Killing is Murder. *Paſch.* 10 *Jac. B. R. Pit* v. *Webley*, 2 *Bulſt.* 72. And Note, that one Dr. *B.* being arreſted and taken in Execution upon a *Sunday* in the Church-yard or Porch, in coming from Divine Service, and it appearing to the Court that the ſaid *B.* had abſconded ſome Time before, the Court would not diſcharge him from Execution, nor puniſh the Bailiffs; but had he not ſo abſconded, they then would have puniſhed the Contempt in the Bailiffs. *Trin.* 23 *Car.* 2. Dr. *Butler*'s Caſe, 2 *Keb.* 777.

Excommunication.

He that doth offend againſt the aforeſaid Statutes, may not only be fined in the Temporal Court, but may be excommunicated by the Eccleſiaſtical Judge for ſo doing, and condemned in Coſts. *Paſch.* 13 *Jac. B. R. Pit* v. *Webley*, 2 *Bulſt.* 72. ſame Caſe, 2 *Croke* 321.

No Prohibition if the King be Party.

The Statutes do only prohibit Arreſts betwixt Party and Party at ſuch Times, but not Arreſts made when the King is a Party, and therefore a Perſon may be apprehended going or returning from Divine Service, by a Warrant from a Juſtice of the Peace, it being for Breach of the Peace and for the King; and ſo in the like Caſes. *Hill.* 16 *Car. B. R. Prinſor*'s Caſe, 1 *Croke* 602. *Paſch.* 11 *Jac. Pit* v. *Webley*, 2 *Croke* 321, and the ſame Caſe, 2 *Bulſt.* 72. *Mich.* 16 *Jac. B. R. Wait* v. *The Inhabitants of Stokes*, *Godbolt*. *Vide infra.*

29 *Car.* 2. *c.* 7. *ſect.* 6.

Alſo it hath been enacted, **That no Perſon or Perſons upon the Lord's Day ſhall ſerve or execute, or cauſe to be ſerved or executed, any Writ, Proceſs, Warrant, Order, Judgment or Decree, (except in Caſes of Treaſon, Felony or Breach of the Peace) but that the Service of every ſuch Writ, Proceſs, Warrant, Order, Judgment or Decree, ſhall be void to all Intents and Purpoſes whatſoever. And the Perſon or Perſons ſo ſerving or executing the ſame, ſhall be as liable to the Suit of the Party grieved, and to anſwer Damages to him for doing thereof, as if he or they had done the ſame without any Writ, Proceſs, Warrant, Order, Judgment or Decree at all.** Stat. 29 Car. 2. Intitled, An Act for the better Obſervation of the Lord's Day.

1 *Cro.* 602.

It appears by *Prinſor*'s Caſe before cited, That one might have been attached, for arreſting upon a *Sunday* before the ſaid Statute 29 *Car.* 2. And *Prinſor* was fined twenty Shillings for ſo doing, but that Caſe had this further Circumſtance, *viz. he might have been arreſted on any other Day.*

Day. And upon a like Motion in *B. R.* 21 & 22 *Car.* 2. *Keeling* ſaid, He had known many Attachments for arreſting a Man upon a *Sunday*, but the Affidavit always contained that he might have been taken on any other Day. To which *Twiſden* added, That ſo alſo it was for arreſting one as he was going to Church to diſgrace him. By Arreſts, &c. *Mod.* 56.

But notwithſtanding the ſaid Statute, it has been held, That Citations or Summons, Warrants for the Peace and good Behaviour, as alſo Eſcape-Warrants, *&c.* may be executed on a *Sunday*, viz.

In *Michaelmas-Term* 11 *W.* 3. the Caſe was, A Libel having been exhibited in the Spiritual Court of *Durham* againſt a Woman for Incontinence, the Citation was fixed upon the Church-Door on a *Sunday* (as is uſual;) and this being objected, it was replied, That all Civilians were of Opinion, that ſuch Citation was ſufficient without any perſonal ſerving, and that that had been the conſtant Practice both before and ſince the ſaid Statute. And *Holt* C. J. ſaid, if the Eccleſiaſtical Law was and had always been to ſerve this Proceſs on a *Sunday*, (in which Reſpect it differed from a Temporal Proceſs, which may be as well ſerved on any other Day) then it ſeemed the Intent of the Statute was not to take away the Serving it in that Manner. 5 *Mod.* 449.

And Warrants of the Peace, good Behaviour, *&c.* have been always held to be excepted by the Words of the Act, as in the Caſe of *Johnſon* and *Coltſon*, *Trin.* 30 *Car.* 2. in *C. B.* A Juſtice of Peace made a Warrant to a Conſtable to take a Perſon, in order to find Sureties for his good Behaviour; the Conſtable executed the Warrant on a *Sunday*, and the Court, in Treſpaſs and Battery brought for this, juſtified the Conſtable, and reſolved that a Warrant for the good Behaviour is a Warrant for the Peace and more; and that the Exception in the ſaid Statute is to be favourably interpreted to preſerve the publick Peace, *&c.* And it has been oftentimes lately reſolved, That upon an Eſcape-Warrant a Perſon may well be arreſted on a *Sunday*. *Ray.* 250. *Vide ſupra.*

See farther of Holy-Days, *&c. antea*, *Chap.* 32.

The Law hath not only provided for the puniſhing of Perſons, that arreſt any Prieſt in the Caſes aforeſaid, but alſo againſt their being diſturbed by any other Means in their performing of Divine Offices, and accordingly it hath been enacted as followeth: Diſturbing Miniſters in preaching, *&c.*

Foraſmuch as it is moſt neceſſary in every Chriſtian Commonwealth, to provide that Tranquility and Peace may be preſerved and continued amongſt the People, and ſpecially in Holy Church in the Time of Divine Service, and Adminiſtration of the Sacraments and Sacramentals, as before this Time it hath been accuſtomed in Holy Church within this Realm, and that all Things being contrary thereunto, or that are, or may be in Diſturbance thereof, may by Foreſight be eſchewed and avoided, and Remedy therefore in due Time provided, as well for the Preſervation of the Queen's Highneſs Peace, as for an univerſal Quietneſs and Order to be uſed within this Realm; 1 *Mariæ*, *c.* 3.

Be it therefore enacted by the Queen our Sovereign Lady, the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That if any Perſon or Perſons of their own Power and Authority, at any Time or Times after the Twentieth Day of December **next coming, do or ſhall willingly and of purpoſe, by open and overt Word, Fact, Act, or Deed, maliciouſly or contemptuouſly moleſt, let, diſturb, ver or trouble, or by any other unlawful Ways or Means diſquiet or miſuſe**

Diſtur-bance.

any Preacher or Preachers that now is, or that at any Time or Times hereafter ſhall be licenſed, allowed or authorized to preach by the Queen's Highneſs, or by any Archbiſhop or Biſhop of this Realm, or by any other lawful Ordinary, or by any of the Univerſities of Oxford and Cambridge, or otherwiſe lawfully authoriſed or charged by reaſon of his or their Cure, Benefice, or other Spiritual Promotion or Charge, in any of his or their open Sermon, Preaching or Collation that he or they ſhall make, declare, preach or pronounce in any Church, Chapel, Church-yard, or in any other Place or Places, uſed, frequented or appointed, or that hereafter ſhall be uſed or appointed to be preached in.

In ſaying Maſs, &c.

Or if any Perſon or Perſons, after the ſaid Twentieth Day of December next coming, ſhall maliciouſly, willingly or of purpoſe moleſt, let, diſturb, vex, diſquiet, or otherwiſe trouble any Parſon, Vicar, Pariſh Prieſt or Curate, or any lawful Prieſt, preparing, ſaying, doing, ſinging, miniſtring or celebrating the Maſs, or other ſuch Divine Service, Sacraments or Sacramentals, as was moſt commonly frequented and uſed in the laſt Year of the Reign of the late Sovereign Lord King Henry the Eighth, or that at any Time hereafter ſhall be allowed, ſet forth or authoriſed by the Queen's Majeſty.

Breaking down Altars, &c.

Or if any Perſon or Perſons, at any Time or Times after the ſaid Twentieth Day of December, ſhall contemptuouſly, unlawfully or maliciouſly, of their own Power or Authority, pull down, deface, ſpoil, abuſe, break, or otherwiſe unreverently handle or order the moſt bleſſed, comfortable and holy Sacrament of the Body and Blood of our Saviour Jeſus Chriſt, commonly called the Sacrament of the Altar, being, or that ſhall be in any Church or Chapel, or in any other decent Place, or the Pix or Canopy wherein the ſame Sacrament is or ſhall be; or unlawfully, contemptuouſly or maliciouſly of their own Power and Authority, pull down, deface, ſpoil, or otherwiſe break any Altar or Altars, or any Crucifix or Croſs, that now or hereafter ſhall be in any Church, Chapel or Church-yard; that then every ſuch Offendor and Offendors in any the Premiſſes, his or their Aidor, Procuror or Abettor, Aidors, Procurors or Abettors, immediately and forthwith after any of the ſaid Act or Acts, or other the ſaid Miſdemeanors ſo committed, done or made, or any Time or Times after, ſhall be apprehended, arreſted and taken by any Conſtable or Conſtables, Churchwarden or Churchwardens of the ſaid Pariſh, Town or Place where the ſaid Offence or Offences ſhall be ſo committed, made or done, or by any other Officer or Officers, or by any other Perſon or Perſons then being preſent at the Time of the ſaid Offence or Offences ſo unlawfully committed, made or done.

Examination by Juſtices.

Which Perſon or Perſons ſo apprehended, taken or arreſted, with convenient ſpeed ſhall be brought and carried to any Juſtice of Peace within the ſaid Shire, or within any City, Borough, Liberty or Town Corporate wherein Juſtices of Peace be, where the ſaid Offence or Offences ſhall be ſo committed, done or made: And that the ſaid Juſtice of Peace, upon due Acculation thereupon had and made by the Apprehendor or Apprehendors, or other Perſon or Perſons, of any of the ſaid Perſon or Perſons ſo offending, forthwith ſhall commit the ſaid Perſon or Perſons ſo apprehended, arreſted and taken, to ſafe keeping and Cuſtody, as by the Diſcretion of the ſaid Juſtice

shall be thought most meet and convenient, and that within Six Days next and immediately after the said Accusation so had and made, the said Justice, with one other Justice of Peace in the said Shire, City, Borough, Liberty or Town Corporate, shall diligently examine the Act or Acts, Offence or Offences aforesaid. Disturbance.

And if they the said two Justices of Peace shall, upon their said Examination, find or perceive the said Person or Persons so accused guilty of any of the said Offence or Offences whereof he or they shall be so accused, and that by two sufficient Witnesses, or by his or their own Confession or Confessions, that then and immediately, with convenient speed, the said two Justices shall commit and award the said Person or Persons so accused, as is aforesaid, to the Gaol of or for the said Shire, City, Borough, Liberty, or Town Corporate where the said Offence or Offences was so committed, made or done, there to remain without Bail or Mainprize by the space of Three Months then next insuing, and further to the next Quarter-Sessions to be holden within the said Shire, City, Borough, Liberty or Town Corporate, next after the End of the said Three Months; at which said Quarter-Sessions, the said Person or Persons so committed to the Gaol, as is aforesaid, upon his or their Reconciliation and Repentance in that behalf, before the said Justices of Peace, at the said Sessions, shall be delivered and discharged out of Prison and Gaol, upon sufficient Surety of his good Abearing and Behaviour, to be then and there taken by the said Justices for one whole Year then next insuing, as by the Discretion or Discretions of the said Justices then and there being, or of the more part of them, shall be thought meet and convenient: And if the said Person or Persons so in Gaol, as is aforesaid, will not be reconciled and repent at the said Quarter-Sessions, that then the said Person or Persons immediately in Time convenient shall be further awarded and committed to the said Gaol by the said Justices, or by the more part of them, there to remain without Bail or Mainprise, until he or they so committed and awarded to Gaol, as aforesaid, shall be reconciled, and be penitent for his or their said Offence or Offences. Commitment by Justices.

And be it further enacted by the Authority aforesaid, That if any Person or Persons at any Time or Times after the said Twentieth Day of December, of their own Authority and Power, willingly and unlawfully do rescue any Offendor or Offendors so apprehended, taken or arrested, as is aforesaid, or will disturb, hinder or let the said Offendor or Offendors so offending, as is aforesaid, to be apprehended, taken or arrested, that then every one of the said Rescuers or Disturbers shall suffer like Imprisonment as is aforesaid, and further shall pay, forfeit and lose for a Fine, for every of his or their said Offences, Five Pounds to the Queen's Majesty, her Heirs and Successors. Penalty for rescuing an Offender, &c.

And be it further enacted by the Authority aforesaid, That if any the said Offendors aforesaid be not taken, apprehended or arrested immediately in Time convenient, as is aforesaid, but do escape or go away, that then the said Escape shall be lawfully presented before the Justices of Peace in the said Shire, City, Borough, Liberty or Town Corporate, at the next Quarter-Sessions to be holden where the said Escape was made and suffered, and that then the Inhabitants of the Parish where the said Escape was so suffered, shall forfeit and lose to the Queen's Majesty, her Heirs and Successors, for every such Escape to be presented.

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ſuch Offence Five Pounds, to be levied and taken as other like Amerciaments before this Time have been levied and taken upon any Village, Hundred or Town, for the Eſcape of any Murderer, or other Felon, for not making Purſuit upon Hue and Cry, according to the Eſtatute of Wincheſter, and the Eſtatute made and provided in the Third Year of the worthy King Henry the Seventh.

Juſtices, &c. to ſet Fines and Amerciaments.

And be it further enacted by the Authority aforeſaid, That all and ſingular Juſtices of Peace, Juſtices of Aſſiſe, Juſtices of Oyer and Determiner, and all and ſingular Mayors, Bailiffs, and Juſtices of Peace, within any City, Borough or Town Corporate, in any Parts within this Realm, within the Limits of their Commiſſion or Commiſſions, ſhall have full Power and Authority by Virtue of this Act, after the ſaid Twentieth Day of December, to inquire of all and ſingular the Offences and Miſdemeanors aforeſaid, and to hear and determine the ſame, and to ſet the Fines and Amerciaments of the ſaid Offendor or Offendors, as is aforeſaid.

Proviſo for the Eccleſiaſtical Juriſdiction.

Provided always, and be it further enacted by the Authority aforeſaid, That this Act, or any Thing therein contained, ſhall not in any wiſe extend to abrogate and take away the Authority, Juriſdiction, Power and Puniſhment of the Eccleſiaſtical Laws now ſtanding and remaining in their Force, of or for the Puniſhment of any the Offences and Miſdemeanors aforeſaid; but that the Authority, Power, Juriſdiction and Puniſhments of the ſaid Eccleſiaſtical Laws, of and for any of the Offences and Miſdemeanors aforeſaid, ſhall ſtand in full Power and Strength, and to be uſed and exerciſed in all and in every Thing, as though this Act had never been had and made; this preſent Act, or any Thing therein contained to the contrary thereof, in any wiſe notwithſtanding.

Not to be twice puniſhed, &c.

Provided always, and be it enacted, That whatſoever Perſon offending in the Premiſſes, ſhall for any the Offences afore recited receive Puniſhment of the Ordinary, having a Teſtimonial thereof under the ſaid Ordinary's Seal, ſhall not for the ſame Offence eftſoons be convicted before the Juſtice; and in like wiſe receiving for the ſaid Offences Puniſhment by the Juſtice, he ſhall not for the ſame Offence eftſoons receive Puniſhment of the Ordinary; any Thing in this Act to the contrary notwithſtanding. Stat. 1 Mar. c. 3.

Maſs repealed.

Firſt, As to this Statute it is to be noted, That ſo much of it as concerns the Maſs, is repealed by *Stat.* 1 *Eliz. c.* 2, and ſo ſaith *Dodderidge* in *Creſwick* and *Rokeſby*'s Caſe, *Hill.* 10 *Jac. B. R.* 2 *Bulſt.* 51. But in other Reſpects, as if Diſturbance be of a Perſon in Preaching, *&c.* the Statute remains yet in Force, *Hill.* 11 *Jac. B. R. Croſs* v. *Stanhop*, *Godbolt*, and in the ſaid Caſe of *Creſwick* v. *Rokeſby*, 2 *Bulſt.* 51. But one being committed to Priſon upon this Statute, for diſturbing a Miniſter lawfully authorized in his publick Prayer, and Preaching; it was agreed, that that Part of the Statute which concerns Diſturbance in Preaching, is not repealed by the Statute of 1 *Eliz.* but as to Diſturbance in Prayer it is, and therefore the Commitment being for both was naught. *Hill.* 23 *Car.* 2. *B. R.* Dr. *Bruce*'s Caſe, *Aleyn* 50. But in *Paul Moon*'s Caſe, *Trin.* 33 *Car.* 2. *B. R.* Sir *Thomas Jones*, *Rep.* 159, it was reſolved by the Court, that this Statute did extend to the Divine Service now eſtabliſhed; and that the Word [ſuch] in the Statute ſhall not be referred to the Quality of the Service, but to the Authority by which it is eſtabliſhed.

And

And for Preſervation of the Peace of the Church at all Times, and of the Miniſter in Time of Divine Service, it hath been alſo enacted, Diſturbers.

5 & 6 *Ed.* 6. *cap.* 4.

Foraſmuch as of late divers and many outragious and barbarous Behaviours and Acts have been uſed and committed by divers ungodly and irreligious Perſons, by quarrelling, brawling, fraying and fighting openly in Churches and Church-yards; therefore it is enacted by the King our Sovereign Lord, with the Aſſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That if any Perſon whatſoever ſhall, at any Time after the firſt Day of May **next coming, by Words only, quarrel, chide or brawl in any Church or Church-yard, that then it ſhall be lawful unto the Ordinary of the Place where the ſame Offence ſhall be done, and proved by two lawful Witneſſes, to ſuſpend every Perſon ſo offending; that is to ſay, if he be a Layman,** ab ingreſſu Eccleſiæ, **and if he be a Clerk, from the Miniſtration of his Office for ſo long Time as the ſaid Ordinary by his Diſcretion ſhall think meet and convenient, according to the Fault.**

Smiting, &c.

And further be it enacted by the Authority aforeſaid, That if any Perſon or Perſons, after the ſaid firſt Day of May, **ſhall ſmite or lay any violent Hands upon any other, either in any Church or Church-yard, That then,** ipſo facto, **every Perſon ſo offending ſhall be deemed excommunicate, and be excluded from the Fellowſhip and Company of Chriſt's Congregation.**

Striking with any Weapon.

And alſo it is enacted by the Authority aforeſaid, That if any Perſon, after the ſaid firſt Day of May, **ſhall maliciouſly ſtrike any Perſon with any Weapon in any Church or Church-yard; or after the ſame firſt Day of** May **ſhall draw any Weapon in any Church or Church-yard, to the Intent to ſtrike another with the ſame Weapon, that then every Perſon offending, and thereof being convicted by Verdict of twelve Men, or by his own Confeſſion, or by two lawful Witneſſes, before the Juſtices of Aſſiſe, Juſtices of** Oyer **and** Determiner, **or Juſtices of Peace in their Seſſions, by force of this Act ſhall be adjudged by the ſame Juſtices, before whom ſuch Perſon ſhall be convicted, to have one of his Ears cut off: And if the Perſon or Perſons ſo offending have none Ears, whereby they ſhould receive ſuch Puniſhment as is before declared, that then he or they to be marked and burned in the Cheek with an hot Iron, having the Letter F. whereby he or they may be known and taken for Fray-makers and Fighters, and beſides that every ſuch Perſon to be and ſtand** ipſo facto **excommunicated, as is aforeſaid.** Stat. 5 & 6 Ed. 6. c. 4.

Cathedral Churches.

This Statute doth extend as well to Cathedral as Parochial Churches and Church-yards, *per Curiam. Paſch.* 33 *Eliz. B. R. Dethick*'s Caſe, 3 *Croke* 224.

And although this Statute doth ſay, that he who ſmites another, *&c.* ſhall be deemed excommunicate *ipſo facto*, *&c.* yet there ought to be a Declaration in the Eccleſiaſtical Court of the Excommunication, otherwiſe a Perſon excommunicated for an Offence againſt this Statute could not be abſolved from ſuch Excommunication, nor receive Abſolution from the Ordinary. *Paſch.* 4 *Car. C. B. Viner* v. *Eaton*, *Hetley* 86. Alſo he that ſmites another, doth not ſtand excommunicate until he be convicted thereof at Law, and this tranſmitted to the Ordinary. *Trin.* 23 *Car.* 2. *Dyer* v. *Eaſt*, 1 *Vent.* 246.

Coſts given.

When the Proceedings for the Offences againſt this Statute are in the Court Chriſtian, Coſts may be given *pro expenſis litis*, but not *pro damnis*;

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damnis; for if ſo, a Prohibition will lie. *Hill.* 15 *Jac. B. R. Large* v. *Alton*, 2 *Croke* 464. *Paſch.* 4 *Car. C. B. Viner* v. *Eaton*, *Hetley* 86.

Perſon making Defence.

And if any Perſon is beaten in any Church or Church-yard, it is an Offence againſt this Law for him that is ſo beaten or aſſaulted to give back any Blows, or draw a Weapon, *&c.* in his own Defence, as he may do in other Places. *Hill.* 12 *Jac. B. R. Frances* v. *Ley*, 2 *Croke* 367. *Mich.* 12 *Jac. Day* v. *Beddingfield*, *Noy* 104.

Indictment for drawing a Weapon, *&c.* how to be laid.

If the Proceedings be in the Temporal Court by way of Indictment for drawing a Weapon in the Church, *&c.* it muſt be ſaid [With an Intent to ſtrike ſuch a Perſon,] otherwiſe the Indictment will not be good; and in the Caſe upon ſuch an Indictment (where it was not ſo ſaid) it being moved, that the Indictment might be good as for an Aſſault only, ſo as the Offender ſhould be fined for the ſame; yet by the whole Court, the Indictment was void in all, the Concluſion of it being *contra formam ſtatuti*, ſo the Offence laid as an Offence againſt the Statute, the Jury cannot inquire and find an Offence at the Common Law. 33 *Eliz. B. R. Penhallo*'s Caſe, 3 *Croke* 231, the ſame Caſe, 4 *Leon.* 49, and *Trin.* 42 *Eliz. Noy* 171. And alſo in an Indictment upon this Statute for ſtriking in the Church, it muſt be ſhewed that the ſtriking was with a Weapon, for to ſtrike only where no Weapon is uſed, is but Excommunication *ipſo facto*. *Trin.* 12 *Car. B. R. Cholmley*'s Caſe, 1 *Croke* 464. And if a Man takes up a Stone in the Church-yard, and offers to throw it at another, or having a Hatchet or Ax in his Hand, offers to ſtrike another therewith, this is not an Offence within this Statute of 5 & 6 *Ed.* 6, by two Juſtices; for theſe are not ſuch Weapons as may properly be ſaid to be drawn, as a Sword and Dagger, *&c. Dalton's Juſtice of Peace*, *cap.* 23. *fol.* 49. So two Perſons being committed to Priſon by Juſtices of the Peace, for Diſturbance of a Miniſter licenſed during his Office, were diſcharged upon a *Hab' Corp'* by the Court of the *King's Bench*, for that their Commitment was too general, not ſhewing wherein they diſturbed, but only that they, *per apertum factum* diſturbed, *&c.* not ſhewing the particular Fact whereby they did diſturb, *viz.* by Brawling, Fighting or otherwiſe, there being ſeveral Puniſhments to each; but the Court bound them to their good Behaviour for a Year, *&c. Mich.* 29 *Car.* 2. *Dominus Rex* v. *Nichols* and *Robins*, 3 *Keb.* 803.

Ordinary may inhibit, *&c.*

And generally it is, that an Ordinary, for the Peace of the Church, may inhibit any Perſon from making a Diſturbance in the Church, where he foreſees a Diſturbance is likely to be, and if his Inhibition be diſobeyed, may excommunicate for the Contempt. *Hutton*'s Caſe, *Latch* 116. So may the Churchwardens juſtify to appeaſe any Irreverence or Diſorder in the Church, or Church-yard, in Time of Divine Service, as to whip Boys, or take off the Hats of thoſe who irreverently would keep them on, *Mich.* 18 *Car.* 2. *Hawe* v. *Planner*, 2 *Keb.* 124, ſame Caſe, 1 *Sand.* 13. 1 *Lev.* 196, and 1 *Sid.* 301, or a Perſon may be indicted for uſing indecent and irreverent Behaviour in the Church during Divine Service, *Paſch.* 15 *Car.* 2. 1 *Keb.* 491, or a *Supplicavit* may be granted againſt ſuch a Perſon, that is, a Writ, whereby the Party complained of ſhall be bound to give Surety, and be bound to keep the Peace. *Paſch.* 14 *Car.* 2. *The King* v. *Douglaſs*, 1 *Keb.* 290.

Miniſter offending.

And it ſeems that the Miniſter himſelf, if he be guilty of any Miſbehaviour in his Preaching, or otherwiſe in the Church, may be bound to the good Behaviour. *Howſon*'s Caſe, *Hetley* 104.

Motion for a Prohibition to the Eccleſiaſtical Court, to ſtay a Suit there againſt *Wenmouth*, for brawling in the Belfrey and ſtriking a Man there; upon Suggeſtion of the Statute of 5 & 6 *Ed.* 6. *cap.* 4. and alledging that all Statutes are conſtruable by the Common Law, and that *Wenmouth* came there as Mayor to ſuppreſs a Riot. But the Court (abſent *Holt* C. J.) denied a Prohibition, becauſe this Offence was conuſable in the Eccleſiaſtical Court before this Statute, *ratione loci*; and that the Statute, though it provides a Penalty, does not alter the Juriſdiction. 2 *Ld. Raym.* 850, 851. *Wenmouth* v. *Collins.* Diſturbers.

It is alſo enacted, **That if any Perſon or Perſons, at any Time or Times after the tenth Day of** June, **do and ſhall willingly, and of Purpoſe, maliciouſly or contemptuouſly come into any Cathedral or Pariſh Church, Chapel, or other Congregation permitted by this Act, and diſquiet or diſturb the ſame, or miſuſe any Preacher or Teacher, ſuch Perſon or Perſons, upon Proof thereof before any Juſtice of Peace, by two or more ſufficient Witneſſes, ſhall find two Sureties to be bound by Recognizance in the Penal Sum of Fifty Pounds; and in Default of ſuch Sureties, ſhall be committed to Priſon, there to remain till the next General or Quarter-Seſſions. And upon Conviction of the ſaid Offence at the ſaid General or Quarter-Seſſions, ſhall ſuffer the Pains and Penalty of twenty Pounds to the Uſe of the King and Queen's Majeſties, their Heirs and Succeſſors.** Stat. 1 W. & M. cap. 18. 1 W. & M. c. 18. Diſturbing the Congregation, &c.

Beſides the Acts of Parliament which thus ſecure the Miniſter in his quiet Officiating, there be theſe three Canons which alſo reſtrain all Diſturbance and Moleſtation. Canons reſtraining Diſturbance, &c.

CAN. XVIII. A Reverence and Attention to be uſed within the Church in Time of Divine Service.

In the Time of Divine Service, and of every Part thereof, all due Reverence is to be uſed; for it is according to the Apoſtle's Rule, Let all Things be done decently, and according to Order. *Anſwerable to which Decency and Order, we judge theſe our Directions following: No Man ſhall cover his Head in the Church or Chapel in the Time of Divine Service, except he have ſome Infirmity, in which Caſe let him wear a Night-cap or Coif. All Manner of Perſons then preſent ſhall reverently kneel upon their Knees when the General Confeſſion, Litany, and other Prayers are read, and ſhall ſtand up at the ſaying of the Belief, according to the Rules in that Behalf preſcribed in the Book of Common Prayer; and likewiſe when in Time of Divine Service the Lord Jeſus ſhall be mentioned, due and lowly Reverence ſhall be done by all Perſons preſent, as it hath been accuſtomed, teſtifying by theſe outward Ceremonies and Geſtures their inward Humility, Chriſtian Reſolution, and due Acknowledgment, that the Lord Jeſus Chriſt, the true Eternal Son of God, is the only Saviour of the World, in whom alone all the Mercies, Graces, and Promiſes of God to Mankind for this Life and the Life to come are fully and wholly compriſed. None, either Man, Woman or Child, of what Calling ſoever, ſhall be otherwiſe at ſuch Times buſied in the Church, than in quiet Attendance to hear, mark, and underſtand that which is read, preached or miniſtred, ſaying in their due Place audibly with the Miniſter, the Confeſſion, the Lord's Prayer, and the Creed, and making ſuch other Anſwers to the publick Prayers as*

are

Reading of Acts, &c.

are appointed in the Book of Common Prayer; neither ſhall they diſturb the Service or Sermon by walking or talking, or any other Way, nor depart out of the Church during the Time of Service or Sermon, without ſome urgent or reaſonable Cauſe.

CAN. XIX. Loiterers not to be ſuffered near the Church in Time of Divine Service.

The Church-wardens or Queſt-men, and their Aſſiſtants, ſhall not ſuffer any idle Perſons to abide, either in the Church-yard or Church-porch, during the Time of Divine Service or Preaching, but ſhall cauſe them either to come in, or to depart.

CAN. CXI. Diſturbers of Divine Service to be preſented.

In all Viſitations of Biſhops and Archdeacons, the Church-wardens or Queſt-men, and Sides-men, ſhall truly and perſonally preſent the Names of all thoſe which behave themſelves rudely and diſorderly in the Church, or which by untimely ringing of Bells, by walking, talking, or other Noiſe, ſhall hinder the Miniſter or Preacher.

CHAP. XXXV.

The Duty of Miniſters in reading ſome particular Acts of Parliament and Proclamations of the King; as likewiſe Briefs, Citations, &c.

Reading Act of Parliament on the 5th of *November.*

THE legiſlative Authority of this Kingdom, for the better Promulgation of ſome good and wholeſome Laws, has thought fit to require the publick Reading of them in the Church after Morning Prayer or Preaching, to the End that all Chriſtian People may have the more eaſy and more perfect Knowledge of them, and be more inclined to pay their Obedience to them. The firſt Statute appointed to be read in Churches, was (I think) *Anno* 3 *Jac.* 1. *c.* 1. *An Act for a Publick Thankſgiving to Almighty God every Year on the Fifth Day of* November, as before recited, *Chap* 32. the Annual Reading preſcribed in theſe Words:

3 Jac. 1. c. 1. And becauſe all and every Perſon may be put in mind of his Duty, and be then better prepared to the ſaid Holy Service, be it enacted by the Authority aforeſaid, that every Miniſter ſhall give Warning to his Pariſhioners publickly in the Church, at Morning Prayer the Sunday before every ſuch Fifth Day of November, for the due Obſervation of the ſaid Day; and that after Morning Prayer or Preaching upon the ſaid Fifth Day of November, they read publickly, diſtinctly and plainly this preſent Act.

The

The next Statute appointed to be read in Churches, was (I think) *Anno* 12 *Car.* 2. *c.* 14. *An Act for a perpetual Anniverſary Thankſgiving on the Nine and Twentieth Day of* May, as recited in the foregoing *Chap.* 32. and the publick Reading of it injoined in theſe Words:

Reading of Acts, &c. *Simile* on the 29th Day of *May.*

And to the End that all Perſons may be put in mind of their Duty thereon, and be the better prepared to diſcharge the ſame with that Piety and Devotion as becomes them, be it further enacted, That every Miniſter ſhall give Notice to his Pariſhioners publickly in the Church at Morning Prayer, the Lord's Day next before every ſuch Twenty-ninth Day of May, **for the due Obſervation of the ſaid Day, and ſhall then likewiſe publickly and diſtinctly read this preſent Act to the People.**

Where *Note*, That although theſe two Acts of Parliament be equally injoined to be read in Churches, yet the Time and Manner of reading them are different. For *Firſt*, As to the Time of Reading; the Act for the 5th of *November* is to be read *upon the ſaid Day*, and not when the Notice of it was given the *Sunday* before; whereas the Act for the 29th of *May* is to be read not on the Feſtival itſelf, but on *the Lord's Day next before every ſuch Twenty-ninth Day of* May. Then *Secondly*, In a differing Manner; the Act for the 5th of *November* to be read *after Morning Prayer or Preaching*; but the Act for the 29th of *May* at *Morning Prayer* when Notice is publickly given in the Church for the due Obſervation of the ſaid Day, that is, immediately after the *Nicence* Creed.

The third and laſt Statute appointed to be read in Churches for the Terror of Evil Doers, is *Anno* 19 *Geo.* 2. intitled,

An Act more effectually to prevent profane Curſing and Swearing.

Foraſmuch as the horrid, impious and execrable Vices of profane Curſing and Swearing (ſo highly diſpleaſing to Almighty God, and loathſome and offenſive to every Chriſtian) are become ſo frequent and notorious, that unleſs ſpeedily and effectually puniſhed, they may juſtly provoke the Divine Vengeance to increaſe the many Calamities theſe Nations now labour under: And whereas the Laws now in Being for puniſhing thoſe Crimes, have not anſwered the Intents for which they were deſigned, by Means of Difficulties attending the putting ſuch Laws in Execution: For Remedy whereof, may it pleaſe your moſt excellent Majeſty that it may be enacted; and be it enacted by the King's moſt excellent Majeſty, by and with the Advice and Conſent of the Lords Spiritual and Temporal and Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That from and after the Firſt Day of June **One thouſand ſeven hundred and forty-ſix, if any Perſon or Perſons ſhall profanely Curſe or Swear, and be thereof convicted on the Oath of any One or more Witneſs or Witneſſes, before any one Juſtice of the Peace for any County, City, Riding, Diviſion or Liberty, or before the Mayor, Juſtice, Bailiff, or other chief Magiſtrate, of any City or Town Corporate, or by the Confeſſion of the Party offending, every Perſon or Perſons ſo offending ſhall forfeit and loſe the reſpective Sums herein after mentioned; (that is to ſay)** Preamble.

Every Day Labourer, Common Soldier, Common Sailor, and Common Seaman, One Shilling; The Penalty of profane Curſing and Swearing.

Reading of Acts, &c.

And every other Person under the Degree of a Gentleman, Two Shillings;

And every Person of or above the Degree of a Gentleman, Five Shillings.

And in case any such Person or Persons shall, after Conviction, offend a second Time, every such Person shall forfeit and lose Double; and for every other Offence after a Second Conviction, Treble the Sum first forfeited by any Offender, for profane Cursing and Swearing as aforesaid.

Profane Swearers in the Hearing of any Justice or other chief Magistrate,

And be it further enacted by the Authority aforesaid, That in case any Person or Persons shall profanely Swear or Curse in the Presence and Hearing of any Justice of the Peace for any County, Riding, Division or Liberty; or in the Presence or Hearing of any Mayor, Justice, Bailiff, or other Chief Magistrate of any Town Corporate; every such Justice, Mayor, or other Chief Magistrate as aforesaid, shall, and is hereby authorized and required to convict every such Offender of such Offence (in the Form and Manner herein after set forth) without any other Proof whatsoever.

to be convicted without other Proof.

Constables, &c. to seize Persons profanely swearing, if unknown,

And be it further enacted by the Authority aforesaid, That in case any Person or Persons shall profanely Swear or Curse in the Presence and Hearing of any Constable, Petty Constable, Tythingman, or other Peace Officer, it shall and may be lawful for any and every such Constable, Petty Constable, Tythingman, or other Peace Officer, and they and each of them are hereby authorized and required (in case any such Person shall be unknown to such Constable, Petty Constable, Tythingman, or other Peace Officer) to seize, secure and detain such Offender or Offenders, unknown to him or them as aforesaid; and such Offender or Offenders forthwith to carry before the next Justice of the Peace for the County, Riding, Division, or Liberty, or before the Mayor, Justice, Bailiff, or other chief Magistrate of the Town Corporate, wherein such Offence was committed; and the said Justice, Mayor, or other chief Magistrate, is hereby authorized and required, on the Oath of such Constable, Petty Constable, Tithingman, or other Peace Officer, to convict the Offender in Manner and Form herein after directed: And in case any such Person so profanely Swearing or Cursing in the Presence or Hearing of any such Constable, Petty Constable, Tithingman, or other Peace Officer, shall be known to any of them, every such Constable, Petty Constable, Tythingman, or other Peace Officer, shall, and is hereby required, speedily to make Information before some Justice of the Peace for the County, Riding, Division or Liberty, Mayor, Justice, Bailiff or chief Magistrate of any Town Corporate, as aforesaid, in order that the Offender or Offenders may be by such Justice, Mayor, Bailiff or chief Magistrate, convicted thereof, and punished for the same, in Manner and Form as in and by this Act is directed.

and bring them before the next Justice, &c.

who is to convict them on the Officer's Oath;

and if they are known, to make Information against them.

Justices, &c. upon Information, to order the Offender to appear, &c.

And be it further enacted by the Authority aforesaid, That every such Justice of the Peace, Mayor, or other chief Magistrate, as aforesaid, shall immediately, upon Information given upon Oath of any such Constable, Petty Constable, Tythingman, or other Peace Officer, or of any other Person whatsoever, cause the Offender or Offenders to appear before him; and upon such Information being proved as aforesaid, convict such Offender or Offenders in such Man-

ner as in and by this Act is prescribed. And in case such Offender or Offenders shall not immediately pay down the respective Sum so forfeited, or give Security to the Satisfaction of such Justice, Mayor, or other chief Magistrate, before whom such Conviction is made, it shall and may be lawful for such Justice, Mayor, or other chief Magistrate, to commit the Offender to the House of Correction for the County, Riding, Division, Liberty, City, or Town Corporate, where such Offence wall be committed, there to remain, and be kept to hard Labour, for the Space of Ten Days.

Reading of Acts, &c.

Penalty to be paid down, or Security given, or the Offender to be committed for 10 Days to the House of Correction.

Provided always, and it is hereby enacted by the Authority aforesaid, that in case any Common Soldier belonging to any Regiment in his Majesty's Service, or any Common Sailor or Common Seaman belonging to any Ship or Vessel, shall be convicted of prokane Cursing or Swearing as aforesaid, and shall not immediately pay down the Penalty by him forfeited, or give Security for the same as aforesaid, and also the Cost of the Information, Summons and Conviction, as in and by this Act is directed, every such Common Soldier, Common Sailor or Common Seaman, instead of being committed to the House of Correction, as by this Act is directed, shall, by the said Justice, Mayor, Bailiff, or other Head Officer, be ordered to be publickly set in the Stocks for the Space of One Hour, for every single Offence; and for any Number of Offences, whereof he shall be convicted at one and the same Time, Two Hours.

Common Soldiers and Sailors not paying Penalty, &c. to be set in the Stocks.

And be it further enacted by the Authority aforesaid, That if any Justice of the Peace of any County, Riding, Division or Liberty, Mayor, Justice, Bailiff, or other chief Magistrate of any Town Corporate, shall wilfully and wittingly omit the Performance of his Duty in the Execution of this Act, he shall forfeit and lose the Sum of Five Pounds; one Moiety thereof to the Use of the Informer, and the other Moiety thereof to the Use of the Poor of the Parish wherein such Justice, Mayor, or chief Magistrate shall reside; to be recovered by Action, Suit, Bill or Plaint, in any of his Majesty's Courts of Record at Westminster; wherein no Essoin, Protection, or Wager of Law shall be allowed, or more than one Imparlance.

Justices, &c. not doing their Duty, forfeit 5 *l.*

And be it further enacted by the Authority aforesaid, That if any Constable, Petty Constable, Tythingman, or other Peace Officer, shall wilfully and wittingly omit the Performance of his Duty in the Execution of this Act, and be thereof convicted by the Oath of one Witness, before any Justice of the Peace for any County, Riding, Division or Liberty, or before the Mayor, Justice, Bailiff, or other chief Magistrate, of any Town Corporate, every such Constable, Petty Constable, Tythingman, or other Peace Officer so offending shall forfeit and lose the Sum of Forty Shillings; to be levied and recovered by Distress and Sale of the Offender's Goods and Chattels, by Virtue of a Warrant under the Hand and Seal of such Justice, Mayor, or other chief Magistrate, and to be disposed of, one Moiety thereof to the Use of the Informer, and the other Moiety to the Use of the Poor of the Parish where such Offence shall be committed; and in case such Offender shall not have sufficient Goods and Chattels, whereon to levy the said Penalty, it shall and may be lawful for such Justice, Mayor, or other Magistrate, to commit such Offender to the House of Correction for the County, Riding, Division,

Constables, &c. not doing their Duty, forfeit 40 *s.* and for want of Distress, to be committed for 1 Month to the House of Correction.

Reading of Acts, &c.

sion, Liberty, City, or Place, there to remain, and be kept to hard Labour for the Space of one Month.

And be it further enacted by the Authority aforesaid, That all and every Justice of the Peace for any County, Riding, Division or Liberty, and all and every Mayor, Justice, Bailiff, or other chief Magistrate of any Town Corporate, before whom any Person or Persons shall be convicted of profane Swearing or Cursing, shall cause the Conviction to be drawn up in the Words and Form following:

Form of Conviction;

Middlesex, to wit, BE it remembered, that on the Day of in the Year of his Majesty's Reign, *A. B.* was convicted before me (*one of His Majesty's Justices of the Peace for the County, Riding, Division or Liberty aforesaid; or before me, Mayor, Justice, Bailiff, or other chief Magistrate of the City or Town of within the County of , as the Case shall be*) of swearing one or more profane Oath or Oaths, or of cursing one or more profane Curse or Curses, *as the Case shall be.*

Given under my Hand and Seal, the Day and Year aforesaid.

to be final;

Which said Form and Conviction shall not be liable to be removed by Certiorari into his Majesty's Court of King's Bench, but shall be deemed and taken to be final to all Intents and Purposes whatsoever; and the said Justice, Mayor, Bailiff, or other chief Magistrate, before whom such Conviction shall be made, shall cause the same to be fairly wrote over upon Parchment, and returned to the next General or Quarter-Sessions of the Peace for the County wherein such Conviction was made, to be filed by the Clerk of the Peace, and remain and be kept amongst the Records of the said County.

and to be wrote over on Parchment, and returned to the next Sessions, to be filed, &c.

Justices, &c. to put this Act in Execution indiscriminately.

And be it further enacted by the Authority aforesaid, That all and every Justice of the Peace for any County, Riding, Division or Liberty, and every Mayor, Justice, Bailiff, or other chief Magistrate of any City or Town Corporate, may, and they are hereby authorized and required to put this Act in Execution against any Person or Persons within their several Jurisdictions, although such Justice, Mayor, Bailiff, or other chief Magistrate shall be rated, and pay to the Relief of the Poor of any Parish, Town or Place, where any Offence, contrary to the true Intent and Meaning of this Act, shall be committed; any Law or Statute to the contrary in any wise notwithstanding.

Penalties how to be disposed of.

And be it further enacted by the Authority aforesaid, That all and every Penalty or Penalties inflicted by this Act, upon any Person or Persons for profane Cursing and Swearing, shall be disposed of for the Benefit of the Poor of the Parish wherein such Offence was committed; and that all Charges of the Information and Conviction of any such Offender shall be borne and paid by the Party offending, if able, over and above the Penalties inflicted by this Act, which Charges shall be settled and ascertained by the Justice of Peace, Mayor, Bailiff, or other chief Magistrate, before whom such Conviction shall be made. And in case such Party shall not be able, or shall not immediately pay the said Charges and Expences, or give Security for the same to the Satisfaction of such Justice of the Peace, Mayor, Bailiff, or other chief Magistrate, it shall and may

Offenders to pay all Charges over and above the Penalties.

be

be lawful for the Juſtice, Mayor, Bailiff, or other chief Magiſtrate, before whom ſuch Information and Conviction ſhall be made, to commit ſuch Offender to the Houſe of Correction as aforeſaid, there to remain, and be kept to hard Labour, for the Space of Six Days, over and above ſuch Time for which ſuch Offender may be committed in Default of Payment of the Penalties inflicted by this Act; and in ſuch Caſe no Charges of Information and Conviction ſhall be paid by any Perſon whatſoever.

Reading of Acts, &c. or to be committed to the Houſe of Correction for ſix Days extraordinary.

And it is hereby further enacted, That if any Action or Suit ſhall be commenced or brought againſt any Juſtice of the Peace, Conſtable, or other Officer or Perſon whatſoever, for doing, or cauſing to be done, any thing in purſuance of this Act, concerning the ſaid Offences, the Defendant in that Action may plead the General Iſſue, and give the Special Matter in Evidence; and if upon ſuch Action Verdict be given for the Defendant, or the Plaintiff become nonſuit, or diſcontinue his Action, then the Defendant ſhall have Treble Coſts.

General Iſſue. Treble Coſts.

Provided always, and it is hereby enacted, That no Perſon ſhall be proſecuted or troubled for any Offence againſt this Statute, herein before or herein after mentioned, unleſs the ſame be proved or proſecuted within Eight Days next after the Offence committed.

Proof, &c. to be made within eight Days.

And it is further enacted by the Authority aforeſaid, That this Act ſhall be publickly read Four ſeveral Times in the Year, in all Pariſh Churches and publick Chapels, by the Parſon, Vicar, or Curate of the reſpective Pariſhes or Chapels, immediately after Morning or Evening Prayer, on Four ſeveral Sundays (that is to ſay) the Sunday next after the Twenty-fifth Day of March, Twenty fourth Day of June, Twenty-ninth Day of September, and Twenty-fifth Day of December, in every Year; or in caſe Divine Service ſhall not be performed in any ſuch Church or Chapel on any of the Sundays before mentioned, then upon the Firſt Sunday after any of the ſaid quarterly Days on which Divine Service ſhall happen to be performed in any ſuch Church or Chapel, under the Pain of forfeiting the Sum of Five Pounds for every ſuch Omiſſion or Neglect; to be levied by Diſtreſs and Sale of the Offender's Goods and Chattels, by virtue of a Warrant under the Hand and Seal of any One Juſtice, Mayor, Bailiff, or other chief Magiſtrate, as aforeſaid.

Act to be read quarterly in all Churches, &c. under Penalty of 5 *l.* for every Neglect.

And be it further enacted by the Authority aforeſaid, That the Clerk of the Juſtice, Mayor, Bailiff, or other chief Officer, before whom Proceedings upon this Act ſhall be had, ſhall and may receive and take for the Informations, Summons, and Conviction of every Offender againſt this Act, the Sum of One Shilling, and no more.

Fee of 1 *s.* to the Juſtice's, &c. Clerk.

And be it further enacted by the Authority aforeſaid, That from and after the ſaid Firſt Day of June One thouſand ſeven hundred and forty-ſix, an Act made in the Twenty-firſt Year of the Reign of King James the Firſt, intituled, An Act to prevent and reform profane Curſing and Swearing, and alſo an Act made in the Sixth and Seventh Years of the Reign of King William the Third, intituled, An Act for the more effectual ſuppreſſing profane Curſing and Swearing, ſhall be and are hereby repealed.

Acts of 21 *Jac.* 1. and 6 & 7 *W.* 3. repealed.

Note; The publick Reading of the former Acts was injoined by Precept only; this alone by Penalty on the Miniſter omitting or neglecting his Duty herein. But obſerve, the Duty being made perſonal, and extending

How it extends to Curates, &c.

Reading of Acts, &c.

tending to the Parſon, Vicar or Curate, the Penalty ſhall be levied not on the Benefice, nor on the Incumbent, if he be not himſelf Reſident, but on the Curate, or other Perſon allowed to officiate. *Note* further, There is this Difference in a Juſtice of Peace and a Miniſter becoming obnoxious to Penalties in this Act; the Juſtice of Peace or chief Magiſtrate ſhall incur no Forfeiture, unleſs he *wilfully and wittingly omit the Performance of his Duty*, but the Miniſter ſhall be liable to Forfeiture for the bare Omiſſion of his Duty, though ſuch Omiſſion were not wilful, but caſual and undeſigned.

Reading it recommended by the Archbiſhop.

The diligent Reading of the Act of King *W.* 3. againſt Swearing, *&c.* was expreſly recommended by the Archbiſhop of *Canterbury* in his Letter to the Right Reverend the Lords Biſhops of his Province, *July* 16, 1695, in theſe Words; *In the firſt Place, it is the King's Pleaſure that you ſhould take Care concerning the Act againſt prophane Curſing and Swearing, not only that it be publickly read as the Law has in that Caſe provided, but that the Clergy be directed, both in their Catechizing and Sermons, to inſiſt often upon thoſe Points, to the End that, by God's Bleſſing upon their faithful Endeavours, a Stop may be put to thoſe execrable Wickedneſſes, which, if they be ſuffered to continue, will bring down God's heavy Judgments upon this Church and Nation. Secondly, There are alſo other Acts to be read publickly in Churches, which yet are not read (as I underſtand) in many Places. I deſire you to remedy that Neglect.*

Again in his Circular Letter.

The ſame Honourable Prelate has given this good Advice in his Circular Letter, *A. D.* 1699, *Which Information and Requeſt, eſpecially in the Caſe of ſuch incorrigible Offenders, can be made by none ſo properly as by the Clergy, who may beſt be ſuppoſed to underſtand the Neceſſity there is of having Recourſe to the Civil Magiſtrate. And ſince our Law-givers have enacted theſe Temporal Puniſhments on purpoſe to aſſiſt us in the Diſcharge of our Miniſtry, it would be a great Failing in us not to make uſe of them, when all other Methods have been tried to little or no Effect.*

Every pious Perſon ſhould, if need be, be put in mind by the Clergy, that he ought to think himſelf obliged to uſe his beſt Endeavours to have ſuch Offenders puniſhed by the Civil Magiſtrate, as can no otherwiſe be amended. And that when he hears his Neighbour ſwear, or blaſpheme the Name of God, or ſees him offend in Drunkenneſs, or Prophanation of the Lord's Day, he ought not to neglect to give the Magiſtrate Notice of it. In ſuch a Caſe, to be called an Informer, will be ſo far from making any Man odious in the Judgment of ſober Perſons, that it will tend to his Honour, when he makes it appear by his unblameable Behaviour, and the Care he takes of himſelf and his own Family, that he doth it purely for the Glory of God, and the Good of his Brethren.

The Benefit of ſuch publick Reading.

Although no other Statutes of this Realm are injoined to be read in Churches, but ſuch only as have been before mentioned; yet if we conſider the good Uſe and Benefit of ſuch publick Reading: As *Firſt*, That by this Means many of the poor and ordinary People come to the Notice of the Law, and the Knowledge of their Duty, of which they might otherwiſe have remained ignorant, or at leaſt inadvertent. *Secondly*, That ſuch ſolemn Way of Reading after Divine Service in the Church does raiſe more Attention, and leave a better Impreſſion, than if the ſame were promulged in any other Place at any ordinary Time. *Thirdly*, That looſe and wicked People, by hearing Sentence openly pronounced upon them, may be the more afraid to offend, and may be reſtrained by Terror, when they would not have obeyed for *Conſcience Sake*. *Fourthly*, That good Magiſtrates and conſcientious Informers may be the more encouraged

Reading of Acts, &c.

couraged to discharge their Duty, when the Powers committed to them, and the Execution pressed upon them, are openly declared in the Face of the Congregation. *Fifthly*, That Ministers may with greater Zeal rebuke Vice and Prophaneness, when they can argue from Human as well as Divine Laws, and can threaten a present Vengeance, as well as a future Judgment. *Sixthly*, That all Christian Subjects may be the better disposed to *lead a quiet and peaceable Life in all Godliness and Honesty*, when they hear the Civil Government concerned for the Honour of Religion, and finding the Magistrate so becoming the proper *Ministers of God*. I say, considering these and many other Advantages of Penal Statutes against Immorality and Prophaneness being read in Churches, it were to be wished that the like Proviso had been made for those other Acts of Parliament that condemn and punish the more notorious Sins; such, suppose, as *Anno* 5 *Eliz. cap.* 9. *An Act for Punishment of such Persons as shall procure or commit any wilful Perjury.* Anno 4 Jac. 1. c. 5. *An Act for repressing the odious and loathsome Sin of Drunkenness.* Anno 21 Jac. 1. cap. 7. *An Act for the better repressing of Drunkenness, and restraining the inordinate Haunting of Inns, Alehouses, and other Victualling-houses.* Anno 29 Car. 2. cap. 7. *An Act for the better Observation of the Lord's Day, commonly called Sunday.* Anno 9 & 10 W. 3. *An Act for the more effectual suppressing of Blasphemy and Prophaneness.* And (to read within the Cities of *London* and *Westminster*, and the Liberties of the same) *Anno* 3 *Jac.* 1. *cap.* 21. *An Act to restrain the Abuses of Players.* If these and the like wholesome Laws made, or to be made, were injoined to be read in Churches upon several stated *Sundays*, it would soon teach our common People the more readily to understand their Duty, and the more cautiously to practise it.

Want of Proviso's, and of the Acts.

But there is one Thing to be wished for in this Matter; which is, that when Acts of Parliament are injoined to be read in Churches, there might be some Proviso added, that the Church-wardens should be obliged to procure such Acts at the Charge of each Parish, and preserve them as Goods of the Church for successive Use and Application of them; lest for want of such Provision it should come to pass, (what I doubt has already often happened) that in remote Villages and poor Benefices the Ministers have no due Notice of such Acts to be read, or be not so able to purchase them; and the two Acts for the 5th of *November* and the 29th of *May* have been very often neglected to be read in Country Churches; and even in Cities, Towns, and Corporations, Ministers were forced to read them out of a large Statute Book brought into the Desk in not so decent and reverent a Manner, because those Acts were not in sufficient Numbers singly printed, and because the Clergy could not so well procure them.

Care of the Archbishop for Remedy.

This Mischief has been in great Measure remedied by the vigilant and pious Care of the Most Reverend Father in God, *Thomas* Lord Archbishop of *Canterbury*, who, for the better *Accommodation of the Clergy, and the good of the Publick*, has caused to be printed and published in a small and cheap Volume, *Octavo*, *A Collection of Articles, Canons, Injunctions*, &c. *together with the several Acts of Parliament concerning Ecclesiastical Matters, some whereof are to be read in Churches*, London, MDCXCIX.

Proclamations to be read.

The Parish-Priest is likewise to observe, that beside the express Acts of Parliament before-mentioned, His late Majesty, *being thereunto moved by the pious Address of the Commons in Parliament assembled*, did *by the Advice of his Privy Council* issue out two successive Proclamations, *for preventing*

Proclamations.

preventing and punishing Immorality and Prophaneness; and *charged and commanded every Minister in his respective Parish or Chapelry to read, or cause to be read, the said Proclamations at least Four Times in every Year,* immediately *after Divine Service.*

The first Proclamation for preventing and punishing Immorality and Prophaneness.

William R.

WHEREAS we cannot but be deeply sensible of the great Goodness and Mercy of Almighty God in putting an End to a long, bloody and expensive War, by the Conclusion of an honourable Peace, so we are not less touched with a Resentment, that notwithstanding this and many other great Blessings and Deliverances, Impiety, Prophaneness and Immorality do still abound in this our Kingdom: And whereas nothing can prove a greater Dishonour to a well ordered Government, where the Christian Faith is professed, nor is likelier to provoke God to withdraw his Mercy and Blessings from us, and instead thereof to inflict heavy and severe Judgments upon this Kingdom, than the open and avowed Practice of Vice, Immorality and Prophaneness: which amongst many Men has too much prevailed in this our Kingdom of late Years, to the high Displeasure of Almighty God, the great Scandal of Christianity, and the ill and fatal Example of the rest of our Loving Subjects, who have been soberly educated, and whose Inclinations would lead them to the Exercise of Piety and Virtue, did they not daily find such frequent and repeated Instances of dissolute Living, Prophaneness and Impiety, which has in a great Measure been occasioned by the Neglect of the Magistrates not putting in Execution those good Laws which have been made for suppressing and punishing thereof, and by the ill Example of many in Authority, to the great Dishonour of God, and Reproach of our Religion. Wherefore, and for that we cannot expect Increase or Continuance of the Blessings we and our Subjects injoy, without providing Remedies to prevent the like Evils for the future, we think ourselves bound by the Duty we owe to God, and the Care we have of the People committed to our Charge, to proceed in taking effectual Course, that Religion, Piety and good Manners may, according to our hearty Desire, flourish and increase under our Administration and Government; and being thereunto moved by the pious Address of the Commons in Parliament assembled, we have thought fit, by the Advice of our Privy Council, to issue this our Royal Proclamation, and to declare our Royal Purpose and Resolution to discountenance and punish all Manner of Vice, Immorality and Prophaneness in all Persons from the highest to the lowest Degree within this our Realm, and particularly in such who are imployed near our Royal Person; and that for the greater Incouragement of Religion and Morality, we will upon all Occasions distinguish Men of Piety and Virtue by Marks of our Royal Favour. And we do expect, that all Persons of Honour, or in Place of Authority, will to their utmost contribute to the discountenancing Men of dissolute and debauched Lives, that they being reduced to Shame and Contempt, may be inforced the sooner to reform their ill Habits and Practices, that the Displeasure of good Men toward them may supply what the Law (it may be) cannot wholly prevent. And for the more effectual reforming these Men, who are a Discredit to our Kingdom, our further Pleasure is, and we do hereby strictly charge and command all our Judges, Mayors, Sheriffs, Justices of the Peace, and all other our Officers and Ministers, both Ecclesiastical and Civil, and other our Subjects whom it may concern,

Proclamations.

concern, to be very vigilant and ſtrict in the Diſcovery, and the effectual Proſecution and Puniſhment of all Perſons who ſhall be guilty of exceſſive Drinking, Blaſphemy, prophane Swearing and Curſing, Lewdneſs, Prophanation of the Lord's Day, or other diſſolute, immoral or diſorderly Practices, as they will anſwer it to Almighty God, and upon Pain of our Higheſt Diſpleaſure. And for the more effectual Proceedings herein, we do hereby direct and command our Judges of Aſſizes and Juſtices of Peace to give ſtrict Charges, at the reſpective Aſſizes and Seſſions, for the due Proſecution and Puniſhment of all Perſons that ſhall preſume to offend in any the Kinds aforeſaid; and alſo of all Perſons that contrary to their Duty ſhall be remiſs or negligent in putting the ſaid Laws in Execution; and that they do, at their reſpective Aſſizes and Quarter-Seſſions of the Peace, cauſe this our Proclamation to be publickly read in open Court immediately before the Charge is given. And we do hereby further charge and command every Miniſter in his reſpective Pariſh or Chapel to read, or cauſe to be read, this our Proclamation at leaſt Four Times in every Year, immediately after Divine Service, and to incite and ſtir up their reſpective Auditories to the Practice of Piety and Virtue, and the avoiding of all Immorality and Prophaneneſs. And to the End, that all Vice and Debauchery may be prevented, and Religion and Virtue practiſed by all Officers, private Soldiers, Mariners or others, who are imployed in our Service either by Sea or Land, we do hereby ſtrictly charge and command all our Commanders and Officers whatſoever, that they do take Care to avoid all Prophaneneſs, Debauchery, and other Immoralities, and that by the Piety and Virtue of their own Lives and Converſations, they do ſet good Examples to all ſuch as are under their Authority, and likewiſe to take Care, and inſpect the Behaviour and Manners of all ſuch as are under them, and to puniſh all thoſe who ſhall be guilty of any the Offences aforeſaid. And whereas ſeveral wicked and prophane Perſons have preſumed to print and publiſh ſeveral pernicious Books and Pamphlets, which contain in them impious Doctrines againſt the Holy Trinity, and other fundamental Articles of our Faith, tending to the Subverſion of the Chriſtian Religion; therefore for the puniſhing the Authors and Publiſhers thereof, and for the preventing ſuch impious Books and Pamphlets being publiſhed or printed for the future, we do hereby ſtrictly charge and prohibit all Perſons that they do not preſume to write, print or publiſh any ſuch pernicious Books or Pamphlets, under the Pain of incurring our High Diſpleaſure, and of being puniſhed according to the utmoſt Severity of the Law. And we do hereby ſtrictly charge and require all our loving Subjects to diſcover and apprehend ſuch Perſon and Perſons whom they ſhall know to be Authors or Publiſhers of any ſuch Books or Pamphlets, and to bring them before ſome Juſtice of Peace or chief Magiſtrate, in order that they be proceeded againſt according to Law.

Given at our Court at *Kenſington* the Four and twentieth Day of *February* 1697, in the Tenth Year of our Reign.

A Second Proclamation for preventing and puniſhing Immorality and Prophaneneſs.

William R.

WHEREAS nothing can prove a greater Diſhonour to a well ordered Government, where the Chriſtian Faith is profeſſed, nor is likelier to provoke God to withdraw his Mercy and Bleſſings from us, &c. *we do hereby ſtrictly charge and command all our Commanders and*

Writs and Citations.

Officers whatsoever, That they do take Care to avoid all Prophaneneſs, Debauchery, and other Immoralities, and that by the Piety and Virtue of their own Lives and Converſations, they do ſet good Examples to all ſuch as are under their Authority, and likewiſe take Care, and inſpect the Behaviour and Manners of all ſuch as are under them, and to puniſh all thoſe who ſhall be guilty of any of the Offences aforeſaid.

Given at our Court at *Kenſington* the Ninth of *December* 1699, in the Eleventh Year of our Reign.

Note; This ſecond Proclamation is only a new Edition of the former, or a further Publication or Reinforcement of it, only leaving out the Preface of the firſt, which related to that Juncture of Time, *the Concluſion of an Honourable Peace*; and likewiſe omitting the laſt Paragraphs of it concerning the *wicked and prophane Perſons who have preſumed to print and publiſh ſeveral pernicious Books and Pamphlets*, this being now provided for by Act of Parliament made 9 & 10 *W.* 3. So as this latter Proclamation was only publiſhed to ſuperſede thoſe Parts of the former, which were eſpecially adapted to that Seaſon, *Feb.* 24. 1697, and not ſo proper to *Decemb.* 9. 1699.

Royal Briefs, &c.

The Clergy are alſo obliged to read in their Churches the Royal Briefs or Letters Patent, to aſk and receive the Charitable Benevolence of well diſpoſed Perſons, upon Occaſion of great Sufferings and Loſſes by Fire, or other Caſualty. Though ſome have cenſured ſuch Briefs as arbitrary, and more than legal, eſpecially becauſe of the *Non Obſtante* Clauſe, *Any Act or Statute to the contrary in any wiſe notwithſtanding*.

Citations, &c.

Beſides Acts of Parliament, Proclamations and Briefs, the Parochial Miniſter is by Canonical Obedience obliged to read all *Citations* and *Forms of Excommunication*, and other regular Precepts and Orders that are injoined by the Dioceſan, or other Ordinary of the Place. And yet when any Forms of Admonition, Cenſure or Inquiry do iſſue out of the Spiritual Court drawn up in *Latin*, it may be a juſt Queſtion, Whether the Miniſter is bound to read ſuch original Writing, or not rather a Tranſlation or familiar Explication of it? For I think it is not agreeable to the Rules of our Church, nor indeed to the Nature of our Reformed Religion, to have any Thing read in our Congregations in a *Tongue not underſtood by the People*.

Latin.

Proclaiming of Courts, &c. an Abuſe.

There is one Abuſe and Innovation, brought into ſome Country Churches, of cauſing the Pariſh Clerk or Sexton to proclaim in the Church, the *Keeping of Courts, the Pariſh Meetings*, and other occaſional Summons; nay, ſometimes to publiſh Hues and Cries, and Inquiries after loſt Goods, &c. all which are unſuitable to the Place, and irregular in the Perſon. If in Country Villages it may be convenient to notify ſuch Things when the People are moſt aſſembled together, yet ſuch Notice ſhould be given in the Church-yard or Porch, not in the Body of the Church, or at leaſt, not there by any Lay-Officer; for the Rubrick does expreſly declare, That *nothing ſhall be proclaimed or publiſhed in the Church, during the Time of* Divine Service, *but by the Miniſter*; *nor by him any Thing but what is preſcribed in the Rules of this Book, or injoined by the King, or by the Ordinary of the Place.*

Johnſon's Defence.

CHAP.

CHAP. XXXVI.

Farms, &c.

Spiritual Perſons not to take Farms, or buy or ſell for Lucre or Profit, &c.

THAT a Miniſter may yet the better perform his Duty, *viz.* without Diſtraction (as far as may be), it hath been enacted as followeth: For the more quiet and virtuous Increaſe and Maintenance of Divine Service, the Preaching and Teaching the Word of God, with godly and good Example giving, the better Diſcharge of Curates, the Maintenance of Hoſpitality, the Relief of poor People, the Increaſe of Devotion, and good Opinion of the Layity toward the Spiritual Perſons; Be it enacted, ordained and eſtabliſhed by the King our Sovereign Lord, with the Aſſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by Authority of the ſame, That no Spiritual Perſons, Secular or Regular, of what Degree ſoever he or they be, ſhall from henceforth take to farm to himſelf, or to any Perſon or Perſons to his Uſe, of the Leaſe or Grant of the King our Sovereign Lord, nor of any other Perſon or Perſons, by Letters Patents, Indentures, Writings, by Word or otherwiſe, by any Manner of Means, any Manors, Lands, Tenements, or other Hereditaments for Term of Life, for Term of Years, or at Will, upon Pain to forfeit Ten Pound for every Month that he, or any other to his Uſe, ſhall occupy any ſuch Farm, by reaſon of any ſuch Leaſe or Grant hereafter to be made; the one Half of which Forfeiture to be to the King our Sovereign Lord, and the other half thereof to every ſuch Perſon that will ſue for the ſame by Original Writ, Bill, or Plaint of Debt, or by any Information in any of the King's Courts, in which Action and Suit no Wager of Law ſhall be admitted for the Defendant, nor any Eſſoin or Protection allowed.

21 *H.* 8. *c.* 13 *ſect.* 1. Spiritual Perſons not to take Farms, &c.

Sect. 2. And be it alſo enacted by the Authority aforeſaid, That all and every ſuch Spiritual Perſon or Perſons which now have, or occupy in Farm by themſelves, or by any other to their Uſe, any Manors, Lands, Tenements, or Hereditaments of the Leaſe or Grant of the King our Sovereign Lord, or any other Perſon or Perſons, for Term of Life, or for Years, or at Will, by any Writing or otherwiſe, or that now have any annual Rents, or other annual Advantage or Profit, by Occaſion or Colour of any ſuch Leaſe or Farm, ſhall clearly bargain, ſell, give or grant away on this Side the Feaſt of St. Michael the Archangel next coming, to any ſuch Lay-Perſon or Perſons, as they will at their own Nominations and Appointment, all ſuch Leaſe, Term, Intereſt and Profit, as any ſuch Spiritual Perſon, or any other to his Uſe, now hath or have, in or by reaſon of any ſuch Farm: So that in no wiſe any ſuch Spiritual Perſon or Perſons, at any Time after the ſame Feaſt, by themſelves, or any other to their Uſe, by any Manner of Means, Fraud, or Male Ingine, ſhall have, uſe or occupy in Farm any Manors, Lands, Tenements, or Hereditaments of the Demiſe, Leaſe

To alien what they have.

Farms, &c.

Lease or Grant of any Person or Persons heretofore made, or hereafter to be made, to themselves, or to any other to their Uses: Nor from the said Feast shall take any annual Rent, or other annual Advantage or Profit, by Occasion or Colour of any such Lease or Farm by any Manner of Means, upon Pain to forfeit for every Month so occupying any such Farm, at any Time after the said Feast, contrary to this present Act, Ten Pound, and upon Pain to forfeit ten Times as much as any such Spiritual Person, or any to his Use, shall take in any annual Rent, Advantage or Profit, by Occasion or Colour of any such Lease, at any Time after the said Feast; the one Half of which Forfeitures to be to the King our Sovereign Lord, and the other Half to him that will sue for the same by Original Writ, Bill, or Plaint of Debt, or by Information, in any of the King's Courts, in which Action or Suit no Wager of Law shall be admitted for the Defendant, nor any Essoin or Protection allowed.

Leases to them void.

Sect. 3. And be it also enacted, That all such Leases made, or hereafter to be made unto any such Spiritual Person or Persons, or to any other to their Use, for Term of Life, Term of Years, or at Will, of any Manors, Lands, Tenements or Hereditaments, whereof they or any of them shall take any Profit, or Meddling by themselves, or by any to their Use, after the said Feast of Saint Michael, by Colour of any such Lease or Grant, and not by them bargained, granted and sold away before the said Feast, as is before limited, shall from thencefoyth be utterly void and of none Effect, as well against the Lessor or Lessors, Grantor or Grantors, their Heirs and Assigns, and against every of them, as against the Lessee or Lessees, and their Executors and Assigns, and every of them.

Except Temporalties of Bishopricks, &c. during Vacancy.

Sect. 4. Provided always, That this present Act shall not extend to any Spiritual Person or Persons in and for taking to farm any Temporalties during the Time of Vacations of any the Archbishopricks, Bishopricks, Abbeys, Priories, or other Collegiate, Cathedral or Conventual Churches; nor to any Spiritual Person or Persons that shall tender or make any traverse upon any Offices or Office concerning his or their Freehold.

Against buying and selling for Lucre.

Sect. 5. And be it also enacted by the Authority aforesaid, That no Spiritual Person or Persons, Secular or Regular, of what Estate or Degree soever they be, shall from henceforth by himself, nor by any other for him, nor to his Use, bargain and buy to sell again for any Lucre, Gain or Profit, in any Markets, Fairs or other Places, any Manner of Cattle, Corn, Lead, Tin, Hides, Leather, Tallow, Fish, Wool, Wood, or any Manner of Victual or Merchandize, what Kind soever they be of, upon Pain to forfeit treble the Value of every Thing by them, or by any to their Use, bargained and bought to sell again, contrary to this Act. And every such Bargain and Contract hereafter to be made by them, or by any to their Use, contrary to this Act, shall be utterly void, and of none Effect. And the one Half of every such Forfeiture to be to the King our Sovereign Lord, and the other Half to him that will sue for the same by Original Writ of Debt, Bill, Plaint or Information, in any of the King's Courts, in which Action or Suit no Wager of Law for the Defendant shall be admitted, nor any Essoin nor Protection allowed.

Proviso for necessary Horses and Apparel, &c.

Sect. 6. Provided alway, That if any such Spiritual Person or Persons shall happen hereafter, without Fraud or Covin, to buy Horses,

Horſes, Mares, or Mules, to the only Intent to occupy for himſelf or his Servants, to ride to and fro upon his neceſſary Buſineſs, or any other Chattels or Goods to the only Intent and Purpoſe at the Buying thereof to be imployed and put in and about his neceſſary Apparel or his own Houſe, or of his Perſon and Servants, or in, for and about the only Occupying, Manuring, or Tillage of his own Glebe or Demean Lands, annexed to his Church, or for the neceſſary Expences of his own Houſhold-keeping; and after the buying of any ſuch Horſes, Cattle or Goods, or Exerciſe of them, or any of them, happeneth to miſlike any of them, that they ſhould not be good, profitable, nor convenient for any of the Purpoſes aboveſaid for the which they were bought; that then every ſuch Spiritual Perſon or Perſons may lawfully bargain, and put away ſuch Things ſo by him bought, without Fraud or Covin, for any of the Purpoſes aboveſaid, at his Pleaſure and Advantage; this Act, or any Thing therein contained notwithſtanding. Farms, &c.

Sect. 7. Provided alway, That all Abbots, Priors, Abbeſſes, Prioreſſes, Provoſts, Preſidents, Maſters of Colleges and Hoſpitals, and all other Spiritual Governors and Governeſſes of any Spiritual Monaſteries, or Houſes of Religion, by what Name or Names ſoever they be called, having Manors, Lands, Tenements and Hereditaments, and other yearly Profits, in the Right of their Monaſteries or Houſes, of the yearly Value of Eight hundred Marks or under, and not above, may uſe and occupy as much and as many of their Demean Lands, Fee-Farms and Farms, to their moſt Advantage, Commodity and Profit, to and for the only Maintenance of their Houſes and Hoſpitals, in as ample and large Manner as they, or any of them, or their Predeceſſors, or the Predeceſſors of any of them, at any Time by the Space of One hundred Years laſt paſt, before the making of this Act, have done, uſed and occupied; any Thing in this preſent Act to the contrary notwithſtanding. Proviſo for Maſters of Colleges, &c.

Sect. 8. Provided alſo, That every other Spiritual Perſon or Perſons not having ſufficient Glebe or Demean Lands in their own Hands, in the Right of their Churches, Monaſteries, and Houſes for Paſturage of Cattle, or for Increaſe of Corn, to and for the only Expences of their Houſholds, or for their Carriages or Journeys, may take in Farm other Lands, and buy and ſell Corn and Cattle for the only Manurance, Tillage and Paſturage of ſuch Farms, ſo that the Increaſe thereof be always imployed and put to and for the only Expences in their Houſholds and Hoſpitalities, and not in any wiſe to buy and ſell again for any other Commodity, Lucre or Advantage, any Corn or Cattle renewing, coming or growing in and upon any ſuch Farm, or otherwiſe, but only the Remain and Overplus above their Expences of their Houſholds, if any ſuch ſhall happen to the Breed and Increaſe thereof, without Fraud or Covin; any Thing in the Law to this preſent Act to the contrary hereof notwithſtanding. Proviſo for Perſons not having ſufficient Glebe, &c.

Sect. 30. And be it further enacted by the Authority aforeſaid, That no Spiritual Perſon, Secular or Regular, beneficed with Cure, as is afore-rehearſed, from the Feaſt of Saint Michael the Archangel next coming, by Authority of any manner Licenſe, Diſpenſation or otherwiſe, ſhall take any particular Stipend or Salary to ſing for any Soul, nor have, or occupy by himſelf, or by any other to his Uſe, any Parſonage or Vicarage in Farm, of the Leaſe or Grant of See *Sect.* 9, 10, 11 of this Act in *Ch.* 3. and other Sections *alibi*, *i.e. Ch.* 4. 37. None beneficed with Cure to Farm any Parſonage or Vicarage.

Farms, &c. of any Perſon or Perſons, nor take any Profit or Rent out of any ſuch Farm, upon Pain to forfeit Forty Shillings for every ſuch Week that he, or any to his Uſe, ſhall occupy, or have any ſuch Stipend or Farm contrary to this preſent Act, and upon Pain to loſe Ten Times the Value of ſuch Profit or Rent as he ſhall take out of any ſuch Farm after the ſaid Feaſt. The one Half of which Forfeitures to be to the King our Sovereign Lord, and the other Moiety to him that will ſue for the ſame by Original Writ, Bill, Plaint of Debt, or by Information in any of the King's Courts, in which Suit and Action no Wager of Law ſhall be admitted for the Defendant, nor any Eſſoin or Protection allowed.

Sect. 31. Provided alway, That no Deanry, Archdeaconry, Chancellorſhip, Treaſurerſhip, Chanterſhip or Prebend, in any Cathedral or Collegiate Church, nor Parſonage that hath a Vicar indued (indowed) nor any Benefice perpetually appropriate, be taken or comprehended under the Frame of Benefice having Cure of Souls, in any Article afore ſpecified.

Not to keep a Tanhouſe or Brewhouſe. Sect. 32. Provided alſo, and be it enacted by the Authority aforeſaid, That no Spiritual Perſon or Perſons Regular or Secular, of what Eſtate, Degree or Condition ſoever he be, or they be, from the 1ſt of April next coming, have, uſe, or keep by him, or themſelves, or by any Perſon or Perſons to his or their Uſe or Commodity, any Manner of Tanhouſe or Tanhouſes, to be uſed or occupied to his or their own Uſe or Behoof, nor have, uſe, or keep any Manner of Brewhouſe or Brewhouſes, to any other Uſe, Intent or Behoof, than only to be ſpent and occupied in his or their own Houſes, upon Pain to forfeit for every Month ſo uſing and occupying any of the ſaid Myſteries or Occupations 10l. one Moiety to the King, and the other to him that will ſue for the ſame by Original Writ, Bill, Plaint of Debt or Information, in any of the King's Courts; and no Wager of Law, nor Eſſoin, or Protection to be therein allowed.

Sect. 33. Is a Proviſo, That the Widows of Noblemen Marrying again under their Degree, may yet retain Chaplains as before, and ſuch Chaplains have a Licence to hold two Benefices. Vide Chap. 2 & 3.

May keep ſufficient of their own Lands to maintain their Houſeholds, &c. Sect. 34. Provided always, That every Spiritual Perſon or Perſons having Lands, Tenements, or other Poſſeſſions in the Right of their Houſes, above the yearly Value of Eight hundred Marks, may keep and retain in their Occupation and Manurance, as much of their ſaid Lands and Tenements, and other Poſſeſſions, as ſhall be neceſſary and ſufficient for Paſturage of their Cattle, and for Tillage of Corn, to be imployed and ſpent for the only Maintenance, Suſtentation and keeping of his or their Houſholds and Hoſpitalities, without Fraud or Covin; any Thing in this preſent Act to the contrary thereof notwithſtanding.

Or take a Houſe, Orchard and Garden to dwell in. Sect. 35. Provided alway, That it may be lawful to every Spiritual Perſon or Perſons to take in Farm any Meſes, Manſions, or Dwelling houſes, having but only Orchards or Gardens in any City, Borough and Town, for their own Habitation or Dwelling; any Thing in this Act to the contrary notwithſtanding. So that no Perſon ſpiritual, other than be above provided for, for their Non-reſidence, have any Liberty of Non-reſidence by Colour of this Proviſo. Stat. 21 H. 8. c. 13.

Non-reſidence.

Note; The Reaſon and Policy of enacting the above Statute is well explained by *Hobart*, in the Caſe of *Colt* and *Glover*, *pag.* 157. to which I refer the Reader. Reſidence, &c.

In an Action brought upon this Statute againſt a Parſon for taking Farms, it is a good Plea for the Defendant to plead, *Non habuit ſeu tenuit ad firmam contra formam ſtatuti*; and the Defendant may upon ſuch Plea give in Evidence, that the Farm was for the Maintenance of his Houſe, *&c.* according to the Proviſo in the Statute, by *Fitz.* and *Shelly*; but *Baldwin*, Chief Juſtice, *contra*, that he ought to plead that Matter ſpecially, elſe cannot give it in Evidence. *Bro. Action ſur le Statute* 3. *Savil* 32. And the Writ grounded on this Statute ought to be *Qui tam* for the King and Party, *&c.* therefore a Writ being brought, which demanded the whole Penalty for the Party, was ruled not to be good. And note, the Statute need not to be mentioned in the Writ. *Bro. Action ſur le Statute* 4. Pleading to this Statute. *Vide* 2 *Bulſt.* 14.

And ſee the Caſe of *Hitchcock* and *Thurland*, *Trin.* 27 *Eliz. B. R.* In an Action on the ſaid Statute it was held, that if any ſuch Leaſe be made (*ut ſupra Sect.* 1.) at this Day, the Leaſe is not void. But the Words *Such Leaſes*, in *Sect.* 3, extend only to ſuch Leaſes, made before the Feaſt of St. *Michael* (as is therein mentioned) and which had not been aliened before the ſaid Feaſt; and 'tis there ſaid to have been formerly ſo reſolved in one *Underwood*'s Caſe. 3 *Leon.* 122.

Note, (as to *Sect.* 31, *ſupra*) the Opinion of *Hobart* in the Caſe of *Colt* and *Glover*, That Biſhopricks are not Benefices within this Law; ſo that if a Parſon takes a Biſhoprick, it avoids not his Benefice by Force of this Statute, but by the antient Common Law it is void, as is holden 11 *H.* 4. 60. But notwithſtanding *Hobart*'s Opinion, it appears clearly in the ſaid Caſe, 11 *H.* 4. that a Biſhoprick was then admitted to be a Benefice, the Words of *Thirning* and the other Judges being, *Quant un home Benefice eſt cree un Eveſque le primer ſerra Void*, &c. *Vide Chap.* 1. and *Chap.* 2. *Hob.* 157. *Cod.* 179.

CHAP. XXXVII.

Of Reſidence and Non-reſidence.

FH
MVSEVM
BRITANNICVM

AS the Law doth oblige every beneficed Perſon to attend the Cure, and perform the Duty of the Incumbent thereof, and doth provide for the puniſhing of all Perſons diſturbing him doing the ſame, or breaking the Peace of the Church, and doth reſtrain him from diſtracting himſelf unneceſſarily with other Affairs; ſo for the better and more conſtant Performance of his Duty, Reſidence upon his Benefice by Law is injoined him, for it hath been enacted, **That as well every Spiritual Perſon now being promoted to any Archdeaconry, Deanry, or Dignity in any Monaſtery or Cathedral Church, or other Church conventual or collegiate, or being beneficed with any Parſonage or Vicarage, as all and every Spiritual Perſon and Perſons which hereafter ſhall be promoted to any of the ſaid Dignities or Benefices, with any Parſonage or Vicarage** 21 *H.* 8. *c.* 13. *ſect.* 26. againſt Non-reſidence.

Residence, &c.

Vicarage, from the Feast of St. Michael the Archangel next coming, shall be personally resident, and abiding in, at and upon his said Dignity, Prebend or Benefice, or at one of them at the least. And in case that any such Spiritual Person, at any Time after the said Feast, keep not resident at one of his said Dignities, Prebends or Benefices, as is aforesaid, but absent himself wilfully by the Space of one Month together, or by the Space of two Months, to be accompted at several Times in any one Year, and make his Residence and abiding in any other Places by such Time, that then he shall forfeit for every such Default Ten Pounds Sterling; the one Half thereof to the King our Sovereign Lord, and the other Half of the same to the Party that will sue for the same in any of the King's Courts by original Writ of Debt, Bill, Plaint or Information: In which Action and Suit the Defendant shall not wage his Law, nor have any Essoin or Protection allowed.

Forfeiture for procuring Licence, &c.

And if any Person or Persons procure or obtain at the Court of Rome, or elsewhere, any Manner of Licence or Dispensation, to be non-resident at their said Dignities, Prebend or Benefices, contrary to this Act, that then every such Person or Persons putting in Execution any such Dispensation or Licence for himself, from the said first Day of April in the Year of our Lord God M. D. and XXX. shall run and incur the Penalty, Damage and Pain of Twenty Pounds Sterling, for every Time so doing, to be forfeited and recovered as is abovesaid; and such Licence or Dispensation so procured, or to be put in Execution, to be void and of none Effect.

Proviso for Persons in the King's Service, &c.

Provided always, That this Act of Non-residence shall not in any wise extend, ne be prejudicial to any such Spiritual Person as shall chance to be in the King's Service beyond the Sea, nor to any Person or Persons going to any Pilgrimage or holy Place beyond the Sea, during the Time that they shall so be in the King's Service, or in the Pilgrimages going and returning home; Nor to any Scholar or Scholars being conversant and abiding for Study, without Fraud or Covin, at any University within this Realm or without, nor to any of the Chaplains of the King's or Queen's, daily or quarterly attending and abiding in the King's or Queen's most honourable Households; nor to any of the Chaplains of the Prince or Princess, or any of the King's or Queen's Children, Brethren or Sisters, attending daily in their honourable Houshoulds, during so long as they shall attend in any of their said Households; nor to any Chaplain of any Archbishop or Bishop, or of any Spiritual or Temporal Lords of the Parliament, daily attending, abiding and remaining in any of their honourable Households; nor to any Chaplain of any Duchess, Marquess, Countess, Viscountess or Baroness, attending daily and abiding in any of their honourable Households; nor to any Chaplain of the Lord Chancellor or Treasurer of England, the King's Chamberlain, or Steward of his Household for the Time being, the Treasurer and Controllor of the King's most honourable Household for the Time being, attending daily in any of their honourable Households; nor to any Chaplain of any of the Knights of the honourable Order of the Garter, or of the Chief Justice of the King's Bench, Warden of the Ports, or also of the Master of the Rolls; nor to any Chaplain of the King's Secretary and Dean of the Chapel, or Almner for the Time being, daily attending and dwelling in any their Households, during the Time that any such Chap-

lain or Chaplains shall abide and dwell, without Fraud or Covin, in any of the said honourable Households; nor to the Master of the Rolls, or Dean of the Arches, nor to any Chancellor or Commissary of any Archbishop or Bishop; nor to as many of the Twelve Masters of the Chancery, and Twelve Advocates of the Arches, as be or hereafter shall be Spiritual Men, during so long Time as they shall occupy their said Rooms and Offices; nor to any such Spiritual Persons as shall happen by Injunction of the Lord Chancellor, or the King's Council, to be bound to any daily Appearance and Attendance to answer to the Law, during the Time of such Injunction. Residente, &c.

Provided also, that it shall be lawful to the King's Highness to give Licence to every of his own Chaplains for Non-residence upon their Benefices; any thing in this present Act contained to the contrary notwithstanding. King's Chaplains.

Provided always, That every Duchess, Marchioness, Countess, Baroness, Widows, which have taken, or that hereafter shall take any Husbands under the Degree of a Baron, may take such Number of Chaplains as is above limited to them being Widows; and that every such Chaplain may purchase Licence to have and take such Number of Benefices with Cure of Soul, and have like Liberty of Non-residence, in Manner and Form as they might have done if their said Ladies and Mistresses had kept themselves Widows; any thing in this present Act contained to the contrary notwithstanding. Stat. 21 H. 8. cap. 13. Chaplains of a Duchess, &c.

And afterwards it was enacted as followeth, Where in the Parliament holden at Westminster in the Twenty-first Year of the Reign of our Sovereign Lord King Henry the Eighth, it was among other Things ordained and provided, that certain honourable Persons, as well Spiritual as Temporal, shall have Chaplains beneficed with Cure, to serve them in their honourable Houses, which Chaplains shall not incur the Danger of any Penalty or Forfeiture made or declared in the same Parliament for Non-residence upon their said Benefices, or for obtaining Licences or Dispensations of Pluralities. In the which Act no Provision was made for any of the King's Judges of his High Courts, commonly called the King's Bench and the Common Place, except only for the Chief Judge of the King's Bench, nor for the Chancellor nor the Chief Baron of the King's Exchequer, nor for any other inferior Persons being of the King's most honourable Council, as by the said Act may appear. 25 H. 8. c. 16.

Wherefore it is ordained and enacted by Authority of this present Parliament, That as well every Judge of the said High Courts, and every of the Chancellor and Chief Baron of the said Exchequer, the King's General Attorney and General Solicitor, which for the Time is, be, or shall be, shall and may from henceforth at his Liberty retain and have singularly to every of them in his House, or attendant to his Person, one Chaplain having one Benefice with Cure of Souls, which may be absent from his said Benefice, and not resident upon the same; the said Statute made in the said One and Twentieth Year, or any other Statute, Act or Ordinance made to the contrary, in any wise notwithstanding. Stat. 25 H. 8. c. 16. Chaplains of Judges, &c.

And it is farther enacted, Whereas in the Parliament begun at London on the Third Day of November in the Twenty-first Year of the Reign of our Sovereign Lord King Henry the Eighth, and from

Residence, &c.

28 *H.* 8. *c.* 13. For Persons above the Age of 40 Years to be resident, and not to be excused for that they are Students in the Universities, *&c.*

thence adjourned and prorogued to the Palace of Westminster the Seventeenth Day of December then next ensuing, amongst other good Acts and Ordinances then and there by the Authority of the said Parliament it was established, ordained and enacted, That as well every Spiritual Person then being promoted to any Archdeaconry, Deanry or Dignity in any Monastery or Cathedral Church, or other Church conventual or collegiate, or being beneficed with any Parsonage or Vicarage, as all and every Spiritual Person and Persons, which should after the Feast of St. Michael the Archangel, which was in the aforesaid One and Twentieth Year of the Reign of our Sovereign Lord King Henry the Eighth, be promoted to any of the said Dignities or Benefices with any Parsonage or Vicarage, should from the said Feast of St. Michael the Archangel be personally resident and abiding at and upon his said Dignity, Prebend or Benefice, or at one of them at the least. And in case any such Spiritual Person at any Time after the said Feast, kept not Residence at one of his said Dignities, Prebend or Benefices (as is aforesaid) but absent himself wilfully by the Space of one Month together, or by the Space of two Months, to be accounted at several Times in any one Year, and make his Residence and Abiding in any other Places by such Time, that then he shall forfeit for every such Default Ten Pounds Sterling, as in the same Act more plainly doth appear. In which Act, among other Provisions contained and specified in the same, it was provided, That the said Act of Non-residence should not in any wise extend, ne be prejudicial to any Scholar or Scholars, being conversant and abiding for Study, without Fraud or Covin, at any University within this Realm or without, as by the same Provision doth also appear more at large. Sithence the making of which good Act and Statute, divers and many Persons being beneficed with Cure of Souls (as is aforesaid) and being not apt to study by Reason of their Age or otherwise, ne never intending before the making of the said Act to travel in Study within any the said Universities for the Increase of Learning, but rather minding and intending their own Ease, singular Lucre and Pleasure, by the same Provision colourably to defraud the same good Statute and Ordinance, do daily and commonly resort and repair to the said Universities of Oxford and Cambridge, and to either of them, where they, under the said Pretence and Colour of Study, do continue and abide, living dissolutely, nothing profiting themselves by Study at all in Learning, but consume the Time in Idleness, and in other Pastimes and insolent Pleasures, giving Occasion and evil Example thereby to other young Men and Students within the said Universities, little or nothing regarding their Cure and Charge of Souls, contrary to the Minds and Intent of the Makers of the aforesaid good Statute and Ordinance. And also divers and many old beneficed Men have and do continually remain there, never exercising nor practising their Learning to the Example of Virtue, and Maintenance of the Commonwealth, in Discharge of their Conscience, according to their Duty, having nevertheless, and occupying such Rooms and Commodities as were instituted and ordained for the Maintenance and Relief of poor Scholars, to the great Hindrance and Detriment of the same;

Be it therefore enacted by the King our Sovereign Lord, with the Assent of the Lords Spiritual and Temporal and the Commons in this present Parliament assembled, That all and singular Spiritual Person and Persons, which now be, or hereafter shall be to any Benefice or Benefices promoted as is aforesaid, being above the Age of Forty Years, (the Chancellor, Vice-Chancellor, Commissary of the said Universities, or any of them, Wardens, Deans, Provosts, Presidents, Rectors, Masters, Principals and other Head Rulers of Colleges, Halls and other Houses or Places Corporate within the said Universities, or any of them, Doctors of the Chair, Readers of Divinity in the Common Schools of Divinity in any of the said Universities only excepted) shall be resident and abiding at and upon one of their said Benefices, according to the Intent and true Meaning of the said former Act, upon such Pain and Penalties as be contained in the said former Act made and appointed for such beneficed Persons for their Non-residence. And that none of the said beneficed Persons being above the Age aforesaid, except before excepted, shall from henceforth be excused of their Non-residence upon the said Benefices, for that they be Students or reliant within the said Universities, or any of them; any Proviso, or any other Clause or Sentence specified or contained in the said former Act of Non-residence, or any other Thing or Things to the contrary hereof in any wise notwithstanding.

Residence, &c.

Persons excepted.

And over this, be it enacted by the Authority aforesaid, That all and singular such beneficed Persons being under the Age of Forty Years, reliant and abiding within the said Universities, or any of them, shall not enjoy the Privilege and Liberty of Non-residence, contained in the Proviso of the said former Act, made for the Scholars of the said Universities, or any of them, unless he or they be present at the ordinary Lecture and Lectures, as well at home in their Houses, as in the common School or Schools, and in their proper Person keep Sophisms, Problems, Disputations and other Exercises of Learning, and be opponent and respondent in the same, according to the Ordinances and Statutes of either of the said Universities, where he or they shall be so abiding or reliant; any Thing contained in the said Proviso or former Act to the contrary notwithstanding.

Concerning Persons under 40 Years of Age, abiding in the Universities.

Provided alway, That this Act shall begin to take Effect at the Feast of St. Michael the Archangel next coming, and not before.

Provided alway, That this Act, nor any Thing therein contained, shall extend to any Person or Persons which now is, or hereafter shall be Readers of any publick or common Lecture in Divinity, Law Civil, Physick, Philosophy, Humanity, or any of the Liberal Sciences, or publick or common Interpreters or Teachers of the Hebrew Tongue, Caldee or Greek, in whatsoever College or Place of any of the said Universities the said Persons for the Time being shall read the said common or publick Lectures: Nor yet to any Person or Persons, after or above the Age of Forty Years, which shall resort to any of the said Universities, to proceed Doctors in Divinity, Law Civil, or Physick, for the Time of their said Proceedings, and executing of such Sermons, Disputations or Lectures, which they be bound by the Statutes of the Universities there to do for the said Degrees so obtained. Stat. 28 H. 8. c. 13.

Proviso for Readers of Publick Lectures, &c.

And

Reſidence, &c.

33 *H.* 8. *c.* 28. Chaplains of Councellors and Officers of Courts, *&c.*

And after it was enacted, Where in the Parliament holden at Weſtminſter in the One and twentieth Year of your moſt gracious Reign, it was amongſt other Things ordained and provided, That certain honourable Perſons, and other of your Highneſs Councellors and Officers, as well Spiritual as Temporal, ſhould and might have Chaplains beneficed with Cure, to ſerve and attend upon them in their Houſes, which Chaplains ſhall not incur the Danger of any Penalty or Forfeiture made or declared in the ſame Parliament, for Non-reſidence upon their ſaid Benefices, or for obtaining Licences or Diſpenſations of Pluralities, in which Act no Proviſion is made for any the Head Officers of your Grace's ſeveral Courts of your Duchy of Lancaſter, the Courts of Augmentations of the Revenues of your Highneſs Crown, the Firſt-Fruits and Tenths, the Maſter of your Majeſty's Wards and Liveries, the general Surveyors of your Grace's Lands, and other your Grace's Courts.

Chancellor of the Duchy of *Lancaſter*, *&c.*

In Conſideration whereof, it may pleaſe your Majeſty, that it may be enacted by your Highneſs, with the Aſſent of the Lords Spiritual and Temporal and the Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That the Chancellor of the ſaid Court of the Duchy of Lancaſter, the Chancellor of your Highneſs Court of Augmentations, the Chancellor of your Grace's Courts of Firſt-Fruits and Tenths, the Maſter of your Highneſs Wards and Liveries, and every of your Grace's general Surveyors of your Highneſs Lands, the Treaſurer of your Grace's Chamber, the Treaſurer of your Highneſs Court of Augmentations, and the Groom of your Grace's Stole, and every of them for the Time being, ſhall and may retain ſingularly to every of them in his Houſe, or attendant upon his Perſon, one Chaplain having one Benefice with Cure of Souls, which may be abſent from the ſaid Benefice, and non-reſident upon the ſame; the ſaid Statute made in the ſaid One and twentieth Year of your moſt gracious Reign, or any other Statute, Act or Ordinance made to the contrary, in any wiſe notwithſtanding.

Times for ſuch Chaplains to repair to their Cure, *&c.*

Provided alway, and be it enacted by the Authority aforeſaid, That every of the ſaid Chaplains ſo being beneficed as is aforeſaid, and dwelling with any the Officers afore-named, ſhall perſonally repair two Times in every Year at the leaſt to his ſaid Benefice and Cure, and there to tarry and abide by the Space of Eight Days at every ſuch Time at the leaſt, to viſit and inſtruct his ſaid Cure, upon the Pain to forfeit for every Time ſo failing, Forty Shillings; the one Moiety thereof to the King our Sovereign Lord, the other to ſuch as will ſue for the ſame by Action of Debt, Bill, Plaint or Information in any of the King's Courts of Record, in which Suit no Eſſoin, Protection or Wager of Law ſhall be allowed. Stat. 33 H. 8. cap. 28.

A Goſpeller or Vicar reſiding in a Cathedral, not thereby diſcharged of his other Cure.

By the Statute of the 21 *H.* 8. *c.* 13. every Spiritual Perſon qualified to hold two Benefices, is to be reſident upon one of his Dignities, Prebends or Benefices, *&c.* and if he be reſident upon one of them, it ſuffices; but if a Man be choſen Goſpeller in a Cathedral Church, and be there reſident, this will not be to the Diſcharge of his Reſidence upon any Dignity, or Benefice with Cure that he ſhall poſſeſs therewith, as was held by *Popham* and *Clinch*. So if a Vicar in a Cathedral Church hath a Benefice with Cure, he ought to be reſident upon it, for he is not properly a Vicar, although he be ſo called, he having neither Vicarage nor Cure of Souls,

Paſch. 41 *Eliz. B. R. Broughton* v. *Gouſley*, 3 *Croke* 663. but the Cauſe was adjourned, the other Judges being abſent, and after compounded. 27 *H.* 8. 10. *Broke, Action ſur le Stat.* 2. *per Cur.* 27 *H.* 8. 10. *Broke, Surmiſe and Suggeſtion* 24. And it is ſaid, that to be reſident on a Prebend is a ſufficient Reſidence, and thereby that a Prebendary is excuſed from being reſident on a Benefice with Cure. 27 *H.* 8. 10. *Broke, Action ſur le Stat.* 2. 27 *H.* 8. *Broke, Surmiſes and Suggeſtion* 24. So in *Acton*'s Caſe, *Hill.* 45 *Eliz. C. B.* 4 *Coke* 119. If a Baron hath three Chaplains, and each of them hath two Benefices, and afterwards the Baron dieth, they ſhall enjoy their Benefices with Cure, if lawfully ſettled in them before; but although each of them be reſident and dwelling upon one of their reſpective Benefices, yet they ſhall be puniſhed for not being reſident upon the other, as was Parſon *Boyton*'s Caſe, 4 *Coke, fol.* 119. and they ought to have of the King a *Non obſtante* in the Diſpenſations for their Pluralities. See *Mich.* 4 *Car. B. R. Green* v. *Guy*, 1 *Croke* 146.

Reſidence, &c.

As to which Matter, I conceive, that although by the Statute of the 21 *H.* 8. *c.* 13. there is no expreſs Proviſion made to excuſe any Perſon from being reſident upon any of his Benefices, by having been a Chaplain to any Perſon, after his Attendance is determined, nor to excuſe other Perſons enabled thereby to hold more than one Benefice by Diſpenſation; yet he that is duly qualified, and diſpenſed with to hold more than one Benefice, if he be duly reſident upon any one of his Dignities, or Benefices with Cure, is not puniſhable by the ſaid Act; becauſe this Act doth only require, that he ſhould be reſident in, at and upon his Dignity, or Benefice, or at one of them at the leaſt; ſuch Interpretation is to be made of that Act as ſhall make the ſame practicable, that is, that the Liberty and Benefit given thereby to Perſons qualified by Birth, Degree or Service, for holding more than one Benefice, may be enjoyed, which is impoſſible, if, by Reaſon of the ſame Act, Perſons having more Benefices than one be reſtrained from being abſent from any one of them by the Space of one Month together, or by the Space of two Months, to be accounted at ſeveral Times in any one Year. And I ſuppoſe, that if a Pluraliſt, though duly reſident upon one of his Benefices, be puniſhable by this Act, for not being reſident upon his other, that a *Non obſtante* had of the King, before ſpoken of, will not ſave him from the Penalty thereof; becauſe all Licences and Diſpenſations to be non-reſident, contrary to the ſaid Act, are thereby made void and of none Effect, with a Proviſion, that it ſhall be lawful to the King to give Licence to every of his own Chaplains to be non-reſident, but no Proviſion for his licenſing of others.

Q. If he that was ſuch Chaplain being duly reſident upon one of his Benefices be puniſhable?

And it is alſo declared and enacted, **That no Diſpenſation by** Non obſtante **of or to any Statute, or any Part thereof, ſhall be allowed, but that the ſame ſhall be held void and of no effect, except a Diſpenſation be allowed of in ſuch Statute; and except in ſuch Caſes as ſhall be ſpecially provided for by one or more Bill or Bills to be paſſed during this preſent Seſſion of Parliament.** And it is alſo declared, **That the pretended Power of ſuſpending of Laws, or the Execution of Laws by Regal Authority without Conſent of Parliament is illegal.** Stat. 1 W. & M. *Declaring the Rights and Liberties of the Subject, &c. ſeſſ.* 2. *cap.* 2. But I conceive, that if any Perſon having more than one Benefice (eſpecially with Cure) by ſufficient Diſpenſation, be puniſhable (being reſident upon one of them) for not being alſo reſident upon his other, he is only puniſhable in the Eccleſiaſtical Court, and as an Offender againſt the Eccleſiaſtical Law, and not againſt the aforeſaid Statute of 21 *H.* 8. and that chiefly by Reaſon of the uſual Pro-

1 *W. & M.* againſt *Non Obſtantes.*

Reſidence, &c.

Archbiſhop's Proviſo in Diſpenſations.

viſo in the Archbiſhop's Diſpenſation to hold two Benefices with Cure, which is this, *Proviſo ſemper in qualibet prædictarum Eccleſiarum tum ea qua majorem ob partem te abeſſe contigerit, tum altera in qua perpetuam & perſonalem reſidentiam feceris treſdecim quotannis Conciones juxta Ordinationes Eccleſiæ Anglicanæ editas, in ea parte habeas, ipſeque ſacrum Dei verbum ſincere, religioſe & reverenter tractes, ubique in eodem Beneficio, a quo te magis abeſſe contigerit, per duos tamen menſes quotannis Hoſpitalitatem exerceas, eoque tempore pro illius beneficii fructibus & commodis Parochiæ ejus incolas præſertim egenos & pauperes (quantum poteris) ſuſtentes & releves.* (*Quære.*)

If Biſhops be puniſhable for Non-reſidence.

It may be a Queſtion, Whether Biſhops, for their being not reſident upon their Biſhopricks, are puniſhable by the Statute of 21 *H.* 8. *c.* 13. and I conceive that they are not puniſhable thereby, for that the ſaid Statute injoins Reſidence to Perſons promoted to any Archdeaconry, Deanry or other Dignity in any Cathedral Church; which other Dignity is to be conſtrued to extend only to Dignities of like or inferior Nature, and not to Biſhopricks, which are of a ſuperior Nature. But though an Archbiſhop or Biſhop be not tied to be reſident upon his Biſhoprick by the Statute of 21 *H.* 8. yet they are thereto obliged by the Eccleſiaſtical Law, and may be compelled to keep Reſidence by Eccleſiaſtical Cenſures. And if a Biſhop hold *in Commendam* an Archdeaconry, Deanery, or like inferior Dignity, Parſonage or Vicarage, with his Biſhoprick, he is puniſhable by the ſaid Statute, if according to the ſame he be not reſident upon ſuch Dignity, Parſonage or Vicarage, and that though he be conſtantly reſident upon his Biſhoprick he ſhall not be excuſed thereby.

To be reſident in the Parſonage Houſe.

The Reſidence required in the Statute of 21 *H.* 8. *c.* 13. is to be underſtood to be in the Houſe belonging to the Dignity or Benefice of which a Parſon is the Incumbent; and therefore, if a Parſon be reſident in the ſame Pariſh, in any other than the Parſonage Houſe, he is not free from the Penalty of this Law, *Per Curiam, Paſch.* 40 *Eliz. B. R. Butler* and *Goodal*'s Caſe, 6 *Co.* 21. and by *Coke, Hill.* 8 *Jac. C. B. Cannye* v. *Dr. Newman*, 2 *Brownlow* and *Gouldſborough* 54. and by *Gawdy* and *Popham contra Clinch* and *Fenner, Mich.* 39 & 40 *Eliz. Goodal* v. *Butler*, 3 *Cro.* 590. ſame Caſe, *Gouldſborough* 54. and *Moor* 540. And if the Incumbent doth demiſe his Houſe to another, and reſerve one Chamber, this doth not better his Caſe, *Hill.* 43 *Eliz. Goodal* v. *Butler*, *Gouldſborough* 169. no, though he doth keep the whole houſe in his Hands and occupy it. *Hill.* 8 *Jac. Carriage* v. *Dr. Newman*, 2 *Brownlow* and *Gouldſborough* 54. But if there be not any Houſe belonging to his Benefice wherein he may dwell, he is excuſed; and ſo I ſuppoſe if by Reaſon of its Meanneſs and Smallneſs it be unfit to entertain his Family; ſo lawful Impriſonment without Covin is a good Excuſe of Non-reſidency; and it is ſaid, that it was holden in the Exchequer, *Trin.* 39 *Eliz.* that Sickneſs without Fraud was alſo a good Excuſe, *viz.* if the Patient remove by the Advice of his Phyſician, *bona fide*, for better Aid, and for the Recovery of his Health. *Paſch.* 40 *Eliz. B. R. Butler* and *Goodal*'s Caſe, 6 *Coke* 21. And generally to make a Perſon liable to the Penalties of the Statute, his Non-reſidence muſt be voluntary, and not by Compulſion or Reſtraint, *Per Curiam, Trin.* 30 *Eliz. B. R. William Collins* v. *Edward Vaughan*, 3 *Cro.* 100. and by *Popham, Hill.* 43 *Eliz. Goodal* v. *Butler*, *Gouldſborough* 169. for the Words of the Statute are, **If he abſent himſelf wilfully.**

Impriſonment, &c. an Excuſe. Vide 1 *Cro.* 590, 6 *Co.* 21. 2 *Bulſt.* 18.

The other Caſes wherein a beneficed Perſon may be excuſed if non-reſident, are expreſſed in the Statutes before ſet down; only this is to be noted, That if a Baroneſs, &c. retaineth two Chaplains according to the

the Statute, and afterwards taketh one of the Nobility to Huſband, the Retainer of theſe two Chaplains remaineth in force, and therefore ſo long as they attend upon ſuch Baroneſs, *&c.* they ſhall not be adjudged non-reſident. *Hill.* 43 *Eliz. C. B. Acton*'s Caſe, 4 *Coke* 118. *b.*

Reſidence, &c.

Alſo Note, Although in the Statute of 21 *H.* 8. *c.* 13, it is only ſaid, that the ſame Statute ſhall not extend to any Spiritual Perſons as ſhall chance to be in the King's Service beyond the Sea; that before the ſaid Statute it was enacted as followeth:

9 *Ed.* 2. *c.* 8. Of Clerks imployed in the King's Service.

Alſo all Barons of the Exchequer claiming by their Privilege, that they ought to make Anſwer to no Complaint out of the ſame Place, extend the ſame Privilege unto Clerks abiding there, called to Oyers, or unto Reſidence, and inhibit Ordinaries that by no Means, or for any Cauſe, (ſo long as they be in the Exchequer, or in the King's Service) they ſhall not call them to Judgment. The Anſwer: **It pleaſeth our Lord the King, that ſuch Clerks as attend in his Service, if they offend, ſhall be corrected by their Ordinaries, like as other; but ſo long as they are occupied about the Exchequer, they ſhall not be bound to keep Reſidence in their Churches.** This is added of new by the King's Council. **The King and his Anceſtors ſince Time out of Mind have uſed, that Clerks which are imployed in his Service, during ſuch Time as they are in Service, ſhall not be compelled to keep Reſidence at their Benefices. And ſuch Things as be thought neceſſary for the King and the Common-wealth, ought not to be ſaid to be prejudicial to the Liberty of the Church.** Stat. 9 Ed. 2. c. 8. See *Regiſter*, *fol.* 58. *b.*

Concerning Information on 21 *H.* 8. *c.* 13, *&c.*

If an Information upon this Statute of 21 *H.* 8. *cap.* 13, be to be brought for Non-reſidence, it may not be brought before the Juſtices of Aſſize, and *Oyer* and *Terminer*; for the Statute doth give it but only in the King's Courts, where there may be Eſſoin, Wager of Law, or Protection, and that notwithſtanding the Statute of 21 *Jac. cap.* 4. *Mich.* 4 *Car. B. R. Green* and *Guy*'s Caſe, 1 *Cro.* 146, and ſee the ſame Book for this Matter, *fol.* 112. And Note, That in the Information it muſt be alledged, that the Party willingly abſented himſelf, *&c.* or it will not be good. *Trin.* 30 *Eliz. B. R. Collins* v. *Vaughan*, 3 *Cro.* 100. And if there be two Informations brought at the ſame Time for the ſame Thing, the Party need not anſwer to either. *Mich.* 11 *Jac. Pye* v. *Coke*, *Moor* 864. 2 *Roll's Abr.* 576.

Note alſo, That when an Action of Debt was brought againſt one as Rector of *T.* in the County of *B.* and the Defendant pleaded, that before Writ brought he was dwelling at *B.* in the County of *N.* it was not allowed as a ſufficient Plea to abate the Writ; for a Parſon ſhall be intended in Law to be reſident upon his Benefice, becauſe of the Cure of Souls which he hath there. The Caſe of the Maſters and Fellows of *Magdalen College* in *Cambridge*, *Paſch.* 13 *Jac.* 11 *Co.* 70. And if in this Caſe he doth plead alſo that he hath another Benefice, yet the Plea ſhall not be allowed. 10 *H.* 6. 8. 7 *H.* 6. 1. 8 *H.* 6. 37.

Stat. 1 *W. & M. cap.* 26.

See alſo the Statute 1 *W. & M. ſeſſ.* 1. *cap.* 26, for veſting in the Univerſities the Preſentation of Benefices belonging to Papiſts; wherein by *Sect.* 6, 'tis provided, That if any Perſon ſo preſented or nominated to any Benefice with Cure, ſhall be abſent from the ſame above the Space of ſixty Days in any one Year, that in ſuch Caſe the ſaid Benefice ſhall become void.

Cod. 939.

In caſe of any habitual Diſtemper of Mind; whereby the Incumbent is rendred incapable of the Adminiſtration of his Cure (as Frenzy, Lunacy, *&c.*)

Reſidence, &c.

&c.) the Laws of the Church have provided Coadjutors; of theſe there are many Inſtances remaining upon our Books, both before and ſince the Reformation; and we find them given generally to Parochial Miniſters, but ſometimes to Deans, Archdeacons, Prebendaries, *&c.* And no doubt they may be given in ſuch Caſes at the Diſcretion of the Ordinary to any Eccleſiaſtical Perſon, having Eccleſiaſtical Cure and Revenue.

The Powers conveyed are firſt in general Terms, the Office of a Coadjutor, and then in particular the Looking after the Cure, the Receiving of the Profits and the Diſcharge of the Burdens, with an Obligation to be accountable to the Ordinary when called upon. But the Article for looking after the Cure is a late Clauſe, and not found in the antient Appointments of this Kind, even of thoſe ſince the Reformation, which extended no farther than the Adminiſtration of the Revenues. Not but the Office was always committed to a Clergyman, who if not ingaged in another Cure might take on him the ſpiritual Part alſo, and have it accordingly committed to him by the Biſhop: But this was properly no Part of the Office of a Coadjutor as ſuch, which antiently related to the Temporalties only.

In the Reign of Queen *Elizabeth* the Court of Wards had taken upon them to commit the Perſon and Revenues of a lunatick Incumbent to a Layman, who was his near Relation; againſt which the Archbiſhop objected as an Incroachment on the Eccleſiaſtical Juriſdiction, and proved the Charge by divers Teſtimonies out of the Records of *Canterbury* and *London*. And the Perſon to whom the Cuſtody had been committed being cited to anſwer the Charge of the Archbiſhop, and alledging nothing to the contrary, the Court thereupon made this Declaration, *viz.* "This Court hath not any Power or Juriſdiction to intermeddle with or commit "the Spiritual or Eccleſiaſtical Livings or Poſſeſſions of any Spiritual "Perſon, that is lunatick or *Non compos Mentis*; but that the ſame "reſteth in the Eccleſiaſtical Magiſtrates to appoint and diſpoſe, as for-"merly hath been accuſtomed. But for the moveable Goods of the "ſaid Incumbent Lunatick, and his temporal Poſſeſſions, the Court "will further conſider thereof, *&c.* In Purſuance of which Declaration the ſaid Archbiſhop committed the Adminiſtration of the Spiritual Revenues to a Clergyman under the Stile of a Coadjutor; and afterwards by a ſeparate Inſtrument committed the Cuſtody of the Lunatick to the Perſon who had been appointed for the whole Care by the Court of Wards.

See *Chap.* 43. of Leaſes avoided by Non-reſidence.

CHAP. XXXVIII.

Of Corporations ſole and aggregate, and of the Statutes concerning Mortmain.

What are the Effects of a Miniſter's legal Poſſeſſion.

HAving ſpoken of the ſeveral Duties of a Miniſter as the Effect of his being inſtituted to a Benefice with Cure, or otherwiſe charged with the Cure thereof, and of all Things relating thereunto, I am now

to ſhew what are the Effects of his legal Poſſeſſion, which is that by which a Clergyman doth become a compleat Incumbent of an Eccleſiaſtical Preferment againſt all Perſons whatſoever, *Hill.* 11 *Jac. Needler* v. *Winton* and *Needham*, 1 *Brownl.* and *Goulds.* 163. 38 *E.* 3. 4. 13 *Jac. Hitchins* and *Glover*'s Caſe, 1 *Roll's* 191. 4 *Eliz. Dyer* 217. 33 *H.* 6. 24. 6 *Co.* 49. *b.* 7 *Co.* 26, whether the Poſſeſſion be by a formal Induction, Inſtallation, or otherwiſe.

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Firſt then of a Clergyman's being legally intitled to an Eccleſiaſtical Benefice or Promotion, there follows this immediate Effect, that ſuch Clergyman is at leaſt thereby an Eccleſiaſtical Secular Body Politick, or Corporation ſole, or a Member of an Eccleſiaſtical Secular Body Politick, or Corporation aggregate, or both, 3 *Inſt.* 202, (for Eccleſiaſtical Regular Bodies Politick are extinguiſhed within this Realm, ſuch were Abbot and Covents.) A Clergyman by being made a Biſhop, Prebend, Parſon, Vicar, or the like, becomes a Corporation ſole. 1 *Roll's Abr.* 512. *a.* By being made Member of a Chapter, he is a Member of a Corporation aggregate, for ſuch is a Dean and Chapter, and all other Corporations conſiſting of many. 1 *Roll's Abr.* 512. *a.* And indeed by being made a Dean or Prebend of a Church, if he holds his Poſſeſſions ſingly he is a Corporation ſole, and yet with others he doth make a Chapter, and thereby is a Member of a Corporation aggregate, and ſo the ſame Perſon by being Incumbent of the ſame Preferment, may be both a Corporation ſole, and a Member of a Corporation aggregate. A Corporation aggregate is ſaid to be inviſible, immortal, and to reſt only in Intendment and Conſideration of Law, and therefore can have neither Predeceſſor nor Succeſſor, nor can they commit Treaſon, be outlawed or excommunicated. 45 *E.* 3. 2. 3. *b. Fitz. Corporations*, &c. 11. They cannot appear in Perſon, but by Attornies, nor do Fealty, becauſe being an inviſible Body cannot appear in Perſon. 13 *H.* 8. 12. And the Continuance of either Sort of Corporations doth not depend upon the Preſervation of their Poſſeſſions, as is ſaid. *Paſch.* 40 & 41 *Eliz. The Dean and Chapter of Norwich*'s Caſe, 3 *Co.* 75, for a Corporation may be created without Lands, and though a Dean and Chapter ſhould part with all their Poſſeſſions, yet they remain ſtill a Corporation to the Purpoſes for which they were inſtituted; they have *Vocem in Capitulo*, &c. *Hill.* 3 *Car. B. R. Haywood* v. *Fulcher*, *Jones* 168. And if the Corps of a Prebend be a Manor, and nothing elſe, and the Manor be recovered from him by a Title paramount, yet this Corporation remains, he is a Prebendary ſtill, and hath *Stallum in Choro & Vocem in Capitulo*, though he hath no Poſſeſſions. 15 *Aſſize* 8. And ſo it is, becauſe by the Biſhop's Conſent they were incorporated before they had Poſſeſſions, and after had Poſſeſſions aſſigned to them out of ſome of the Poſſeſſions of the Biſhoprick, which before were in common. *Mich.* 40 & 41 *Eliz. The Caſe of the Dean and Chapter of Norwich*, 3 *Co.* 75. *b.* 10 *Co.* 28. 25 *Aſſ.* 28. 3 *Cro.* 79.

That he is an Eccleſiaſtical Secular Body Politick, or Corporation ſole, &c.

This Effect of a legal Title, *viz.* of being thereby a Body Politick or Corporate, brings with it another Effect, *viz.* that the Corporation may purchaſe or receive to itſelf and its Succeſſors any Gift of any Manors or other Inheritances, whether corporeal, as Lands and the like, or incorporeal, as Advowſons, Tithes, Rents, Commons, Eſtovers; but a Chapter is not a Body that hath a Capacity of its ſelf, to take by Purchaſe or by Gift without the Dean, who is the Head of their Body. *Eire*'s Caſe, *Moor* 51. 4 *Leon.* 223. 1 *Inſt.* 263, 264. 13 *H.* 8. 12. 14 *H.* 8. 30. Yet there may be a Chapter without any Dean, as the

Such Body Politick, &c. may purchaſe Lands.

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Chapter of the Collegiate Church of *Southwel*; and Grants by or to them are as effectual as other Grants by Dean and Chaper, and they are reſtrained by the Statutes of 13 *Eliz.* tho' the Words of that Statute be, **Deans and Chapters,** *Trin.* 27 *Car.* 2. *C. B. The Chapter of the Collegiate Church of Southwell* v. *The Biſhop of Lincoln* and *J. S. Mod. Rep.* 204. And a Corporation aggregate may alſo take any Chattel, Bond, Leaſe, or the like, in its politick Capacity, becauſe it always is in Being; but otherwiſe it is as to Corporations ſole, for regularly as to them no Chattel can go in Succeſſion. 1 *Roll's Abr.* 515. *b.* 4 *Co.* 65. Nor can they take Bond to them and their Succeſſors. *Mich.* 32 *H.* 8. *Dyer* 48. *a. contra* by *Shelley*. Therefore if a Leaſe for Years be made to a Biſhop, or to a Parſon and his Succeſſors, it ſhall go to his Executors or Adminiſtrators, for it is as a Leaſe made to a Man and his Heirs, which ſhall go to the Executors. *Inſt.* 46. *b.* Accordingly when a Chantery Prieſt incorporate took a Leaſe to him and his Succeſſors for an Hundred Years, and after took a Releaſe from the Leſſor to him and his Succeſſors, it was adjudged that by the Releaſe he had but an Eſtate for Life, for he had the Leaſe at firſt in his natural Capacity, for that it could not go in Succeſſion, and the Words [*his Succeſſors*] could not give him an Eſtate of Inheritance in the ſame Capacity he had the Leaſe for want of the Words [*his Heirs*]. If the King by his Letters Patent giveth Lands *Decano & Capitulo, habendum ſibi & Hæredibus & Succeſſoribus ſuis*, in this Caſe, albeit they be Perſons capable to take in their natural Capacity to them and their Heirs, yet becauſe the Grant is made to them in their politick Capacity, it ſhall enure to them and their Succeſſors: And ſo if the King do grant Lands to *J. S. habendum ſibi & Succeſſoribus, ſive Hæredibus ſuis*, this Grant ſhall enure to him and his Heirs. 1 *Inſt.* 9. *a.* But if the King grant to *J. S.* Parſon of *D.* and his Succeſſors, and to *J. S.* Clerk, and his Heirs, in this Caſe he is Tenant in Common with himſelf. 1 *Inſt.* 190. *a.*

How a Corporation aggregate may take a Chattel, *&c.*

As to a Corporation purchaſing Lands, *&c.*

As to a Corporation receiving or purchaſing Lands, or the like, theſe Things are to be noted: Firſt, That a Corporation cannot be ſeiſed in Tail, for that every Eſtate in Tail ought to limit of what Body their Heirs ſhall be, but it may have an Eſtate in Fee determinable upon the Death of a Perſon without Iſſue, *&c.* Secondly, A ſole Corporation may be ſeiſed of a Freehold for its own Life, but not a Corporation aggregate, becauſe it never dies. Thirdly, A Corporation cannot be ſeiſed to the Uſe of another; and therefore if one by Licence without a valuable Conſideration makes a Feoffment, levieth a Fine, or ſuffers a Recovery, or the like, to a Corporation, and no Uſe is limited, the Corporation ſhall be ſeiſed to their own Uſe; or if an Uſe be limited to ſome certain Perſon, yet the Corporation ſhall be ſeiſed to their own Uſe, and not to the Uſe of him to whom the Uſe is declared. 1 *Co. fol.* 122, 126. Fourthly, If Lands be given to a Corporation aggregate of many, it muſt be by Deed; but to a ſole Corporation they may be granted without Deed, and ſo may all other Things that will paſs without Deed to a Perſon in his natural Capacity. 1 *Inſt.* 94. *b.* Fifthly, If Lands be granted to, or purchaſed by a Corporation aggregate, as Dean and Chapter, *&c.* they have a Fee-ſimple without the Word [*Succeſſors*], for that the Body never dies. 19 *H.* 6. 74. 20 *H.* 6. 36. 1 *Inſt.* 94. *b.* But if they be given to, or purchaſed by a ſole Body Politick or Corporate, as Biſhop, Parſon, or the like, who after their Deceaſes have a Succeſſion; there to give him an Eſtate of Inheritance in his politick or corporate Capacity, he muſt have theſe Words [*his Succeſſors*], for as the Heir doth inherit to the

Lands given, *&c.* to a Corporation aggregate.

Anceſtor, and the Executors ſucceed to the Teſtator; ſo doth the Succeſſor ſucceed to the Predeceſſor; and yet even in the Caſe of a ſole Corporation, a Fee-Simple ſhall ſometimes paſs without this Word [*Succeſſors*]; as if a Feoffment in Fee be made of Land to a Biſhop, or the like, to have and to hold to him *in libera Eleemoſyna*, a Fee-ſimple doth paſs without the Word [*Succeſſors*], for ſuch Grants in Frankalmoign are ancient Grants, and therefore ſhall be allowed as the Law was taken when ſuch Grants were made. *Plowd. Com.* 242. Lord *Berkley*'s Caſe, 1 *Inſt.* 94. *b.* Sixthly, Although a Corporation hath a Capacity to purchaſe and receive any manner of Inheritance as is ſaid, yet can they not retain it unleſs a due Licence of Mortmain be obtained for the ſecuring it to them, that is, both of the King, the Lords mediate and immediate. And if the King, and all the Lords mediate and immediate, do grant a Diſpenſation of the Statute of *Quia emptores terrarum*, 18 *E.* 1, this ſhall enure to two Intents, *viz.* to a Diſpenſation both of the ſaid Statute, and of the Statutes of Mortmain, becauſe their Deeds ſhall be taken moſt ſtrongly againſt themſelves: But it is a ſafe and good Policy in the King's Licence to have a *Non obſtante* alſo of the Statutes of Mortmain, and not only a *Non obſtante* of the Statute of *Quia emptores terrarum*, 18 *E.* 1. But it appeareth by *Littleton*, that there needeth not any *Non obſtante* of the Statutes of Mortmain, for the King ſhall not be intended to be miſconuſant of the Law; and when he licenſeth expreſly to alien to an Abbot, *&c.* which is in Mortmain, he need not make any *Non obſtante* of the Statutes of Mortmain; for it is apparent to be granted in Mortmain, and the King is the Head of the Law; and therefore *Præſumitur Rex habere omnia Jura in ſcrinio pectoris ſui*, for the Maintenance of his Grant to be good according to the Law. 1 *Inſt.* 99. *a.*

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Grants in Frankalmoign.

Licence of Mortmain to be obtained.

And as to the King's Licence it hath been enacted, **That if Prelates, Clerks beneficed, or religious People which have purchaſed Lands, and the ſame have put to Mortmain, be impeached upon the ſame before our Juſtices, and they ſhew our Charter of Licence, and Proceſs thereupon made by an Inqueſt of** Ad quod damnum, **or of our Grace, or by Fine, they ſhall be freely let in Peace, without being further impeached for the ſame Purchaſe. And in caſe they cannot ſufficiently ſhew, that they have entred by due Proceſs after Licence to them granted in general or in ſpecial, that they ſhall be well received to make a convenient Fine for the ſame, and that the Inquiry of this Article ſhall wholly ceaſe, according to the Accord compriſed in this Parliament.** Stat. 18 E. 3. cap. 3. And if the King, who gave the Licence, doth die before Execution thereof, yet it may be executed after. 1 *Inſt.* 52. *b.* If an Eccleſiaſtical Perſon hold Lands by Fealty and certain Rent, the Lord may confirm his Eſtate to hold to him and to his Succeſſors in Frankalmoign; for the former Services be extinct, and nothing is reſerved, but that he holds of him, and ſo he did before; 1 *Inſt.* 99. *a*, and this it ſeems without other Licence.

18 *E.* 3. *c.* 3. As to the King's Licence.

And as to this Matter, divers other Statutes have been made; the Firſt, upon which all the reſt are built and have Dependance, is, *Stat.* 9 *H.* 3. *c.* 36. The Words of which are, **It ſhall not be lawful from henceforth to any to give his Lands to any Religious Houſe, and to take the ſame Land again to hold of the ſame Houſe. Nor ſhall it be lawful to any Houſe of Religion to take the Lands of any, and to releaſe the ſame to him of whom he received it: If any from henceforth give his Lands to any Religious Houſe, and thereupon be convict,**

Stat. 9 *H.* 3. *c.* 36.

Mortmain. convict, the Gift shall be utterly void, and the Land shall accrue to the Lord of the Fee.

How avoided by Religious Men. But religious Men found out divers Ways to avoid this Statute, as by purchasing Lands held of themselves, or to take long Leases for Years, and many other Devices to escape out of this Statute: And besides, all others, except only Ecclesiastical Persons regular, as Abbots, &c. thought themselves to be out of this Statute; therefore to meet with these Evasions was made this Statute, 7 *Ed.* 1, which is as followeth:

Remedy by *Stat.* 7 *Ed.* 1. Where of late it was provided, That Religious Men should not enter into the Fees of any without Licence and Will of the Chief Lord of whom such Fees be holden immediately: And notwithstanding such Religious Men have entred as well into their own Fees, as in the Fees of other Men, appropying and buying them, and sometime receiving them of Gift of others, whereby the Services that are due of such Fees, and which at the Beginning were provided for the Defence of the Realm, are wrongfully withdrawn, and the Chief Lords do leese their Escheats of the same: We therefore to the Profit of our Realm, intending to provide convenient Remedy, by the Advice of our Prelates, Earls, Barons, and other our Subjects, being of our Council, have provided, made, and ordained, that no Person, religious or other, whatsoever he be, that will buy or sell any Lands or Tenements, or under the Colour of Gift or Lease, or that will receive by reason of any other Title, whatsoever it be, Lands or Tenements, or by any other Craft or Ingine will presume to approve to himself, under Pain of Forfeiture of the same, whereby such Lands or Tenements may any wise come into Mortmain: We have provided also, that if any Person, religious or other, do presume either by Craft or Ingine to offend against this Statute, it shall be lawful to us, and other Chief Lords of the Fee immediate to enter into the Land so aliened, within a Year from the Time of the Alienation, and to hold it in Fee, and as Inheritance. And if the Chief Lord immediate be negligent, and will not enter into such Fee within the Year, then it shall be lawful to the next Chief Lord immediate of the same Fee to enter in the same Land within half a Year next following, and to hold it as before is said; and so every Lord immediate may enter into such Land, if the next Lord be negligent in entring into the same Fee, as is aforesaid. And if all the Chief Lords of such Fees, being of full Age, within the Four Seas, and out of Prison, be negligent or slack in this Behalf, We immediately after the Year accomplished, from the Time that such Purchases, Gifts or Appropriations happen to be made, shall take such Lands and Tenements into our Hand, and shall infeoff other therein by certain Services to be done to us for the Defence of our Realm, saving to the Chief Lords of the same Fees their Wards and Escheats, and other Services thereunto due and accustomed. And therefore we command you, that ye cause the aforesaid Statute to be read before you, and from henceforth to be kept firmly and observed. Witness my self at Westminster, the Fourteenth Day of November in the Seventh Year of our Reign.

Annuity no Mortmain. This Statute is to be understood of such Inheritances as may be holden, for of such Inheritances as are not holden, as Villains, Rents, Charges, Commons, and the like, the King shall have them presently by a favourable Interpretation of the Statute; and this Statute doth extend as well to Temporal Corporations sole or aggregate as Ecclesiastical: But an Annuity

granted to them is not Mortmain, becauſe it chargeth the Perſon only, not the Land. 1 *Inſt. fol.* 2. *b.* Mortmain.

But this Statute extending only to Gifts, Alienations, and other Conveyances, made between them and others, they gave over that Way; but then pretending a Title to the Land (that they meant to get), brought a feigned Action againſt the Tenant of the Land, and he by Conſent and Colluſion ſhould make Default, and thereupon they ſhould recover the Land and enter by Judgment at Law. But this Evaſion was provided againſt in theſe Words: Another Evaſion invented.

When Religious Men and other Eccleſiaſtical Perſons do implead any, and the Party impleaded maketh Default, whereby he ought to leeſe the Land, forasmuch as the Juſtices have thought hitherto, that if the Party impleaded make Default by Colluſion, that where the Demandant, by Occaſion of the Statute, could not obtain Seiſin of the Land by Title of Gift, or other Alienation, he ſhall now by reaſon of the Default, and ſo the Statute is defrauded. It is ordained by our Lord the King, and granted, That in this Caſe, after the Default made, it ſhall be inquired by the Country, whether the Demandant had Right in the Thing demanded or no; and if it be found that the Demandant had Right in his Demand, the Judgment ſhall paſs with him, and he ſhall recover Seiſin; and if he hath no Right, the Land ſhall accrue to the next Lord of the Fee, if he demand it within a Year from the Time of the Inqueſt taken. And if he do not demand it within the Year, it ſhall accrue to the next Lord above, if he do demand it within half a Year after the ſame Year: And ſo every Lord after the next Lord ſhall have the Space of half a Year to demand it ſucceſſively, until it come to the King, to whom at length, through Default of other Lords, the Land ſhall accrue. And to challenge the Jurors of the Inqueſt, every of the Chief Lords of the Fees ſhall be admitted, and likewiſe for the King, they that will ſhall challenge. And after the Judgment given, the Land ſhall remain clear in the King's Hands, until it be dereigned by the Demandant, or ſome other Chief Lord, and the Sheriff ſhall be charged to anſwer therefore at the Exchequer. Stat. 13 Ed. 1. cap. 32. Remedy by 13 *E.* 1. *c.* 32.

Notwithſtanding all theſe Statutes, they after procured Lands to be conveyed to divers Perſons and their Heirs to the Uſe of them and their Succeſſors, by reaſon whereof they took the Profits. But a Stop was put to this Practice by another Statute, as followeth: Another Evaſion.

Whereas it is contained in the Statute De Religioſis, **that no Religious, nor other, whatſoever he be, do buy or ſell, or under Colour of Gift, or Term, or any other manner of Title whatſoever, receive of any Man, or in any manner by Gift or Ingine, cauſe to be appropriated unto him any Lands or Tenements upon Pain of Forfeiture of the ſame, whereby the ſaid Lands or Tenements in any manner might come to** Mortmain. **And if any Religious, or any other, do againſt the ſaid Statute, by Art or Ingine in any manner, that it be lawful to the King, and to other Lords upon the ſaid Lands and Tenements to enter, as in the ſaid Statute doth more fully appear. And now of late by ſubtil Imagination, and by Art and Ingine, ſome religious Perſons, Vicars, and other Spiritual Perſons, have entred in divers Lands and Tenements which be adjoining to their Churches, and of the ſame, by Sufferance and Aſſent of the Tenants, have made Church-yards, and by Bulls of the Biſhop of Rome have dedicated and hallowed the ſame, and in them do make** Remedy by 15 *R.* 2. *c.* 5.

Mortmain. continually Parochial Burying without Licence of the King and of the Chief Lords; therefore it is declared in this Parliament, That it is manifestly within the Compass of the said Statute. And moreover it is agreed and assented, That all they that be possessed by Feoffment, or by other manner, to the Use of religious People, or other Spiritual Persons, of Lands and Tenements, Fees, Advowsons, or any manner of other Possessions whatsoever, to amortise them, and whereof the said Religious and Spiritual Persons take the Profits, that betwixt this and the Feast of St. Michael next coming, they shall cause them to be amortised by the Licence of the King and of the Lords, or else that they shall sell and alien them to some other Use between this and the said Feast, upon Pain to be forfeited to the King, and to the Lords, according to the Form of the said Statute of Religious, as Lands purchased by Religious People. And that from henceforth no such Purchase be made, so that such Religious or other Spiritual Persons take thereof the Profits, as afore is said, upon Pain aforesaid. And that the same Statute extend and be observed of all Lands, Tenements, Fees, Advowsons, and other Possessions purchased, or to be purchased to the Use of Guilds or Fraternities. And moreover it is assented, because Mayors, Bailiffs, and Commons of Cities, Boroughs, and other Towns which have a perpetual Commonalty, and others which have Offices perpetual, be as perpetual as People of Religion, that from henceforth they shall not purchase to them, and to their Commons or Office, upon Pain contained in the said Statute De Religiosis. And whereas others be possessed, or hereafter shall purchase to their Use, and they thereof take the Profits, it shall be done in like manner as is aforesaid of People of Religion. Stat. 15 R. 2. cap. 5.

King's Licence to amortise.

23 *H.* 8. *c.* 10. Of Feoffments, *&c.* to Uses. And after all these, then was made the Statute of 23 H. 8. c. 10. as followeth: Where by reason of Feoffments, Fines, Recoveries, and other Estates and Assurances, made of Trust, of Manors, Lands, Tenements, and Hereditaments, to the Use of Parish Churches, Chapels, Church-wardens, Guilds, Fraternities, Commonalties, Companies, or Brotherheads, erected and made of Devotion, or by common Assent of the People without any Corporation, and also by reason of Feoffments, Fines, Recoveries, Wills, and other Acts made to any Uses aforesaid, or to the Uses and Intents to have Obits perpetual, or a continual Service of a Priest for ever, or for Threescore or Fourscore Years, founden of the Issues and Profits of the Manors, Lands, Tenements and Hereditaments, whereof such Feoffments, Fines, Recoveries, Wills, and other Acts been made, or that the Feoffees, Comisees, Recoverers, or other Persons and their Heirs thereof seized, shall take, levy, receive and perceive, or cause or suffer to be taken levied and perceived, the Issues, Revenues, and Profits thereof, and the same to dispose, pay, convert, or otherwise imploy, or suffer, or cause to be disposed, paid, converted, or imployed to any such Uses, Intents or Purposes, as been above specified, or to any other like Uses or Intents; there groweth and issueth to the King our Sovereign Lord, and to other Lords and Subjects of the Realm, the same like Losses and Inconveniencies, and is as much prejudicial to them, as doth and is in case where Lands be alienes to Mortmain:

Be it therefore enacted by the King our Sovereign Lord, the Lords Spiritual and Temporal, and the Commons in this present Parliament

ment assembled, and by Authority of the same, That all and every such Uses, Intents and Purposes, of what Name, Nature or Quality they shall be called, that shall be devised, covenanted, made, declared, or in any wise ordained, after the First Day of March in the Three and twentieth Year of the Reign of our Sovereign Lord King Henry the Eighth, by any Feoffee, Recoverer, or Conisee, or by any other Person or Persons, to whose Use any such Feoffee, Recoverer or Conisee shall be seised of any Manors, Lands, Tenements or Hereditaments, or of the Issues, Revenues and Profits of them, or any of them, shall be utterly void, and of no Strength, Virtue nor Effect in the Law. Mortmain.

Provided alway, That it shall be lawful to every Person being seised of any Manors, Lands, Tenements or Hereditaments, to his own proper Use, or having Feoffees, Recoverers or Conisees to his Use, to make or ordain, or devise, or cause to be made, ordained or devised, any of the Uses, Intents or Purposes above specified, in such manner as they might have done before the making of this Act, and as if this Act had never been had ne made: So that no such Uses, Intents or Purposes to be so made, ordained or devised after the said First Day of March, be not in any wise made, ordained, devised or appointed to indure, continue or abide, by any Craft, Colour, Terms, Sentences, Clauses, Words, or other Means, above the Term of Twenty Years next after the first making and beginning of any such Uses, Intents or Purposes.

And it is farther enacted, That if any Person or Persons in Default of this Statute bind or ordain any their Heirs or Successors, or any other Person or Persons, that they shall suffer such Uses, Intents or Purposes to indure and continue contrary to this Act, upon Pains or Penalties of Losses of any other Lands, Tenements, Hereditaments, or of any other Thing or Things; or do attempt or devise by any Colour, Craft or Means, any Thing or Things, to make any such Uses, Intents or Purposes to be declared contrary to the true Meaning of this Act, to continue or abide for any longer Time or Season than is above limited for the same; that then every such Pain, Penalty, Craft, Colour, and every other Thing and Things of what Kind, Nature or Quality soever it be, that shall be so made, ordained or devised in Defraud of this Act, shall be utterly void in the Law to all Intents. And that this Statute shall be always interpreted and expounded as beneficially as may be, to the Destruction and utter Avoiding of such Uses, Intents and Purposes therein above remembred, and of all other like Uses and Intents, otherwise than only after such manner as is afore by this present Act provided.

Provided alway, That in such Cities and Towns Corporate, where by their ancient Customs they have good and lawful Authorities to devise into Mortmain the Lands, Tenements and Hereditaments within the same Cities or Towns Corporate, that this Act shall not be in any wise prejudicial or hurtful to any such Custom. 23 H. 8. cap. 10. Proviso for ancient Customs.

But notwithstanding this, or any of the before-mentioned Statutes, any Man at this Day may give Lands, Tenements or Hereditaments, to any Person or Persons and their Heirs, for the finding of a Preacher, Maintenance of a School, Relief and Comfort of maimed Soldiers, Sustenance of poor People, Reparations of Churches, Highways, Bridges, Charitable Uses allowed.

Mortmain.

Bridges, Cawſeys, diſcharging of poor Inhabitants of a Town of common Charges, for making of a Stock for poor Labourers in Huſbandry, and poor Apprentices, and for the Marriage of poor Virgins, or for any other charitable Uſes. See the ſeveral Statutes of 35 *Eliz. c.* 7. 39 *Eliz. c.* 5. 43 *Eliz. c.* 4. And it is a good Policy, upon any Feoffment, *&c.* to ſuch charitable Uſes, to reſerve a ſmall Rent to the Feoffor and his Heirs, or to expreſs ſome ſuch Conſideration of ſome ſmall Sum; for then the Feoffees ſhall be ſeiſed to their own Uſe, and not to the Uſe of the Feoffor, and ſo will be put out of Doubt, that the Statute of 23 *H.* 8, cannot make void the Uſe. *Mich.* 34 & 35 *Eliz.* *The Queen* and *Porter*'s Caſe, 1 *Coke* 24. *b.* *Paſch.* 13 *Jac.* *The Caſe of the Maſter and Fellows of Magdalen College*, 11 *Coke* 70. Alſo notwithſtanding any of the aforeſaid Statutes, by the Cuſtom of the City of *London* any Citizen, being a Freeman of *London*, by his Will in Writing may deviſe all his Leaſes and Lands, or any Part thereof in the ſaid City in Mortmain without Licence, *Doct. & Stud. Chap.* 10. *Mich.* 14 *Jac.* *Standiſh* v. *Short*, *Bridgm.* 103. *Paſch.* 28 & 29 *H.* 8. *Dyer* 33, but then the Citizen muſt be reſident there, and taxable to Scot and Lot. *Roll's Abr.* 1. 556. 45 *Ed.* 3. 26. *Br. Cuſtoms* 7. 38 *Aſſ. p.* 18. Upon an Alienation in Mortmain an Entry is given to the Lord of whom the Land is holden, and the King can hold of none, but all Lands ought immediately or mediately to be held of him; yet if it appear in any Conveyance, that an Eſtate is granted to the King with an Intent to convey it in Mortmain, it is not good. 17 *Ed.* 3.

By 35 *Eliz.* *c.* 7. 39 *Eliz.* *c.* 5. 43 *Eliz.* *c.* 4.

Augmentation of poor Benefices, by 17 *Car. c.* 3. See in the following Chapter the *Stat.* 29 *Car.* 2. *c.* 8, for Augmentation of Vicarages.

And for the Augmentation of poor Benefices with Cure, it hath been enacted, **That every Owner or Proprietor, Owners or Proprietors of any Impropriation, Tithes, or Portion of Tithes, in any Pariſh or Chapelry within the Kingdom of** England, **or Dominion of** Wales, **is, are, and ſhall be, by Virtue of this Act, enabled and impowered to give or beſtow, unite and anner the ſame, or any Part thereof, unto the Parſonage or Vicarage of the ſaid Pariſh Church or Chapel where the ſame do lie, or ariſe, or ſettle the ſame in Truſt for the Benefit of the ſaid Parſonage or Vicarage, or of the Curate and Curates there ſucceſſively, where the Parſonage is impropriate, and no Vicar indowed, according to his or their reſpective Eſtates, without any Licence of Mortmain; any Law or Statute to the contrary notwithſtanding.**

Where the Maintenance of a Parſonage, *&c.* amounts not to 100*l. per Annum.*

And be it further enacted, That if the ſettled Maintenance of ſuch Parſonage, Vicarage, Churches and Chapels ſo united, or of any other Parſonage or Vicarage with Cure in the Kingdom of England, **or Dominion of** Wales, **ſhall not amount to the full Sum of One hundred Pounds** per Annum, **clear and above all Charges and Reprizes, that then it ſhall be lawful for the Parſon, Vicar and Incumbent of the ſame, and his Succeſſors, to take, receive and purchaſe to him and his Succeſſors, Lands, Tenements, Rents, Tithes, or other Hereditaments, without any Licence of Mortmain; any Law or Statute to the contrary notwithſtanding.** Stat. 17 Car. 2. c. 3.

7 & 8 *W.* 3. *c.* 37.

It is alſo enacted, **That whereas it would be a great Hindrance to Learning, and other good and charitable Works, if Perſons well inclined may not be permitted to found Colleges or Schools for Encouragement of Learning, or to augment the Revenues of Colleges and Schools already founded, by granting Lands, Tenements, Rents or other Hereditaments to ſuch Colleges or Schools, or to grant Lands or other Hereditaments to other Bodies politick or incorporated now in**

in Being, or hereafter to be incorporated for other good and publick Uses; Be it therefore enacted by the King's most excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by Authority of the same, that it shall and may be lawful to and for the King, our most gracious Sovereign Lord, and for his Heirs and Successors, when and as often, and in such Cases as his Majesty, his Heirs or Successors shall think fit, to grant to any Person or Persons, Bodies Politick or Corporate, their Heirs and Successors, license to alien in Mortmain. And also to purchase, acquire, take, and hold in Mortmain in Perpetuity or otherwise, any Lands, Tenements, Rents, or Hereditaments whatsoever, of whomsoever the same shall be holden. And it is hereby declared, that Lands, Tenements, Rents or Hereditaments so alienes, or acquired, and licensed, shall not be subject to any Forfeiture for or by Reason of such Alienation or Acquisition. Stat. 7 & 8 W. 3. cap. 37. Mortmain.

By Stat. 9 Geo. 2. ch. 36. it is enacted, That from and after the Twenty-fourth Day of June in the Year of our Lord One thousand seven hundred and thirty-six, no Manors, Lands, Tenements, Rents, Advowsons, or other Hereditaments, Corporeal or Incorporeal, whatsoever, nor any Sum or Sums of Money, Goods, Chattels, Stocks in the Publick Funds, Securities for Money, or any other personal Estate whatsoever, to be laid out or disposed of in the Purchase of any Lands, &c. shall be given, granted, alienes, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any Person or Persons, Bodies Politick or Corporate, or otherwise, for any Estate or Interest whatsoever, or any ways charged or incumbred by any Person or Persons whatsoever, in Trust or for the Benefit of any Charitable Uses whatsoever, unless such Gift, Conveyance, Appointment or Settlement of any such Lands, &c. Sum or Sums of Money, or personal Estate (other than Stocks in the publick Funds) be, and be made by Deed indented, sealed, and delivered in the Presence of two or more credible Witnesses, twelve Kalendar Months at least before the Death of such Donor or Grantor (including the Days of the Execution and Death) and be inrolled in his Majesty's high Court of Chancery within six Kalendar Months next after the Execution thereof, and unless such Stocks be transferred in the publick Books, usually kept for the Transfer of Stocks, six Kalendar Months at least before the Death of such Donor or Grantor, (including the Days of the Transfer and Death) and unless the same be made to take Effect in Possession for the Charitable Use intended immediately from the making thereof, and be without any Power of Revocation, Reservation, Trust, Condition, Limitation, Clause, or Agreement whatsoever, for the Benefit of the Donor or Grantor, or of any Person or Persons claiming under him.

Provided, That nothing herein before mentioned, relating to the Sealing and Delivery of any Deed or Deeds twelve Kalendar Months at least before the Death of the Grantor, or to the Transfer of any Stocks six Kalendar Months before the Death of the Grantor, or Person making such Transfer, shall extend, to any Purchase of any Estate or Interest in Lands, &c. or any Transfer of any Stock to be made really and bona fide for a full and valuable

Mortmain. Consideration actually paid at or before the making such Conveyance or Transfer, without Fraud or Collusion.

And it is further enacted, That all Gifts, Grants, Conveyances, Appointments, Assurances, Transfers and Settlements whatsoever, of any Lands, &c. or of any Estate or Interest therein, or of any Charge or Incumbrance affecting or to affect any Lands, &c. or of any Stock, &c. or Securities for Money to be laid out or disposed of in the Purchase of any Lands, &c. or of any Estate or Interest therein, or of any Charge or Incumbrance affecting or to affect the same, to or in Trust for any Charitable Uses whatsoever, which shall at any Time, from and after the said Twenty-fourth Day of June, be made in any other Manner or Form than by this Act is directed and appointed, shall be absolutely and to all Intents and Purposes null and void.

Provided, That this Act shall not extend to make void the Dispositions of any Lands, &c. or of any personal Estate to be laid out in the Purchase of Lands, &c. which shall be made in any other Manner or Form, than by this Act is directed, to or in Trust for either of the two Universities within England, or any of the Colleges or Houses of Learning within either of the said Universities, or to or in Trust for the Colleges of Eton, Winchester or Westminster, or any or either of them, for the better Support and Maintenance of the Scholars only upon the Foundations of the said Colleges of Eton, Winchester, and Westminster.

Provided, That no such College, &c. which doth or shall hold and enjoy so many Advowsons of Ecclesiastical Benefices, as are or shall be equal in Number to one Moiety of the Fellows or Persons usually stiled or reputed as Fellows, or, where there are or shall be no Fellows or Persons usually stiled or reputed as Fellows, to one Moiety of the Students upon the Foundation whereof any such College, &c. doth or may, by the present Constitution of such College, &c. consist, shall, from and after the said Twenty-fourth Day of June, be capable of purchasing, acquiring, receiving, taking, holding, or enjoying any other Advowsons of Ecclesiastical Benefices by any Means whatsoever; the Advowsons of such Ecclesiastical Benefices as are annexed to, or given for the Benefit or better Support of the Headships of any of the said Colleges, &c. not being computed in the Number of Advowsons hereby limited.

Provided, That nothing in this Act contained shall extend to the Disposition, &c. of any Estate, real or personal, lying or being within Scotland.

CHAP.

CHAP. XXXIX.

Church and Church-yard.

Freehold of the Church and Church-yard, in whom. Intereſt in, and diſpoſing Seats in the Church, Church Repairs, Church Goods, &c. Endowment of Vicarages, of the diſtinct Rights of the Parſon and Vicar, and of Augmentations and Dilapidations.

What Freehold and Profits a Compleat Incumbent has Right to.

A Second Effect of a Clergy-man's being a compleat Incumbent of an Eccleſiaſtical Benefice, is, That the Church and Profits of the Church are actually veſted in him, ſo that he may enter upon, and convert the Profits to his proper Uſe; but yet he may not have Right to all the Profits that do belong to his Church.

When a Rector hath Poſſeſſion of a Rectory.

As to which, to ſpeak particularly, it muſt be known, that after a Rector hath Poſſeſſion of a Rectory, (eſpecially where there is no Vicar), the Soil and Freehold of the Church it ſelf, and Church-yard belonging to the Rectory, is in the Rector, 11 *H.* 4. 12. *Hill.* 12 *Jac. B. R. Frances* v. *Ley*, 2 *Croke* 367, but the Fee-ſimple of the Glebe, *&c.* are ſaid to be in Abeyance. 1 *Inſt.* 341. *a.* And by his Leaſe of the Parſonage, the Church and Church-yard do paſs; and if the Walls, Windows or Doors of the Church be broken by any Perſon, or the Trees in the Church-yard be cut down, or Graſs there be eaten up by a Stranger, the Incumbent of the Rectory (or his Tenant, if they be let) may have his Action for the Damage. 21 *H.* 7. 21. *Br. Treſpaſs* 210. 38 *H.* 6. 19. 11 *H.* 4. 12. *Br. Dean and Chapter* 3. 12. And ſee 8 *H.* 6. *fol.* 9. where the Leſſee at Will of a Parſon brought his Action of Treſpaſs for breaking his Cloſe and Houſe, which was the Church and Church-yard, and admitted to be maintainable. And, ſaith *Rolle*, it ſeems by the Book, that it was for coming there, not in Time of Divine Service, *&c.* but at ſome other Time. *Roll's Abr.* 2. *pag.* 337.

Parſon's Licence to bury in the Church.

And becauſe the Soil and Freehold of the Church is in the Parſon alone, and that the Church is not, as the Church-yard is, a common Burial-place for all the Pariſhioners, the Church-wardens, or Ordinary himſelf, cannot grant Licence of Burying to any Perſon within the Church but only the Rector, or Incumbent thereof, *Hill.* 12 *Jac. B. R. Frances* v. *Ley*, 2 *Croke* 366. *Mich.* 12 *Jac. Day* v. *Beddingfield*, *Noy* 104. yet the Church-wardens by Cuſtom may have a Fee for every Burial within the Church, by reaſon the Pariſh is at the Charge of repairing the Floor. *Mich.* 27 *Car.* 2. *Andrews* v. *Symſon*, 3 *Keble* 504, 523, 527. 1 *Ventris* 274. And though the Church and Church-yard be the Parſon's, and be conſecrated, yet a Man may preſcribe to have a Way through the Church or Church-yard. *Roll's Abr.* 2. 265.

Trees growing in the Church-yard. 35 *Ed.* 1. *An.* 1307.

And concerning the Parſon's Right to Trees growing in the Church-yard, it hath been eſtabliſhed as followeth, which, *Coke* ſays, is but a Declaration of the Common Law, 11 *Coke* 49. **Becauſe we do underſtand, that Controverſies do oft times grow between Parſons of Churches**

Seats in Churches.

Churches and their Parishioners, touching Trees growing in the Church-yard, both of them, pretending that they do belong unto themselves: We have thought it good rather to decide this Controversy by Writing than by Statute; forasmuch as a Church-yard that is dedicated is the Soil of a Church, and whatsoever is planted belongeth to the Soil, it must needs follow that those Trees which be growing in the Church-yard are to be reckoned amongst the Goods of the Church, the which Lay-men have no Authority to dispose; but as the Scripture doth testify, the Charge of them is committed only to Priests to be disposed of.

To be used for repairing of the Chancel, &c.

And yet seeing those Trees be often planted to defend the Force of the Wind from hurting of the Church, We do prohibit the Parsons of the Church, that they do not presume to fell them down unadvisedly, but when the Chancel of the Church doth want necessary Reparations. Neither shall they be converted to any other Use, except the Body of the Church doth need like Repair: In which Case the Parsons of their Charity shall do well to relieve the Parishioners with bestowing upon them the same Trees; which we will not command to be done, but will commend it when it is done. Stat. 35 Ed. 1. An. 1307.

Trespasser punishable.

If the Trees be cut down by any but the Incumbent, he may sue such Trespasser in the Spiritual Court to have him punished there, but not for Damages. *Mich.* 13 *Jac. Bellamy*'s Case, *Roll*'s 1 *Rep.* 255.

Prescription to repair an Isle, and to sit there, &c.

Though it doth generally hold true, that the Soil and Freehold of the Church is in the Incumbent thereof, yet if any Inhabitant, and his Ancestors only, and none other, have used Time out of Mind to repair an Isle of the Church, and to sit there with his Family to hear Divine Service, and to bury there, this makes the Isle proper and peculiar to his House, and he cannot be displaced or interrupted by the Parson, Churchwardens, or Ordinary himself. But the constant Sitting and Burying there, without using to repair it, doth not gain any peculiar Property or Preheminence therein, so that such Isle being repaired by the Parishioners in common, the Parson's, Parishioners, and Ordinary's Rights remain to them. *Corven*'s Case, 12 *Coke* 105. *Hill.* 12 *Jac. B. R. Frances* v. *Ley*, 2 *Croke* 366. *Bootley* and *Bayly*'s Case, *Hobart* 69. *Trin.* 10 *Jac. C. B. Garven* v. *Pim*, *Godbolt* 200. *Mich.* 11 *Jac. May* v. *Gilbert*, 2 *Bulstrode* 150. *Mich.* 12 *Jac. Day* v. *Beddingfield*, &c. *Noy* 104. *Mich.* 17 *Jac. Dawtree* v. *Dee*, *Palmer* 46. For the Reason of any Person's Propriety in an Isle is from the Prescription to repair and use it alone; because it is from thence presumed, that the Isle was erected by him whose Estate he hath, with the Assent of the Parson, Patron and Ordinary, to the Intent to have it only to himself, as is said in *Corven*'s Case, 12 *Coke* 105. *Mich.* 10 *Jac. Prin* v. *Gorven*, *Moor* 178.

Proprietor of an Isle adjoining to a Church.

When any Person hath good Title to an Isle adjoining to a Church, if the Ordinary doth place another Person in a Seat therein with the Proprietor, the Proprietor may have his Action upon the Case against the Ordinary; and if he be impleaded in the Spiritual Court for such Seat, a Prohibition will lie, by *Coke*, *Trin.* 10 *Jac. C. B. Garven* v. *Pim*, *Godbolt* 200. Or if any private Person doth sit in such Seats, or keep out him that hath the Right, or doth bury his Dead there without his Consent, an Action upon the Case doth well lie for the Proprietor. *Trin.* 10 *Jac. Dawney* v. *Dee* and others, 2 *Croke* 604. And yet it seems, that the Freehold of such Isle is only in the Incumbent, *Dawtree* and *Dee*'s Case, *Trin.* 18 *Jac. Palmer* 46.

Though the Freehold of the Body of the Church be in the Incumbent thereof, and the Seats therein be fixed to the Freehold, yet becauſe that the Church is dedicated to the Service of God, and is for the Uſe of the Inhabitants, and the Seats are erected for their more convenient attending upon Divine Service, the Uſe of them is common to all the People that pay to the Repair thereof: And for this Reaſon, if any Seat, though affixed to the Church, be taken away by a Stranger, the Church-wardens (and not the Parſon) may have their Action againſt the wrong Doer. 8 *H.* 7. 12. But the Authority of appointing what Perſons ſhall ſit in each Seat is in the Ordinary, who is to take Care to order all Things appertaining to Divine Service, ſo that the Service of God may be beſt celebrated, that there be no Contention in the Church, and that all Things be done decently and in order; for he having the Cure of Souls, is preſumed by the Law, to be a Perſon that will have a prudent Regard to the Qualities of Men in this Caſe, and to give Precedence to ſuch as ought to have it; and with this agrees 8 *H.* 7. 12. and *Corvin*'s Caſe, 12 *Coke* 105. and by *Hutton*, *Paſch.* 4 *Car. C. B. Eaton* v. *Ayliff*, *Hetley* 94. and by *Coke*, *Brownlow* and *Gouldsborough* 1. *p.* 45. and by *Coke* in *Garven* and *Pim*'s Caſe, *Trin.* 10 *Jac. Godbolt* 200. *Mich.* 11 *Jac. B. R. May* v. *Gilbert*, 2 *Bulſtrode* 150. *Boothly* and *Bayly*'s Caſe, *Hobart* 69. 'Tis ſaid indeed in *Pim* and *Gorwin*'s Caſe, *Mich.* 10 *Jac. Moor* 878, to be held by the Juſtices, that Seats in the Body of the Church are diſpoſable by the Parſon and Church-wardens. But this may be underſtood in ordinary Caſes, when no Contention or Diſſatisfaction is about this Matter, and the Ordinary will not interpoſe becauſe none complain, or elſe this Caſe is miſreported. For all the Books are, that, generally ſpeaking, the Power of Diſpoſal of Seats in the Body of the Church is in the Ordinary; and ſo it is ſaid to be held by the Juſtices in this very Caſe, according to *Coke*'s Report of it, where it is called *Corven*'s Caſe, 12 *Coke* 105, and according to *Godbolt's Reports* 200, where it is called *Garven* and *Pim*'s Caſe. But by Cuſtom the Church-wardens may have the ordering of the Seats, as in *London*, which by the like Cuſtom may be in other Places, as was admitted in *Langley* and *Chute*'s Caſe, *Hill.* 30 and 31 *Car.* 2. *C. B. Raymond* 246. *Brabin* v. *Tredennick*, *Paſch.* 16 *Jac. B. R. Roll's* 2 *Abr.* 288. *N.* 7. *Poph.* 140. ſame Caſe *Roll's* 2 *Rep.* 24. But the Church-wardens muſt ſhew ſome particular Reaſon why they are to order the Seats excluſive of the Ordinary; for a general Allegation, that the Pariſhioners have uſed to repair and build all the Seats in the Church, *& ratione inde* the Church-wardens have uſed to order and diſpoſe of the Seats, is not ſufficient to take away the Ordinary's Power in diſpoſing and ordering the Seats, becauſe this is no more than the Pariſhioners are bound to do of common Right, (*viz.*) building and repairing the Seats; for which they have the Eaſement and Conveniency of ſitting in them. *Hill.* 30 *&* 31 *Car.* 2. *B. R. Greaterchy* v. *Beardſly*, 2 *Levinz* 241.

Seats in Churches.

How the Seats are common to all.

Seats in the Body of the Church in the Ordinary.

By Cuſtom may be in the Church-wardens.

If a Layman by the Diſſolution of the Monaſteries hath a Monaſtery in which is a church Parcel of it, and he ſuffers the Pariſhioners for ſixty Years to come thither to hear Divine Service, and to uſe it as their Pariſh Church, that ſhall give Juriſdiction to the Ordinary to diſpoſe of the Seats; becauſe in Fact, by the conſtant Uſage and Sufferance of the Proprietor, it is become the Pariſh-Church, although before it was not ſubject to the Juriſdiction of the Ordinary; *Quære*. But if the Proprietor, or Patron himſelf, hath uſed to diſpoſe of and order the Seats, by placing Perſons therein, in ſuch Caſe the Ordinary cannot diſplace ſuch Perſons, becauſe

Church Parcel of a Monaſtery uſed as a Pariſh Church.

Seats in Churches.

the Proprietor, or Patron, hath uſed, during all the Time that it hath been uſed as a Pariſh-Church, to have the placing in the Seats. *Trin.* 12 *Jac. Buzard*'s Caſe, *Roll's* 2 *Abr.* 288.

The great Queſtion as to Seats in the Body of the Church.

But the great Queſtion is, Whether all the Seats in that Part of the Church which is common to all the Pariſhioners, and repaired by them, be at the Diſpoſal of the Ordinary, or whether ſome may not belong to private Perſons, ſo that the Ordinary may not diſplace them, if he ſee Cauſe. Some Caſes are, that the Biſhop may diſpoſe of all ſuch Seats; and Firſt, it is ſaid to be held by the Juſtices, that a Perſon cannot preſcribe for a Seat in the Body of a Church. *Mich.* 10 *Jac. Pim* and *Gorwin*'s Caſe, *Moor* 878. And after, when a Prohibition to the Eccleſiaſtical Court was ſued for upon Surmiſe of a Title by Preſcription to a Seat in the common Part of the Church, all the Juſtices are ſaid to anſwer, That for the Title, they were not there to meddle with it, this being for a Seat in the Church: And again being further preſſed in the Matter, all of them ſaid, That they would not meddle with the deciding of ſuch Controverſies for Seats in the Church, but would leave the ſame to them to whom it more properly belonged. But if the Seat be in an Iſle peculiar to any Perſon, the Iſle and Seat being repaired and uſed Time out of Mind, or the Seat being built in ſuch Iſle by any Perſon with the Conſent of all the *Quorum Intereſt*, Remedy for Diſturbance ſhall be at Common Law. *Mich.* 11 *Jac. B. R. May* v. *Gilbert*, 2 *Bulſtrode* 150. And it is ſaid, that a Pew cannot belong to an Houſe. *Brownlow* and *Goulsborough* 1. *page* 45.

Preſcription to repair, &c.

Contrary to this, it is ſaid to be held by the whole Court, that if a Perſon hath uſed Time out of Mind, at his own Coſts only, to maintain a Pew in repair, and had therefore had the ſole Uſe of it, the Preſcription is a Warrant for a Prohibition, in caſe ſuch Perſon be ſued in the Eccleſiaſtical Court to be diſplaced, though the Pew be ſituated in the Body of the Church; and that no Man can challenge a Seat as peculiar to himſelf without ſuch ſpecial Reaſon, although one Perſon or Family hath uſed Time out of Mind to ſit in the ſame, and none others, *Boothly* and *Bayly*'s Caſe, *Hobart* 69, and by *Coke* in *Corven* and *Pim*'s Caſe, *Trin.* 10 *Jac. C. B. Godbolt* 200. *Roll's* 2 *Abr.* 288. *N.* 3. Yet contrary to all the aforeſaid Caſes, it is ſaid by *Coke* to be reſolved generally in the Star-Chamber, *Paſch.* 10 *Jac.* betwixt *Huſſey* and *Catharine Leyton and others*, that if a Man hath an Houſe in any Pariſh, and that Time out of Mind, he, and all thoſe whoſe Eſtate he hath, have uſed to have a certain Pew in the Church, and the Ordinary will diſplace him, he ſhall have a Prohibition, for if he hath it by Preſcription, he hath as good Right in the Seat, as he hath in his Houſe, *Corven*'s Caſe, 12 *Coke* 106; and this ſeems now to be reſolved and ſettled, *Trin.* 14 *Car.* 2. and *Paſch.* 16 *Car.* 2. in *Buxton* and *Bateman*'s Caſe, 1 *Siderfin* 88, 201. *Raymond* 52. 1 *Keble* 345, and in the Caſe of *Crook* and *Uxon* v. *Samſam*, *Mich.* 18 *Car.* 2. *B. R.* 2 *Keble* 92. and a Difference made between an Action of the Caſe for a Diſturbance, and a Prohibition; for in an Action of the Caſe, the Plaintiff may intitle himſelf without alledging any Reparations; but to have a Prohibition, which is to out the Ordinary of his Juriſdiction, there, Reparation ought to be ſhewed: See *Paſch.* 28 *Car.* 2. *B. R. Marchant* v. *Whitpain*, 3 *Keble* 754. *Trin.* 23 *Car.* 2. *C. B. Bradbury* v. *Burch*, Sir *Thomas Jones's Reports* 3. 3 *Inſt.* 202. *Mich.* 34 *Car.* 2. *C. B. Aſhly* v. *Freckelton*, 3 *Levinz* 73. And in an Action of the Caſe for Diſturbance to a Seat, if the Plaintiff do preſcribe to have the ſole Uſe of the Sitting in the Seat, he need not be ſo

The Reaſon.

Where properly an Action, or where a Prohibition lies.

very exact in his Preſcription, the Action being brought againſt a Wrong Doer, a Poſſeſſion is ſufficient for the Plaintiff to maintain ſuch Action; for where the Plaintiff declared, that he was ſeiſed in Fee of a Houſe, and that he and all thoſe whoſe Eſtate he had in the ſaid Houſe, had a Seat in the Church which they had repaired as often as was neceſſary, and that the Defendant had diſturbed him in ſitting there; this was held a good Declaration, although the Plaintiff did not directly ſet out, that he, and thoſe whoſe Eſtate he had, had enjoyed the Seat. *Paſch.* 29 *Car.* 2. *B. R. Marchant* v. *Whitepain*, 2 *Levinz* 193. Seats in Churches.

Prohibition to the Spiritual Court, where the Suit was for two Seats in the Pariſh-Church of *King's Norton*; the Defendant pleaded, that ſhe was in Poſſeſſion of two antient Meſſuages to which thoſe Seats belonged; which Plea being rejected by that Court, the Plaintiff now moved for a Prohibition, which was oppoſed, for that the Church was new built by the Pariſhioners, and for that Reaſon there could be no Preſcription to the Seats, but that they were in the Gift of the Biſhop; ſo a Conſultation was prayed.

The Plea tendered by the Defendant was ſuch as could not be tried in the Spiritual Court, becauſe they cannot hold Plea of the Inheritance of the Seats, nor of any Thing which concerns the Freehold; ſo the Prohibition muſt ſtand. 1 *Mod. Ca. L. and E.* 338. *Swetnam* v. *Archer*.

A Man may ſue, if he pleaſes, upon his Preſcription in the Eccleſiaſtical Court, to have his Poſſeſſion quieted (as for a Seat in a Church, which was the preſent Caſe) which the Ordinary ought to do upon the Foundation of his Uſage to have ſat there: For one may ſue upon a Preſcription in the Spiritual Court, if it be not denied, as upon a *Modus decimandi*; or for a Penſion due by Preſcription, and the Spiritual Court will give Judgment upon it. By *Holt* C. J. in the Caſe of *Jacob* v. *Dallow*, 2 Ld. *Raym.* 756.

And it hath been further adjudged, that a Perſon may not only claim by Preſcription a Seat as peculiar to him, but the upper Part of a Seat, and in the Chancel as well as in the Body of the Church; and an Action upon the Caſe lieth for it at the Common Law. *Noy* 129. But if there be any Contention about the Priority, the Biſhop may inhibit them from making a Diſturbance, until the Controverſy be tried, *viz.* in the Temporal Court, and excommunicate the Diſturber. *Hatton*'s Caſe, *Latch* 116. and *Hill.* 22 *Jac. Carlton* v. *Hutton*, *Noy* 78. and *Palmer p.* 424. See *Trin.* 14 *Car.* 2. *B. R. Buxton* and *Bateman*'s Caſe, 1 *Siderfin* 89. One may claim the upper Part of a Seat.

Now after this, to ſpeak my own Thoughts, I conceive that the Ordinary had anciently the Power of placing the Pariſhioners in ſuch Seats at leaſt as are ſet in that Part of the Church repaired by the Pariſhioners, according to 8 *H.* 7. 12. and that Preſcriptions to have Seats as belonging to Houſes, and the Ordinaries Power to give Titles (which are the Riſe of ſuch Preſcriptions) are but lately talked of; for I cannot find in the old Books any Mention of ſuch Titles by Preſcription, or Power in the Ordinary. And it ſeems to me, that the Ordinary hath no ſuch Power, and that ſuch Preſcriptions are not reaſonable; for firſt, it hath been adjudged, that if an Ordinary doth make a Grant of a Seat to one and his Heirs, it is not good, and the Reaſon given is, That a Seat cannot belong to a Perſon but to an Houſe, for otherwiſe when a Perſon goes out of a Town to dwell in another Place, yet he ſhall retain the Seat, which is unreaſonable. *Paſch.* 16 *Jac. B. R. Brabin* and *Trudum*'s Caſe, *Popham* 140. the ſame Caſe, *Roll's* 2 *Abr.* 288. *N.* 7. So the Queſtion being, whether a Preſcription be good to an Iſle in a Church, as belonging to a Manor It ſeems that Preſcriptions to have Seats as belonging to Houſes, are not reaſonable.

Seats in Churches.

Manor where the Party had no Dwelling Houſe but only Land? This Queſtion was not reſolved, but the Court inclined that ſuch a Preſcription was not good, *Hill.* 29 & 30 *Car.* 2. *C. B. Shambrok* v. *Fettiplace*, 2 *Modern Rep.* 283. And if the Ordinary may not make a Grant of a Seat to a Perſon and his Heirs, I ſee not how he can make any ſuch Grant to bind Poſterity, for he cannot make a Grant to an Houſe (not Things but Perſons only, being capable of Grants): See *Hain*'s Caſe, 12 *Coke* 113. If it be ſaid, that the Grant may be good to the preſent Poſſeſſor of an Houſe, and to the Perſons that in after Time ſhall be the Poſſeſſors of ſuch Houſe, as a Privilege annexed to that Houſe; yet this Grant appears to be as unreaſonable, as if it had been made to a Perſon and his Heirs; for if by the Ordinary's Grant it may belong to an Houſe, it muſt belong to the Owners of the Houſe, and muſt go with the Houſe to a Perſon and his Heirs; and ſo a Grant to the preſent and future Poſſeſſors of an Houſe, and to a Perſon and his Heirs, will have the ſame Inconvenience. For the Owner of a Houſe may remove into another Pariſh, and have no Tenant, and yet retain the Seat, if it may by ſuch Grant belong to an Houſe. And if the Ordinary may appropriate one Seat to an Houſe, he by the ſame Reaſon may appropriate all the Seats in the Church to ſeveral Houſes, and ſo no Room would be left for the other Inhabitants. And if the beſt and upper Seats only be appropriated, Perſons of greater Quality could not be ſeated but in inferior and remote Places of the Church, the beſt Seats by ſuch means being taken up, and it may be only by mean Tenants or Servants living in ſuch Houſes, unto which they are ſaid to belong, which are ſhameful Inconveniences. Alſo it is ſaid, that though the Freehold of the Church be in the Incumbent, yet the Uſe of the Church to hear Divine Service is common to all the Pariſhioners. *Corven*'s Caſe, 12 *Coke* 105. And therefore, I ſee no Reaſon why the Ordinary ſhould have Power to appropriate the Uſe of any Part thereof to the Poſſeſſors of any particular Houſe, (to wit) either by licenſing any Perſon to build a Seat therein for himſelf and the Poſſeſſors of his Houſe only, or by granting in ſuch Manner any Seat formerly built, ſuch Seat being preſumed to be built at the Charge of the Pariſhioners in common, and for their Benefit in common. And if the Biſhop hath not ſuch Power of granting, I ſee not how a Preſcription to have a Seat as belonging to an Houſe can have any juſt Commencement; and if there be no Means by which a Title to a Seat can have a legal Beginning, it ſeems ſtrange that Preſcription ſhould be admitted as the Evidence of that which never could have a legal Beginning or Being, *viz.* a legal Title; and therefore in my Opinion, according to the firſt Sort of the before-mentioned Caſes, it is moſt conſonant to Reaſon, that a Perſon ſhould not preſcribe for to have a Seat in the common Part of the Church as peculiar to his Houſe, and that the Temporal Courts are not ſo proper to meddle with the Deciding of Controverſies about ſuch Seats, but that the Ordinary only ought to determine them, and to place the Inhabitants of every Pariſh within his Juriſdiction according to his Diſcretion. Yet if a Perſon with his Family only have uſed Time out of Mind to ſit in a Seat, and to repair the ſame at his proper Coſts, and being ſued in the Spiritual Court to be removed, doth ſurmiſe their Sitting and Repairing; no doubt but that he may obtain a Prohibition, and that ſuch Preſcription will be allowed to be a good Title. But the Surmiſe of ſitting alone in a Seat, Time out of Mind, without a Surmiſe of Repairing, will not be ſufficient for a Title to have a Prohibition, as hath been before ſhewed.

If the Ordinary's Grant may bind Poſterity.

It ſeems unreaſonable.

Either by Licence to build, or by Grant.

Therefore Preſcriptions unreaſonable.

But

Seats in Churches.

But if a Suit be commenced in the Eccleſiaſtical Court for a Seat upon the Account of Preſcription, a Prohibition will lie for the Party ſued, becauſe, whether the Preſcription be good or not, is not in the Spiritual Court to judge. *Hill.* 5 *Jac. B. R. Noy* 129. and by *Coke* in *Garwen* and *Pim*'s Caſe, *Godbolt* 200. And it is ſaid, that the Plaintiff in the ſame Suit, if it go againſt him, may, as it ſeems, have a Prohibition as to the Coſts, becauſe the Suit is *Coram non Judice* as to the Principal. *Paſch.* 4 *Jac. C. B. Eaton* v. *Ayliff*, *Hetley* 94. But I cannot be ſatisfied with this laſt Opinion, *viz.* that where the Plaintiff libels in the Spiritual Court upon a Cuſtom or Preſcription, and it be found againſt him, that there is no ſuch Cuſtom or Preſcription, and Coſts given; that he ſhall have a Prohibition to free and diſcharge himſelf from thoſe Coſts; for the Spiritual Court may in ſeveral Caſes proceed upon Libels grounded on Preſcription, where the Preſcription is not denied; ſo that ſuch Suits are not abſolutely *Coram non Judice*. The Reaſon why a Prohibition ſhall be granted where the Preſcription or Cuſtom is denied, I take to be, that the Notion of Cuſtoms and Preſcriptions is different by the Eccleſiaſtical Law from what it is at the Common Law, as to the Time in which ſuch Cuſtom or Preſcription may be created; for the Eccleſiaſtical Law allows of different Times in creating Cuſtoms or Preſcriptions, and generally of leſs Time than is allowed of by the Common Law, which owns no Time in ſuch Caſe, but that whereof there is no Memory of Man to the contrary. Therefore the Common Law will not ſuffer the Spiritual Courts to try Preſcriptions, whereby they might affect and charge Perſons Inheritances by adjudging them to be good, which by the Common Law are no Preſcriptions. But where the Cauſe doth proceed to Sentence, and the Spiritual Judge doth decree that there is not any Preſcription ſufficient in their Law, and by Conſequence can be none of an elder Date allowed by the Common Law, the Reaſon the Common Law proceeds upon in granting Prohibitions in ſuch Suits, totally fails in this Caſe, and the Plaintiff ought not to be aided by a Prohibition to diſcharge himſelf from thoſe Coſts given againſt him for his groundleſs and vexatious Proſecution; and the Prohibition can in ſuch Caſe be of no other Uſe, or to any other Purpoſe, than to diſcharge the Plaintiff of thoſe Coſts, which both in Law and Conſcience he ought to pay.

Prohibition to the Eccleſiaſtical Court *pro Def.* Alſo for the Plaintiff as to Coſts, if Suit goes againſt him in Spiritual Court, which ſeems unreaſonable.

But *aliter* if the Cauſe proceeds to Sentence, and where 'tis only to diſcharge the Plaintiff of Coſts.

Alſo this Title to a Seat is triable at Common Law by Action upon the Caſe. *Hutton*'s Caſe, *Latch* 116. and *Hill.* 22 *Jac. Carlton* v. *Hutton*, *Noy* 78. and *Buxton* and *Bateman*'s Caſe, 1 *Siderfin* 88, 241. and *Bradbury* v. *Burch*, Sir *Thomas Jones Rep.* 3. and *Marchant* and *Whitpain*, 3 *Keble* 754. And it is agreed, that the Plaintiff need not ſhew any Reparation in his Declaration, yet he ought to prove Reparation in Evidence; by *Hale* Ch. Baron, in *Stephen*'s Caſe, 16 *Car.* 2. 1 *Siderfin* 203. But if a Man with the Aſſent of the Ordinary doth ſet up a Seat *in Navi Eccleſiæ* for himſelf, and another doth pull down or deface it, Treſpaſs *vi & armis* doth not lie againſt him, becauſe the Freehold is in the Parſon, and ſo the only Remedy is in the Eccleſiaſtical Court; by *Coke* in *Garven* and *Pim*'s Caſe, *Trin.* 10 *Jac. Godbolt* 200. See *May* and *Gilbert*'s Caſe, *Mich.* 11 *Jac. B. R.* 2 *Bulſt.* 151. and *Mich.* 17 *Jac. B. R. Dawtrie* v. *Dee*, *Palmer* 46. *Roll's* 2 *Rep.* 139. And yet when an Action of Treſpaſs was brought againſt Church-wardens for a Seat broken down by them, becauſe it was ſet up by a private Perſon without the Licence of the Ordinary, it was adjudged, that though Church-wardens might well remove Seats in the Church at Pleaſure, yet they cannot cut the Timber of them, and therefore the Action lies. *Trin.* 2 *Jac. Gibſon* v. *Wright*, *&c. Noy* 108.

Upon Trial at Common Law.

Plaintiff ought to prove Reparation.

If in removing Seats Church-wardens may cut the Timber.

Church Repairs.

I ſhall not queſtion the Law of this Caſe, but thus much is to be ſaid againſt it, that the Freehold being in another Perſon, the Annexing of a Seat thereto ſeems to make the Seat to be a Part of the Freehold, and ſo to be in him in whom the Freehold is, and the Uſe of it in them that have the Uſe of the Church; and if ſo, then the breaking the Timber could be no Wrong to him that had no legal Right in them after they were faſtned to the Freehold, and became as other Seats of common Uſe, and at the Diſpoſal of the Ordinary. *Vide* 8 *H.* 7. 12.

Where the Action ought to be joint or ſeveral.

If two pretend to have Title to a Seat by Preſcription, and thereupon jointly bring an Action upon the Caſe for a Diſturbance, and declare upon a joint Right and Preſcription; if upon the Evidence it ſhall appear that they are not Jointenants, but Tenants in Common, they cannot recover, but muſt be nonſuited; for that ſuch Evidence doth not maintain the Title upon which they bring their Action, and as Tenants in Common they cannot make a joint Preſcription, but ought to preſcribe ſeverally; by *Lea*, *Haughton* and *Chamberlain* againſt *Croke* and *Dodderidge*. *Paſch.* 19 *Jac. B. R.* Sir *Henry Snelgrave* v. *Brograve*, *Palmer* 161, and *Bendl.* 89.

If the Ordinary may place in the Seats in the Chancel.

Another Queſtion may be, Whether the Ordinary may place in the Seats erected in the Chancel, which is uſually repaired by the Rector or Proprietor? As to which, 'tis reported that *Coke* ſaid, That for the Body of the Church the Ordinary is to place and diſplace; but the Chancel is the Freehold of the Parſon, and is Parcel of his Glebe. 1 *Brownlow* and *Gouldſborough* 45. By which he ſeems to intend, that the Power of placing and diſplacing, as to the Seats in the Chancel, is in the Parſon, and yet no ſuch Thing may be collected from his ſaying that the Freehold of the Chancel is in the Parſon, and is Part of his Glebe, for the Freehold of the Church is alſo in the Parſon, and yet the Ordinary hath the Authority of ſeating therein. Nor is the Parſon's repairing the Chancel any Reaſon for outing the Ordinary of his Juriſdiction there, as in Iſles or Chancels built by Perſons of Quality; becauſe the Chancels repaired by Rectors, Impropriators, or Appropriators, were with the Body of the Church at firſt erected for the Uſe of the Pariſhioners; and ſo we ſee they have the Uſe of them in Common; the others are for private Uſe. And the Parſon by repairing doth no more than what he is bound to do of common Right; nay, by the Canon or Common Law of the Church, the Perſon that receives the Profits of any Church is bound to repair the whole Church, and ſo is the Practice in all Countries but *England*, where Cuſtom only doth transfer the Burthen of repairing the Body of the Church, and fencing of the Church-yard upon the Pariſhioners. The Church-wardens of *Denford*'s Caſe, *Noy* 41. and in ſome Places (as in *London*) of repairing the Chancels alſo, to which *Linwood* gives Teſtimony, *De officio Archidiaconi C. Archidiaconi* v. *Reparatione & de Eccleſiis Edificandis C. Si Rector* v. *Defectus Eccleſiæ*. And therefore, unleſs it might (as it may not) be truly ſaid, that the Incumbents of Churches in other Countries, where they repair the whole, have ſolely the Authority of placing and diſplacing in all Seats that be or may be in thoſe Churches, there is no Reaſon to think that they are to ſeat in the Chancel with us, becauſe they repair the ſame by the ſame Law and upon the ſame Conſideration, that the Incumbents in Foreign Parts repair the whole Churches, *viz.* of receiving the Profits of the Church: Or unleſs it might be truly ſaid, that becauſe the Pariſhioners with us repair the Body of the Church, the Biſhop may not meddle to place or diſplace them therein. I ſee no Reaſon but that he may place in the Chancel, although that it be repaired by the Parſon; nay, the Reaſon from the Pariſhioners repairing is ſtronger againſt the Or-

dinary, than from the Parſon's repairing: For the Parſon, Appropriator, or Impropriator repairs of Common Right, (for *opus ibit cum Emolumentis* is the Canon Law in this Caſe) but Pariſhioners by Preſcription only, which might more plauſibly be alledged as the Conſideration, or firſt Reaſon of ſuch Liberty; eſpecially if the Parſon had repaired what they do, ſuch Power ſhould have been in him, as it muſt be ſuppoſed to be, if he from repairing hath the Right of ſeating in the Chancel: But it appears to be otherwiſe as to the Body of the Church, for that it was originally and of Common Right in the Parſon; the People's undertaking that Burthen that would otherwiſe have been on Incumbents, could not place this Authority in a third Party, *viz.* the Biſhop; and therefore one might conclude, notwithſtanding the Parſon's repairing, *&c.* that the Ordinary hath this Authority and Juriſdiction of Common Right, as to both Church and Chancel, though the Freehold of both be in the Incumbent or Incumbents, and the Repair of the Chancel be upon the Parſon, and of the Body of the Church upon the Pariſhioners; yet the Law, as I take it, is ſettled to the contrary, that unleſs a Seat be in the Body of the Church, the Ordinary hath nothing to do with it. *Buxton* and *Bateman*'s Caſe, 1 *Siderfin* 88. However, it is ſaid, that if there be an Impropriator, he, and in Conſequence his Farmer, of Common Right ſhall have the chief Seat in the Chancel, becauſe he ought to repair it, but by Preſcription another Perſon may have it, as belonging to his Houſe, *Trin.* 7 *Jac. Sir William Hall* v. *Ellis*, *Noy* 129. the Privilege of an Impropriator in the Chancel being by Reaſon of his repairing, it is to be known what Remedy there is by Law to compel him to repair, if he neglect or refuſe to do it; as to this, I find it is ſaid to be the Opinion of the Court of Common Pleas, that the Spiritual Court may grant Sequeſtration upon an Impropriate Parſonage for not repairing the Chancel, *Mich.* 29 *Car.* 2. 3 *Keb.* 829. yet by another Book 'tis ſaid, that the Court of Common Pleas did incline that there could be no Sequeſtration; for being made Lay-Fee, the Impropriation was out of the Juriſdiction of the Court Chriſtian, and they were only to proceed againſt the Perſon as againſt another Layman for not repairing the Church. *Trin.* 22 *Car.* 2. *C. B. Anonymus*, 2 *Ventris* 35. and by the ſame Caſe, as reported 2 *Modern Rep.* 257, 'tis ſaid, that the whole Court beſides *Atkins* were of that Opinion. See 1 *Modern Rep.* 258.

Upon Unions in *London*, by the Act for rebuilding the City both Pariſhes ſhall contribute to the Repairs of the Church which is to ſerve for the united Pariſhes. *Skin.* 588, 616. *The Pariſh of St. Swithin* and *St. Mary Bothaw in London.*

As to the Repairing of the Body of the Church, the Spiritual Court may compel the Pariſhioners to do it, and may excommunicate every one of them till it be repaired; and thoſe that are willing to contribute muſt be abſolved till the greater Part agree to make a Tax; but the Spiritual Court cannot aſſeſs them towards it, neither can the King's Court, or the Juſtices of Peace, or the Church-wardens alone, impoſe a Tax for it; but the Pariſhioners ought to be ſummoned by the Church-wardens to meet and agree to lay a Tax to do it; and if they refuſe or neglect to meet or to make a Rate, the Church-wardens then may make a Rate alone, if needful; and if a Rate be illegally impoſed, as by a Commiſſion from the Biſhop, *&c.* without the Pariſhioners Conſent, yet if it be after aſſented to, and confirmed by the major Part of the Pariſhioners, that will make it good. *Hill.* 26 & 27 *Car.* 2. *C. B. Rogers* v. *Davenant*, 1 *Mod. Rep.* 194. and 1 *Ventris* 167.

Church-

Church Repairs.

Parſon repairs of Common Right, the Pariſhioners by Preſcription.

If the Impropriator does not repair the Chancel, 2. If there may be a Sequeſtration?

If the Pariſhioners do not repair the Body of the Church.

Church Repairs.

Church-wardens having by Order of the Veſtry laid out ſeveral Sums for Repairs of the Church, and building two new Galleries, and having at going out of their Office Accounts taken by Auditors, and paſſed and allowed by the Veſtry, and an Order of Veſtry for making a Rate to reimburſe them, brought a Bill againſt the ſucceeding Church-wardens to inforce the making ſuch Rate; but thoſe Church-wardens being likewiſe removed, after Examination of Witneſſes and Publication paſſed, held a good Objection at the Hearing, and that they had no Remedy but in the Spiritual Court, or againſt the Pariſhioners in particular who employed them. *Prec. in Ch.* 42. *Batteley & al.* verſus *Cook & al'.*

Summons at the Church.

The Church-wardens in ſummoning the Pariſhioners need not do it from Houſe to Houſe, but a general publick Summons at the Church is ſufficient, and the major Part of them that appear upon ſuch Summons will bind the whole Pariſh. If the Church and Chancel be out of Repair, the Pariſhioners are only chargeable to the Repairs of the Church.

Tax *pro reparatione Eccleſiæ.*

But a Libel in the Spiritual Court, or a Tax *pro reparatione Eccleſiæ*, is well enough, though the Word *Eccleſia* may include the Chancel as well as the Body of the Church, yet ſhall be intended for the Church only; but if any Money raiſed for repairing the Church be laid out upon the Chancel, the Pariſh ought not to allow it to the Church-wardens in their Accounts, nor ſhall they be compelled to pay any Tax for the Repairs of the Church and Chancel. If the Church be down, and the Pariſh increaſed ſo that of Neceſſity there ought to be a larger Church, the major Part of the Pariſh may lay a Tax for the inlarging it, as well as the repairing of it. See for theſe Matters *Paſch.* 29 *Car.* 2. *C. B.* 1 *Mod. Rep.* 236. 2 *Modern Rep.* 222. *Paſch.* 5 *Car.* 1. *C. B. Webb*'s Caſe, *Littleton's Rep.* 263. *Poph.* 137.

Upon a Motion for a Prohibition, to ſtay a Suit againſt *J. S.* for not paying a Tax impoſed by the Church-wardens and other Pariſhioners, for building the Church of *St. Anne's* in *Weſtminſter*; *per Holt*, Chief Juſtice, A Suit may be in the Spiritual Court for Non-payment of a Tax aſſeſſed for Repairs of a Church, but not for building a Church. 1 *Ld. Raym.* 512. *Church-wardens of St. Anne's Weſtminſter.*

Motion for a Prohibition to the Conſiſtory Court of the Biſhop of *Exeter*, where the Plaintiff was libelled againſt for a Rate aſſeſſed by the Church-wardens by Cuſtom for Repair of the Church, as well the Chancel as the Nave of the Church. And reſolved, 1. That the Pariſhioners, and not the Church-wardens, ought to aſſeſs the Rate. 2. That the Parſon ought to repair the Chancel, and not the Pariſhioners; but that the Pariſhioners ought to repair the Nave of the Church. And by *Holt*, C. J. By the Canon Law the Parſon ought to repair the whole; but by the Cuſtom of *England* the Parſon ſhall repair the Chancel, and the Pariſhioners the Nave of the Church. And by the Cuſtom of *London* the Pariſhioners ſhall repair the Chancel alſo. But *Rokeby*, J. was of Opinion, that the Pariſhioners ought to contribute to the Charge of the Ornaments of the Chancel, but *Holt* doubted of that. Then Sir *Bartholomew Shower* moved, that a Prohibition ſhould be granted, only *quoad* the Suit for the Rate for the Chancel. But reſolved, That the Prohibition ſhall be for the whole, becauſe it is but one Rate, and intire: But if a Man libel for two diſtinct Things, the one of which is of Eccleſiaſtical Conuſance, and the other not, a Prohibition ſhall be granted, *quoad* that which is of Temporal Conuſance, and they of the Court Chriſtian ſhall proceed for the other. Therefore in the principal Caſe a Prohibition was granted. 1 *Ld. Raym.* 59. *Penſe* v. *Prouſe.*

Rules

Rules concerning Rates for Repair of Churches.

Church Repairs.

I. THE Cognizance of Rates made for Reparation of Churches and Church-yards belongs to the Spiritual Court: This is the Conſequence of the Statute 13 *Eliz.* And purſuant hereto, Prohibitions have been often denied, and Conſultations granted by the Temporal Courts. To which Purpoſe *Paget* v. *Crumpton* in 1 *Cro.* an anonymous Caſe in *Latch* 203; alſo *Longmore* v. *Churchyard*, *ibid.* 217. the Caſe in *Popham* 197. 1 *Vent.* 308. *Roll's Abr.* 230. *Codex* 219. 1 *Cro.* 659.

II. Rates for Reparation of Churches are to be made by the Church-wardens, together with the Pariſhioners aſſembled, upon Notice to be given in the Church. *Noy* 61. 1 *Mod.* 79. And the major Part of them that appear ſhall bind the Pariſh, 1 *Mod.* 236. or if none appear, the Church-wardens alone may make the Rate. 1 *Mod.* 79, 194. 2 *Mod.* 8, 223. Becauſe they, and not the Pariſhioners, are to be cited and puniſhed for a Defect of Repairs; but the Biſhop cannot direct a Commiſſion to rate the Pariſhioners, and appoint what each ſhall pay: This muſt be done by the Pariſhioners or Church-wardens, as aforeſaid, and the Spiritual Court may inflict Cenſures till they do. 1 *Ventr.* 367.

III. *A Rate for Reparation of the Fabrick of the Church is real, charging the Land and not the Perſon; but a Rate for Ornaments is perſonal upon the Goods, and not upon the Land.* 2 *Roll's Abr.* 262, 270. agreed, the Rate there being for Church Ornaments, and the Sexton's Wages. And becauſe the Party lived out of the Pariſh, though he occupied Lands in it, he was declared to be unduly rated; and further agreed, That a Foreigner ſhall not be charged for repairing Seats in a Church, *&c.* So in *Woodward's* Caſe, 4 *Jac.* 2. a Tax being laid for the Bells, *&c.* a Prohibition was granted, on Suggeſtion that the Party was not an Inhabitant of the Pariſh: And the Court gave this Reaſon, Becauſe 'tis a perſonal Charge, to which only Inhabitants are liable, and not ſuch who only occupy in that Pariſh and live in another.

Church Ornaments. Sexton's Wages. Church Seats. Bells.

IV. A Rate for repairing the Fabrick ſhall be laid on all Lands within the Pariſh, though the Occupiers live in another. This Point was fully ſettled in *Jeffery's* Caſe, where 'twas alſo reſolved, That ſuch occupying of Lands makes the Occupier a Pariſhioner, (though not an Inhabitant) and intitles him to come to the Aſſemblies in the ſame Pariſh, when they meet for ſuch Purpoſes. And though ſeven Years after, in *Paget* and *Crumpton's* Caſe, a Prohibition was obtained, on Surmiſe that the Party lived not in the Pariſh; yet on the Sight of this Precedent, *Popham* Chief Juſtice changed his Opinion; and it was reſolved, *ut ſupra*, by him and the whole Court; and ſo the Law now ſtands. And it has alſo been declared, That if a Man take a Leaſe of a Stall in a Market-Town, where he uſes once a Week to ſell his Wares, but lives in another Pariſh, he ſhall not be charged towards the Repairs of the Church in the Market-Town. 2 *Roll's Abr.* 288. *Co.* 64. *Cro.* 659.

V. *Where ſuch Lands are in Farm, not the Leſſor but the Tenant ſhall pay.* For there is an Inhabitant and Pariſhioner who may be charged; and the Receipt of the Rent does not make the Leſſor a Pariſhioner, (but the Occupying of the Land;) and herewith agrees the Caſe in 4 *Mod.* 148. 5 *Co.* 67.

Church Repairs.

VI. An Impropriator of a Rectory or Parſonage, though bound to repair the Chancel, is alſo to contribute to repair the Church, in caſe he has Lands within the Pariſh. 2 *Roll.* 211. Serjeant *Davy*'s Caſe.

2 *Roll.* 265. *Hob.* 66.

VII. The Inhabitants of a Precinct where there is a Chapel (though it is a Parochial Chapel and they do repair it) are of common Right contributory to the Repairs of the Mother Church. And if they have Seats at the Mother Church, to go thither when they pleaſe, or receive the Sacrament, or marry, chriſten or bury at it, there is no Pretence for a Diſcharge. Nor can ſuch a Plea be allowed, but where they have been diſcharged Time out of Mind, (which is alſo a Doubt,) or that in Conſideration thereof they have paid ſo much to the Repair of the Church, or Wall of the Church-yard, or keeping a Bell, or the like Compoſitions. *Vide Hob.* 66. 2 *Lev.* 186. 2 *Roll.* 290. *Noy* 41. 3 *Keb.* 791.

1 *Mod.* 236. 2 *Mod.* 222.

VIII. *If a Church is ſo much out of Repair that it is neceſſary to pull it down, or ſo little that it needs to be inlarged, the major Part of the Pariſhioners* (having firſt obtained the Ordinary's Conſent to do what is needful, and meeting, upon due Notice) *may make a Rate for that Purpoſe.* This was declared for Law, by all the three Courts ſucceſſively, 29 *Car.* 2. though this Cauſe was much laboured *econtra* by a great Number of *Quakers.*

IX. *The Hall of a Company being rated to Church Repairs, the Spiritual Court in caſe of Non-payment may proceed againſt the Maſter and Wardens of ſuch Company.* For the Hall is liable to pay, and they cannot proceed otherwiſe than by Citation, which may be executed upon an aggregate Corporation; and therefore their Officers are to be cited, and the Rate paid by them is to be allowed on their Accounts.

Freehold of the Church in the Incumbent.

Though it be before ſaid, and *poſt* 400. that the Freehold of the Church is in the Incumbent, and that if the Windows of the Church be broken, the Parſon may have his Action for it at the Common Law, yet the Ordinary may deface any ſuperſtitious Pictures, as is ſaid by *Wray*, Chief Juſtice, to have been done in *Pricket*'s Caſe. And if any other do it without the Ordinary's Licence, he may be bound to his good Behaviour. *Mich.* 12 *Jac. Day* v. *Beddingfield*, *Noy* 104. And this, I ſuppoſe, is to be extended to the Parſon himſelf; ſo if any Coats of Arms be placed in any Windows, or Grave-ſtone or Monument in any Church or Church-yard, neither Parſon, Church-wardens or Ordinary may break down or deface the ſame; and if any of them do, the Heir by Deſcent intereſted in the Coat may have his Action upon the Caſe againſt them. 9 *Ed.* 4. 14. *Mich.* 10 *Jac. B. Pim*'s Caſe, *Roll's Abr.* 1. *p.* 625. *Mich.* 12 *Jac. Day* v. *Beddingfield*, *&c. Noy* 104. *Hill.* 12 *Jac. B. R. Frances* v. *Leys*, 2 *Cro.* 367. or ſo may the Party that ſet them up, being the Executor, although they be fixed to the Freehold of the Parſon. 9 *Ed.* 4. 14. *Corven*'s Caſe, 12 *Coke* 105. 1 *Inſt.* 18. *b.* But as to Monuments ſet up in the Church, the Caſe is to be underſtood of ſuch only as are ſet up in the Iſles belonging to particular Perſons, according as it is explained by *Coke* in *May* and *Gilbert*'s Caſe, *Mich.* 11 *Jac. B. R.* 2 *Bulſtrode* 151. *Trin.* 10 *Jac. C. B. Garven* and *Pim*'s Caſe, *Godbolt* 200. or if ſet up in any other Part of the Church, I ſuppoſe, 'tis to be underſtood, that they were placed there with the Incumbent's Conſent; but the Reaſon given in the Caſe aforeſaid for the ſaid Action, *viz.* becauſe the Church is free to all the Inhabitants to bury in, is not true, for none can bury in the Church without the Parſon's

As to Parſon's Conſent to bury in the Church.

Conſent; *per Curiam, Hill.* 12 *Jac. B. R. Frances* v. *Ley*, 2 *Croke* 367. *Mich.* 12 *Jac. Day* v. *Beddingfield*, *Noy* 104.

Church Goods.

What Goods belong to the Pariſhioners.

However, the Goods of the Church, as Chalice, Surplice, *&c.* do not belong to the Iucumbent, but to the Pariſhioners. 11 *H.* 4. 12. and if they be taken away, or broken, the Church-wardens ſhall have their Action of Treſpaſs at the Common Law. *Bellamie*'s Caſe, *Roll's* 1 *Rep.* 255. 31 *Ed.* 3. 3. *Br. Corporations, &c.* 55, 73, 84. 11 *H.* 4. 12. 37 *H.* 6. 30. Therefore, when the Parſon ſued in the Spiritual Court for the Organs taken out of the Church, a Prohibition was awarded. *Trin.* 12 *Jac. Buckſale*'s Caſe, *Roll's* 1 *Rep.* 77. *Kitchen's Juriſdiction of Courts*, Tit. *Wardens of Churches, fol.* 378.

A Pariſhioner had a Houſe ſo near the Church that a Five o'Clock Bell, rung in the Morning, diſturbed her. She thereupon came to an Agreement in Writing with the Church-wardens and Inhabitants at a Veſtry, that ſhe would build a Cupola and Clock at the Church, in Conſideration whereof the Bell was not to ring at 5 o'Clock during her Life. This was decreed a good Agreement in Chancery. 2 *Williams* 266. *Dr. Martin and Lady Arabella Howard his Wife* v. *Nutkin & al'.*

If the Church-wardens for the Time being neglect to bring an Action for any of the Goods of the Church taken away, their Succeſſors may bring Treſpaſs for them in reſpect of their Office, as was reſolved *per Curiam, Hill.* 31 *Eliz. C. B. Church-wardens of Fotherſton*'s Caſe, 1 *Leonard* 177. But then the new Church-wardens muſt ſay, *ad damnum Parochianorum*, and not *ipſorum*, though the old Church-wardens in whoſe Time the Goods were taken away, might ſay either, *Paſch.* 32 *Eliz. B. R. Hadman and Green* v. *Ringwood*, 3 *Croke* 179. 8 *Ed.* 4. 6. *Br. Corporations, &c.* 55. but by *Frowick*, 12 *H.* 7. 28. the new Church-wardens ſhall not have the Action for ſuch Treſpaſs done to their Predeceſſors; contrary by *Yaxly*; and it is ſaid by *Newton* and *Paſton*, that the Executors of the Church-wardens in whoſe Time the Treſpaſs was done, ſhall have the Action. But the Caſe in 1 *Leonard* 177, is moſt to be relied on; and accordingly 'tis ſaid by the Maſter of the Rolls, (Sir *Joſeph Jekyll*) The Church-wardens may bring Treſpaſs for taking thoſe Goods as well in the Time of their Predeceſſors, as in their own Time. 2 *Williams* 126, *Attorney General* v. *Ruper.*

Sacrilege and Robbery.

If the Goods of the Church be ſtolen, it is Sacrilege and Robbery, and the Church-wardens ſhall have an Appeal of Robbery. *Br. Abr. Appel.* 31, 45. 37 *H.* 6. 39. And a Libel may be alſo in the Spiritual Court againſt the Offender, *pro ſalute animæ & reformatione mor'*, *Paſch.* 18 *Car.* 2. 1. *Welcomb* v. *Lake*, 2 *Keble* 23. 1 *Siderfin* 281. but not to recover Damages, 2 *Inſt.* 492. 1 *Keble* 743. See *Regiſter of Writs* 57. And if a Perſon doth in the Night break the Church, and enter, he is guilty of, and indictable for Burglary, as *Bromley* ſaid, *Paſch. Ma. Dyer* 99. *a.* 3 *Inſt. c.* 14.

Burglary;

Note; Where there are two or three Church-wardens of a Pariſh, each of them is a diſtinct Church-warden, 2 *Williams* 107. and a pecuniary Legacy given to a Pariſh Church, belongs not to the Rector or Vicar, but to the Church-wardens, for the Reparations of the Church, and the Improving and Adorning the ſame. 2 *Williams* 125. *Attorney General* v. *Ruper.* And as the Parſon is a Corporation for taking Land for the Benefit of the Church, ſo the Church-wardens are a Corporation to take perſonal Eſtate. 2 *Williams* 126. S. C.

Though

Church Goods.

Church-wardens may not diſpoſe of Goods without Conſent.

Though the Church-Wardens may have their Action for ſuch of the Pariſh Goods, yet they cannot diſpoſe of them without the Conſent of the Pariſh, and a Gift of ſuch Goods by them without the Conſent of the Sidemen or Veſtry is void, as was ſaid in *Methold* and *Winn*'s Caſe, 3 *Bulſt.* 264. And though, as hath been ſaid, the Goods of the Church do belong to the Pariſhioners, yet they cannot have an Action of Account againſt the Church-Wardens for waſting any of them, but muſt make new Church-Wardens, and thoſe new Church-Wardens may bring an Action of Account againſt the former. *Br. Account* 71. *R.* 8 *Ed.* 4. 6. *Br. Corporations*, &c. 55. 4 *Ed.* 4. 6. *Br. Garden*, 7. And though a Pariſh preſcribe to chooſe two Church-Wardens, and that the Perſons ſo choſen ſhall continue in that Office for two Years; yet the Pariſh may, notwithſtanding the Preſcription, remove ſuch Church-Wardens at their Pleaſure, and chooſe new ones; for as it is ſaid, the Pariſh might ſuffer great Loſs, if the Church-Wardens ſhould continue ſo long in their Office contrary to their Will, for in that Time they might waſte all the Pariſh Goods belonging to the Church. 26 *H.* 8. 5. *b. Paſch.* 8 *Jac. C. B.* 13 *Coke* 70. Pariſhioners are ſo far intereſted in all Matters which relate to the Pariſh, that if a Charity be given to cloath poor Perſons of the Pariſh, the Pariſhioners cannot be Witneſſes; becauſe they are intereſted, as being eaſed in their Poor Rates. 1 *Williams* 600. *Attorney General* v. *Wiburgh & al'.*

Where there is a Diſpute, being touching Money given to the Pariſhioners, none of the Inhabitants of the Pariſh ought to be Witneſſes. 2 *Vern.* 317. *Dodſwell* v. *Nott.*

Felony in taking a Winding-Sheet from the Corps.

If any evil Perſon ſhould dig up the Grave of a deceaſed Body, and take from the Corps the Winding-Sheet wherein 'tis wrapped, neither Rector nor Church-Wardens may have their Action for it, for the Property doth remain in him to whom it belonged when the dead Body was wrapped therein; and the Wrapping the dead Body therewith could be no Gift thereof, for a Man cannot relinquiſh the Right which he hath to Goods, unleſs they be veſted in another, of which a dead Body is uncapable; and the Taking thereof is Felony; reſolved by the Juſtices at *Serjeants Inn, Fleet-Street. Hain*'s Caſe, 12 *Coke* 113.

How Vicars may ſhare with Rectors.

As other Perſons may have Intereſt in the Church with the Parſon, and in the Goods belonging thereunto, as is before ſhewed; ſo others may ſhare with the Rectors of Churches, both in the Church itſelf, and alſo in the Profits thereof; of which Vicars of Churches are the great Inſtance, who by Indowments or Preſcription, do ſhare with Appropriators or Impropriators, (who are perpetual Rectors of Churches) both in the Churches themſelves, and the Profits thereof.

As to the Freehold and Soil of the Chancel, and Freehold and Soil of the Body of the Church.

And firſt, I conceive, that (although that the Freehold and Soil of the Chancel may be in the Appropriator or Impropriator, eſpecially where they repair the ſame, either by Compoſition or Preſcription, which is in moſt Places in *England*, except in *London*) the Freehold and Soil of the Body of the Church is in the Vicar, as a Part of his Glebe, for thereof he takes Poſſeſſion at his Induction, by which he is ſeiſed of all the Profits of the Vicarage; which Way of taking Poſſeſſion would be very ſtrange, if the Church itſelf was not a Part of that to which he hath a Right by Inſtitution, and of which he is ſeiſed by his Induction; alſo this appears from the Vicar's being obliged of Common Right to repair the Church. *Roll's Abr.* 2. *p.* 337. Alſo the Trees in a Church-Yard are ſaid to belong to the Vicar, ſo that if they be cut down by the Parſon, or any other, and a Suit be in the Court Chriſtian not only to puniſh the

Indowment of Vicars.

Fact, but alſo for Damages, a Prohibition lyeth; becauſe the Vicar may have Treſpaſs at Common Law; but if the Suit be not for Damages, no Prohibition ſhall be. *Mich.* 13 *Jac. B. R. Bellamie*'s Caſe, *Roll's* 1 *Rep.* 255. But generally ſpeaking, the Compoſition made betwixt the Parſon and the Vicar of a Church, doth ſhew, what of the Glebe, Tithes, or other Profits thereof, do belong to the Rector, and what to the Vicar; and without a Preſcription to the contrary, the Vicar, as well as the Parſon, is bound thereby, *Paſch.* 4 *Car.* in the *Exchequer*, *Lien* v. *Seymore*, *Palmer* 525, and becauſe ſeveral Compoſitions may be loſt, Preſcription and Uſage is much to be regarded, for the ſettling of their ſeveral Rights. *Lit. Rep.* 263. I ſhall therefore add ſome Caſes, to the End that Compoſitions may be the better underſtood, and to ſhew the Force of Preſcription as to this Matter.

Vicar muſt ſhew how he is indowed.

Firſt, *De Jure communi* all Tithes and Profits of the Church do belong to the Parſon, although that there be a Vicar conſtituted, and therefore the Vicar muſt make his Claim, either by ſhewing that he is indowed out of the Parſonage of that to which he pretends a Right, or by Preſcription. *March* 11. *Mich.* 10 *Jac. B. R. Reynolds* v. *Green*, 2 *Bulſt.* 27. *Mich.* 28 & 29 *Eliz. B. R. Godbolt. Mich.* 40 *Eliz. Burſdale* v. *Smith*, 3 *Cro.* 633. *Paſch.* 2 *Car. B. R. Cope* v. *Bedford*, *Palmer* 427. But though the Vicar cannot produce any Indowment, yet if he can prove a conſtant Uſage and Payment, that is ſufficient Evidence of an Indowment. *Hill.* 22 & 23 *Car.* 2. *Bingham* v. *Robinſon*, 2 *Keb.* 729. Or though the Indowment do not mention any Glebe or Tithes to be aſſigned to the Vicar, yet if the Vicar by a conſtant Uſage hath injoyed them, he ſhall not be concluded by their not being mentioned in the Indowment of the Vicarage, (as it has often been adjudged;) for it ſhall be preſumed by Reaſon of a long Poſſeſſion of ſuch Glebe or Tithes, that the Vicarage hath at ſome Time or other been augmented therewith, and that tho' there be no Power reſerved to the Biſhop by the Indowment to augment or diminiſh, &c. For the Biſhop may notwithſtanding augment with the Conſent, or upon citing all Parties, tho' not without Notice or Citation, as he may do when he hath a Power to augment, &c. reſerved to him by the Indowment. *Trin.* 15 *Car.* 2. *Scaccar. Henry Twiſs* v. *Brazennoſe College* in *Oxford*, *Blount & al. Hardres* 328. And ſo it is, though no Land is mentioned in the Valuation of the Church in the Time of *H.* 8, becauſe many Particulars were omitted in that Valuation. *Coynes*'s Caſe, *Clayton's Rep.*

Augmentation by the Biſhop.

Long Poſſeſſion.

And where no Proof of an Indowment could be made, yet becauſe of long Poſſeſſion, the Church being preſentative, what was injoyed was decreed to the Vicar. 9 *Car. Neat* v. *Liſter*, and 39 *Eliz.* in the *Exchequer Chamber*, *Grimes* v. *Smith*, *Tothil* 238.

Of what Tithes by Compoſition.

If a Compoſition be made betwixt the Parſon and Vicar, that the Parſon ſhall have all the Tithes of Corn and Hay, and the Vicar all other Tithes within a Pariſh; and after the Pariſhioners ſow certain Lands arable with Saffron, or the like, as Woad, &c. the Parſon ſhall not have the Tithes of the Saffron or Woad, &c. but the Vicar. *Hill.* 1 *Car. Tindall*'s Caſe, *Bendloe* 159. *Trin.* 7 *Jac. per Coke* ſaid to be adjudged. 2 *Roll's Abr.* 335. So if the Vicar by Indowment or Preſcription be to have the Minute Tithes, and the Land which Time out of Mind hath been arable is not tilled, the Vicar ſhall have the Minute Tithes ariſing upon the ſame, for his Indowment doth not go to the Land, but to the Tithes in any Part of the Pariſh. *Paſch.* 38 *Eliz. B. R. Beddingfield* v. *Freak*, 2 *Roll's Abr.* 335. And ſo it is although the Land had

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been ſowed with Corn for the Space of Forty Years next before, although it be ſaid by the Statute of 2 *Ed.* 6. **That Tithes ſhall be paid as they had been paid Forty Years before.** The like Law if arable Land be converted to an Orchard, for then the Vicar ſhall have the Apples; and if an Orchard be turned to arable, the Parſon ſhall have the Corn. *Paſch.* 38 *Eliz. B. R. The Dean and Chapter of Norwich*'s Caſe, *Owen* 74. *Paſch.* 38 *Eliz. B. R. Beddingfield* v. *Freak*, 3 *Cro.* 467, and 43 *Eliz. Gouldſb.* 149, and *Moor* 909. Or if a Vicar by Indowment hath the Minute Tithes, and hath for long Time uſed by force of this Indowment to have Tithes of Wood of the annual Value of Six Shillings and Eight Pence, by Reaſon of the ſmall Value of the Wood and the Uſage, Tithes of the Wood ſhall be to the Vicar as a ſmall Tithe, although that the Tithe of Wood in its Nature be accounted amongſt great Tithes. *Mich.* 10 *Jac. B. R. Reynolds* v. *Green, per Curiam*, 2 *Roll's Abr.* 335. Note alſo, that Woad growing in the Nature of an Herb, Saffron and Weild, which are a kind of Graſs, are Minute Tithes, and go to the Vicar, when he is to have Minute Tithes. 1 *Car. C. B. Udal* v. *The Vicar of Alton*, and the ſame Caſe, *Hutt.* 77. 1 *Cro.* 28. *Hill.* 1 *Car. Tindal*'s Caſe, *Bendloe* 159. *Paſch.* 38 *Eliz. Beddingfield* v. *Freak*, 1 *Roll's Abr.* 643. The like is to be ſaid of Flax and Hops. *Mich.* 14 *Car. B. R. Web*'s Caſe, 1 *Roll's Abr.* 643. So was it ruled in the Caſe of *Crouch* v. *Riſden*, *Hill.* 21 & 22 *Car.* 2. And that a Preſcription to pay ſo much in lieu of all ſmall Tithes ſhall extend to Hops, Oad, *&c.* 1 *Sid.* 443. 2 *Keb.* 612. 1 *Vent.* 61. But the Tithes of Clover-Graſs ſhall go to him that hath the Tithe Hay. *Darrel* v. *Withers*, 3 *Keb.* 479.

If all the Profits conſiſt of Minute Tithes.

So if Tobacco be planted here, the Tithes thereof be Minute Tithes; but if all the Profit of a Pariſh doth conſiſt of Things, which in their own Nature are Minute Tithes, it is ſaid that they thereby become great Tithes; as if a great Part of a Pariſh be ſowed with Hemp, *&c.* they are ſaid to be great Tithes, otherwiſe not; and in this Reſpect Wool and Lamb may be ſaid to be great Tithes, and for this Reaſon Hops in *Kent* were adjudged great Tithes, but Hops in Orchards or Gardens remain Minute Tithes, and a Field of Forty Acres planted with Saffron was adjudged a ſmall Tithe. *Hill.* 1 *Car. Undal* v. *Tindal*, *Hutt.* 78. But *Quære*, Whether Hemp, Flax, *&c.* be not in their Nature to be accounted ſmall Tithes? If ſo, then the Quantity of Land within any Pariſh ſowed with Hemp, *&c.* cannot make the Tithe of another Nature; and what we call ſmall Tithes ſeems to me to be in reſpect of the Thing itſelf, and not from the ſmall Quantity of Land ſowed therewith within any Pariſh, whereby the Tithes thereof are but ſmall, and of little Value; for if that were to be the Rule to determine what ſhall be ſaid ſmall Tithes, then Corn, Hay, *&c.* muſt in many Pariſhes be accounted ſmall Tithes, which will not be affirmed.

Whether Flax, Hemp, *&c.* be great Tithes or ſmall.

But the Lord Chief Juſtice *Holt* held Flax ſown in a common Field to be a great Tithe; and he did not allow any Difference, but that Flax, Hemp, and other ſuch like Things, growing in open Fields, are great Tithes, be the Quantity of them more or leſs; but the three other Juſtices, *Dolben*, *Gregory*, and *Eyre*, held the contrary, that Flax in its Nature is a ſmall Tithe, but they did not agree whether the Quantity ſowed within a Pariſh of ſuch Things, the Tithes whereof are accounted a ſmall Tithe, ſhall alter the Nature of the Tithe; for ſome of them held, be the Quantity what it will, yet it ſhall remain a ſmall Tithe. But in the Caſe in Queſtion, there being 650 Acres of Arable within the Pariſh,

Pariſh, 26 Acres of which were ſown with Flax, the ſaid three Juſtices all agreed, that this was not ſuch a Quantity of Flax ſown in the Pariſh as to make it to be accounted a great Tithe. *Trin.* 4 *W. & M. B. R. Wharton* v. *Liſle*, 3 *Lev.* 365. S. C. from *Skinner's Rep. poſt. ch.* 49. Small Tithes.

If the Vicar be indowed *de Decimis Garbarum* growing within a certain Hamlet within a Pariſh, and the Indowment be made a long Time ſince, as in the Time of *H.* 3, and the Vicar hath uſed Time whereof, *&c.* to have the Tithe as well of the Hay as of the Corn; although that now at this Day *Garba* doth ſignify a Sheaf of Corn, and as the Civilians ſay, ſignifies ſuch Thing which is bound together by a Band, and in their Books is uſed for Corn, and not for Hay; yet becauſe it is an antient Indowment, and the Uſage hath been ſo that the Vicar hath had the Tithe of the Hay, the Tithe thereof ſhall be to the Vicar: For it ſhall be preſumed, that in antient Time Tithe Hay might be compriſed under the Word *Garba*, and that the Uſe might be then to bind Hay in Bundles; for ſuch antient Grants are not to be expounded according to the Law uſed at this Day, but according as it might be intended to be at the Time of the Grant made. *Mich.* 40 & 41 *Eliz. B. R. Barkſdale* v. *Smith* and *Blinco*, 2 *Roll's Abr.* 335. *Mich.* 40 *Eliz. Barkſdale* v. *Smith*, 3 *Cro.* 633. *Littl. Rep.* 263. *March* 87. And all Compoſitions for the Indowments of Vicarages ſhall be expounded by the Judges of the Common Law, and if the Spiritual Court meddle with that Matter, they are to be prohibited. *Litt. Rep.* 263. *March* 87. *De Decimis Garbarum.* How ancient Grants and Compoſitions are to be expounded.

If a Vicar hath uſed by Preſcription, Time out of Mind, to have all Tithes within a Pariſh (except Corn, which the Parſon appropriate was wont to have), *viz.* of Hay and Hops, from the Time of *H.* 8, when they came into *England*, and of Woad (which is a dying Plant), *&c.* After Rape-Seed is ſowed within the Pariſh, there being not any ſuch Seed ſowed there, nor in *England* till of late Time, yet the Vicar, and not the Parſon appropriate ſhall have the Tithes of the Rape-Seed; for that it is within the Preſcription, altho' that it be a new Thing, for which he cannot preſcribe ſingly, foraſmuch as the Parſon is barred of all Tithes but of Corn by the Preſcription, and this is within the general Preſcription to have all Tithes but of Corn. *Paſch.* 7 *Car. B. R.* Reſolved *per Curiam* upon Evidence at the Bar, in a Caſe that concerned a Parſon and Vicar of a Pariſh in *Kent*, and that there was not any Difference as to this, betwixt ſuch Indowment which was the Grant of the other Party, and ſuch Preſcription, in that the Preſcription doth preſume an Indowment precedent. 2 *Roll's Abr.* 134. Vicar preſcribes for all Tithes except Corn.

Alſo if a Vicar be indowed of the third Part of all the Tithes growing and coming due within the Manor of *D.* he ſhall have the Tithes of the Free Tenants as well as of the Copyholders, for all make the Manor. *Paſch.* 38 *Eliz. B. R. Higham* and *Beſt*'s Caſe, 2 *Roll's Abr.* 335, the ſame Caſe, *Owen* 74, and 3 *Cro.* 426. But if the firſt Indowment be to be ſhewed, whereby a Vicar of a Church is to have all the ſmall Tithes within the Pariſh, and the Parſon impropriate doth take the ſame, and be ſued therefore in the Court Chriſtian, and thereupon doth bring a Prohibition upon Surmiſe of a Preſcription, and then the Vicar doth come and plead the firſt Indowment, which was *Anno Dom.* 1310, whereby ſuch Tithes were allotted to the Vicar, and the Parſon doth demur thereto, the Vicar ſhall have a Conſultation, for that the Parſon cannot preſcribe againſt the firſt Indowment. *Trin.* 2 *Jac. Rot.* 520. *Pringe* v. *Child*, *Noy* 3. *Paſch.* 3 *Jac. Springe*'s Caſe, *Moor* 761 and Of the Tithes of a Manor. Where the Parſon cannot preſcribe againſt the firſt Indowment or Compoſition.

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and 781, for the Preſcription ought to commence after the Indowment, which was after the Time of Limitation, *viz. R.* 1. *Roll's Abr.* 2. *p.* 269. And accordingly, a Vicar libelled againſt a Parſon in the Spiritual Court for Tithes allotted to him by the Compoſition, and (the Parſon pleading Preſcription againſt the Compoſition) the Court Spiritual did allow of ſuch Plea; but a Prohibition was awarded for the Vicar to ſtop his own Suit: And it was alſo decreed in Chancery for the Vicar, that ſuch Preſcription by the Parſon againſt the Compoſition was not good; and an Injunction was awarded for the Vicar to ſtay the Parſon's Suit for ſuch Tithes limited to the Vicar by the Compoſition. *Paſch.* 4 *Jac. Pringe* v. *Child, Moor* 780.

If the Vicar be indowed out of the Parſonage, he is to have *Altaragium*, &c.

But if a Vicar be indowed out of the Parſonage, and thereby to have *Altaragium cum manſo competenti*, he ſhall by the Meaning of theſe Words have Tithes of Wool, Lambs, Colts, Calves, Pigs, Goſlins, Chickens, Butter, Cheeſe, Hemp, Flax, Honey, Fruits, Herbs, and ſuch other ſmall Tithes, with Offerings, as ſhall be due within the Pariſh of which he is Vicar; for *Altaragium* doth comprehend not only the Offerings made upon the Altar, but alſo all the Profit that accrues to the Prieſt by reaſon of the Altar, as it was expounded by the Civilians upon Conference had with them by *John* Lord Biſhop of *London*, *Mich.* 21 *Eliz. Turner* and *Andrew*'s Caſe in the Exchequer; and after it was ſo adjudged in the ſame Court, as *Blount* ſays upon the Word *Altaragium* in his *Law Dictionary*, where alſo he adds from the Gloſs in *Mat. Paris*, *Oblationes ſive nummorum ſive panum tali vel tali Altari, vel ex devotione vel ex conſuetudine, aut Parochianis, aut ab extraneis factæ, Altaragii nomine cenſebantur.* And if the Uſe hath been (where the Vicar hath by the Compoſition *Altaragium*) to pay to the Vicar Tithe Wood, it ought to be continued to him, otherwiſe not. *Mich.* 4 *Car. C. B. D. Wood* and *Greenwood*'s Caſe, *Hetley* 135. And ſo it was held by the Doctors, who certified that the Word *Altaragium* accordingly did paſs Tithe Wool, the Uſage being ſhewed in Evidence to be accordingly. *Hill.* 21 *Jac. B. C. Bret* and *Ward*'s Caſe, *Winch* 70. And when the Vicar intitled himſelf by the Words [*Altaragium & Minutæ Decimæ*] to Tithe Wood, it was held by all the Judges, that though theſe Words do not comprehend Tithe Wood, yet becauſe the Vicar hath uſed by theſe Words to have the Tithe of Wood, (which Uſe was laid) in reſpect of the Uſage or Preſcription, the Vicar ſhall have it, though otherwiſe it ſhould not have paſſed thereby; and ſo 'tis ſaid to be adjudged in the Exchequer, that theſe Words have given to the Vicar Sheaves of Corn, where the Vicar uſed to have them. *Mich.* 13 *Jac. B. R. Reynolds* v. *Green*, 2 *Bulſt.* 27.

Vicar indowed with white Tithes.

But if a Vicar be indowed out of the Parſonage with all white Tithes growing and renewed within a Pariſh, upon all the Land within the Pariſh, the Vicar ſhall not from thence have Tithes of the Parſon's Glebe, for it is always excepted, nor ſhall the Vicar in ſuch Caſe have Tithes of the Land that at the Time of the Indowment was Part of the Glebe, though it be ſince ſevered from it, becauſe at the Time of the Indowment this Land was exempted out of the Indowment, *Trin.* 38 *Eliz. B. R. Blinco* and *Marſton*'s Caſe, and *Coke* ſaid it had been ſo adjudged in one *Young*'s Caſe, 2 *Roll's Abr.* 335, and if there be a ſpecial Cuſtom after the Indowment of the Vicarages, this is iſſuable. *Blinco* and *Marſton*'s Caſe, *Moor* 457. Or if a Vicar be indowed *de minutis Decimis totius Parochiæ*, and the Glebe of the Parſon doth come by Means of the

Statute

Statute of Diſſolutions to the King's Patentee, yet the Patentee, though a Lay-Man, ſhall not pay Tithes to the Vicar of his Glebe, for the Words in the Indowment did not give them; but if there had been in the Indowment expreſs Words, that the Vicar ſhould have the minute Tithes of the Parſon's Glebe, it had been otherwiſe, for the Parſon himſelf ſhould have paid them, and by conſequence the King's Patentee; otherwiſe not. *Mich.* 39 & 40 *Eliz. B. R. Blinco* v. *Baksdale*, 3 *Croke* 578. Augmentations.

And here we may add, that it hath been enacted, **Whereas divers Archbiſhops, Biſhops, Deans and Chapters, and other Eccleſiaſtical Perſons, in Obedience to his Majeſty's Letters, bearing Date the firſt Day of** June **in the Twelfth Year of his ſaid Majeſty's Reign, and out of a Pious Care to improve poor Vicarages and Curacies, where the Indowment thereof was found too ſmall to afford a competent Maintenance to thoſe that ſerve the Cure, have ſince his Majeſty's happy Return, upon their Renewing of Leaſes of Rectories, or Tithes impropriate or appropriate, made or hereafter may make divers Reſervations beyond the ancient Rent, to the Intent the ſame ſhould become payable to the ſaid Vicars or Curates, in Augmentation of their Indowments, which have been for the moſt part injoyed accordingly: But in regard, that ſuch Reſervations were not made to the Vicars or Curates, or if they were, no convenient Remedy could be had by ſuch Vicars or Curates for the Recovery thereof, and they were not at the Time thereof capable of taking any Intereſt to their own Uſe, whereby the ſaid Proviſions will depend upon the good Pleaſure of the Succeſſors, and may in Time be diſappointed;** 29 *Car.* 2. *c.* 8. Of Augmentations of Vicarages, *&c.* See in the precedent Chapter the Stat. 17 *Car. c.* 3. for Augmentation of poor Benefices. And ſee alſo the ſeveral Statutes of 2 & 3 *Annæ*, *c.* 2. and 5 *Annæ*, *c.* 24. for augmenting ſmall Livings, by diſcharging them from Firſt Fruits and Tenths.

For the Eſtabliſhment thereof, Be it enacted by the King's moſt excellent Majeſty, by and with the Advice and Conſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That all and every Augmentation of what Nature ſoever, granted, reſerved or agreed to be made payable, or intended to be granted, reſerved or made payable ſince the ſaid firſt Day of June **in the Twelfth Year of his ſaid Majeſty's Reign, or which ſhall at any Time hereafter be granted, reſerved, or made payable to any Vicar or Curate, or reſerved by Way of Increaſe of Rent to the Leſſors, but intended to be to or for the Uſe or Benefit of any Vicar or Curate, by any Archbiſhop, Biſhop, Dean, Provoſt, Dean and Chapter, Archdeacon, Prebendary, or other Eccleſiaſtical Corporation, Perſon or Perſons whatſoever, ſo making the ſaid Reſervation out of any Rectory impropriate, or Portion of Tithes belonging to any Archbiſhop, Biſhop, Dean, Provoſt, Dean and Chapter, or other Eccleſiaſtical Corporation, Perſon or Perſons, ſhall be deemed and adjudged to continue and be, and ſhall for ever hereafter continue and remain as well during the Continuance of the Eſtate or Term upon which the ſaid Augmentations were granted, reſerved, or agreed to be made payable, as afterwards, in whoſe Hands ſoever the ſaid Rectories or Portion of Tithes ſhall be or come; which Rectories or Portion of Tithes ſhall be chargeable therewith, whether the ſame be reſerved again, or not; and the ſaid Vicars and Curates reſpectively are hereby adjudged to be in the actual Poſſeſſion thereof, for the Uſe of themſelves and their Succeſſors, and the ſame ſhall for ever hereafter be taken, received, and injoy'd by the ſaid Vicars and Curates, and their Succeſſors, as well during the Continuance of the Term or** Eſtabliſhment.

Augmentations.

Eſtate upon which the ſaid Augmentations were granted, reſerved or agreed to be made payable, as afterwards; and the ſaid Vicars and Curates ſhall have Remedy for the ſame, either by Diſtreſs upon the Rectories impropriate or Portions of Tithes charged therewith, or by Action of Debt againſt that Perſon who ought to have paid the ſame, his Executors or Adminiſtrators; any Diſability in the Perſon or Perſons, Bodies Politick or Corporate ſo granting, or any Diſability or Incapacity in the Vicars or Curates to whom, or to or for whoſe Uſe or Benefit the ſame are granted, or intended to be granted, the Statute of Mortmain, or any other Law, Cuſtom, or other Matter or Thing whatſoever, to the contrary notwithſtanding.

Proviſo not to exceed one Moiety, &c.

Provided always, That no future Augmentation be confirmed by Virtue of this Act, which ſhall exceed one Moiety of the clear yearly Value, above all Reprizes, of the Rectory impropriate out of which the ſame ſhall be granted or reſerved.

Leaſes to be entred in Parchment Books.

And to the End the ſaid Vicars and Curates may the better make appear the Certainty of the ſaid Augmentations; Be it enacted by the Authority aforeſaid, That every Archbiſhop, Biſhop, Dean and Chapter reſpectively, on or before the Nine and twentieth Day of September next coming, ſhall cauſe every Leaſe or Grant, whereon any ſuch Augmentation is made, to be fairly entred in a Book of Parchment, to be kept by their reſpective Regiſters for that Purpoſe. And every Dean, Archdeacon, Prebendary, or other Eccleſiaſtical Perſon reſpectively, ſhall cauſe every Leaſe or Grant whereon any ſuch Augmentation hath been made by himſelf, his Predeceſſor or Predeceſſors, to be entred in the ſaid Book, to be kept by the Regiſter of the Biſhop of the Dioceſe; for the entring whereof no Fee ſhall be paid, nor any Thing demanded, ſave only a reaſonable Reward to the Clerk for entring the ſame, not exceeding Five Shillings: Which ſaid Entry being examined by the reſpective Archbiſhop, Biſhop or Dean, and by them reſpectively atteſted in the ſaid Book to be a true Copy of the original Leaſe or Grant, and that the Augmentation in the ſame was intended for ſuch Uſe, ſhall be as a Record; a true Copy whereof, proved by Witneſſes to be a true Copy, ſhall be deemed, taken, adjudged and expounded to be good and ſufficient Evidence in the Law, whereupon the ſaid Vicars and Curates reſpectively ſhall and may, by Virtue of this Act, from Time to Time recover the Benefit of ſuch Augmentation.

Subſtance of Agreements to be entred.

And be it further enacted by the Authority aforeſaid, That where any Archbiſhop, Biſhop, Dean and Chapter, or any other Eccleſiaſtical Corporation or Perſon whatſoever, upon the renewing or granting any Leaſe or Eſtate, have made any Agreement for an Augmentation for the Vicar or Curate, and ſuch Augmentation hath for any Time been accordingly paid, although the ſaid Agreement is not expreſſed or mentioned in the ſaid Leaſe or Grant, every ſuch Eccleſiaſtical Perſon ſhall cauſe the Subſtance of ſuch Agreement to be entred in the ſaid Book, to remain for a Memorial of it to Perpetuity.

Continuance of ſuch Augmentations.

And be it further enacted, That ſuch Augmentation ſo entred ſhall likewiſe continue, and be for ever hereafter good and available in the Law, for the Benefit of the Vicar or Curate for whom it was intended, and their Succeſſors, as well againſt the Archbiſhop, Biſhop, or other Eccleſiaſtical Corporation or Perſon who agreed for the

same, and his and their Successors, as against every other Person injoying the said Rectories or Portions of Tithes intended to be charged therewith in the same Manner, and for which they shall have the same Remedy as they should or ought to have by Virtue of this Act, if the same had been mentioned and reserved in and by the Lease. Augmentations.

And if any Question shall hereafter arise concerning the Validity of such Grants, or any other Matter or Thing in this Act mentioned and contained, such favourable Constructions, and such farther Remedy, if need be, shall be had and made for the Benefit of the Vicars and Curates, as heretofore hath been had and made, or may be had for other Charitable Uses upon the Statutes for Charitable Uses. If Questions arise.

Provided always, and be it further enacted by the Authority aforesaid, That if, upon the Surrender, Expiration, or other Determination of any Lease wherein any such Augmentation as aforesaid hath been or shall be granted, any new Lease of the Premisses, or any Part thereof, shall hereafter be made, without express Continuance of the said Augmentation, every such new Lease shall be utterly void to all Intents and Purposes.

Provided always, That this Act, or any Thing therein contained, shall not extend, or be construed to invalidate, alter, or make void one Lease, bearing Date the Nineteenth of October One thousand six hundred seventy and six, made by the Dean and Chapter of York, of the Parsonage and Tithes of Stourton in the County of Nottingham, wherein there is an Augmentation of Six and thirty Pounds per Annum reserved, and made due and payable to the Vicar of Stourton aforesaid, but that the said Sum of Six and thirty Pounds be always paid to the Vicar and his Successors accordingly; any Thing in this Act contained to the contrary in any wise notwithstanding.

Provided, That this Act, or any Thing therein contained, shall not extend, or be construed to invalidate, alter or make void, one Lease lately made by the Dean and Chapter of Exon, unto Arthur Sprey Esquire, of the Tithe-Sheaf of the Parish of Saint Eval in the County of Cornwal, whereon there is an Augmentation of Twenty Pounds per Annum already made, due and payable to the Vicar of the said Parish during the said Lease, but that the said Sum of Twenty Pounds be always paid to the Vicar and his Successors accordingly; any Thing in this Act contained to the contrary in any wise notwithstanding. Stat. 29 Car. 2. cap. 8.

Vicars and Curates may bring an Action of Debt for any Augmentation made to them, without shewing the Deed by which such Augmentation is made; and although the Augmentation be made and reserved by a Lease for Lives, and that by the Words of this Statute, although by the Law regularly an Action of Debt lies not for Rent reserved on a Lease for Lives, for one Life during the Continuance of the Lease. *Mich.* 33 *Car.* 2. *C. B. Carber* v. *Pinkney*, 3 *Lev.* 82. Debt for Augmentations.

And by a Clause in a Statute of 14 *Car.* 2, it is enacted, That whereas the said Conveyances and Assurances in and by this Act intended to be made void, were some of them of Estates in Fee-simple, and some of them long Terms for Years made to Trustees, who re-demised the same at and under such yearly Rents and Sums of Money as were then appointed to be the Augmentation of certain Vicarages, 14 *Car.* 2. *c.* 25. Upon Demises to Trustees, and Re-demises by them.

Dilapidations.

Vicarages, or Maintenance for Preaching Ministers, since which Time many of the Rectories and Lands so conveyed and leased have been absolutely sold, and the Re-demises thereof granted and assigned by the Owners thereof, for the Benefit of such Purchasers; Be it further enacted and ordained by this present Parliament, and by the Authority of the same, That the said Purchasers, their Heirs and Assigns, shall pay, and the said former Owners of the said Lands and Rectories, their Executors, Administrators and Assigns, shall have, hold and injoy the said Rents and Sums of Money so reserved (for the Augmentation of the said Vicarages, and Maintenance for Preaching Ministers) upon the said several Re-demises, and shall have the same, and the like Remedies by Distress, or by Action of Debt, for the Recovery thereof, as the said Trustees who re-demised the same should or might have had if this Act had not been made. Stat. 14 Car. 2. c. 25. See before the Notes on the Stat. 29 Car. 2. c. 8.

13 *Eliz.* 10. Concerning Dilapidations, &c. *Nelf. Lut.* 40.

I will also here add the Statutes concerning Dilapidations. Be it enacted by the Queen's most excellent Majesty, the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the Authority of the same, That if any Archbishop, Bishop, Dean, Archdeacon, Provost, Treasurer, Chaunter, Chancellor, Prebendary, or any other having any Dignity or Office in any Cathedral or Collegiate Church within this Realm, or if any Parson, Vicar, or other Incumbent of any Ecclesiastical Living whereunto do belong any House or Houses, or other Buildings, which by Law or Custom he is bound to keep and maintain in Reparation, do from henceforth make any Deed or Deeds of Gift or Alienation, or other like Conveyances of his moveable Goods or Chattels, to the Intent and Purpose aforesaid; (*viz.* to defraud their Successors of their Remedies against their Executors or Administrators for Dilapidations) That then the Successor and Successors of him that shall make such Deed or Deeds of Gift or Alienation, shall and may commence Suit, and have such Remedy in any Court Ecclesiastical of this Realm, competent for the Matter against him or them to whom such Deed or Deeds of Gift or Alienation shall be so made, for the Amendment and Reparation of so much of the said Dilapidations and Decays, or just Recompence for the same, as hath happened by his Fact or Default, in such Sort as he might, should or ought lawfully to have, if he or they, to whom such Deed or Deeds of Gift or Alienation shall be made, were Executor or Executors of the Testament and Last Will of him that made such Deed or Deeds of Gift or Alienation, or were Administrator or Administrators of his Goods or Chattels; any Law, Custom, or other Thing to the contrary in any wise notwithstanding. Stat. 13 Eliz. c. 10.

14 *Eliz. c.* 11. The Money recovered how to be imployed.

And by another Statute it is enacted, That all Sums of Money hereafter to be recovered for or in Name of Dilapidations by Sentence, Composition, or otherwise, shall within two Years after such Receipt be truly imployed upon the Buildings and Reparations, in respect whereof such Money for Dilapidations shall be paid, on Pain that every Person so receiving, and not imploying as aforesaid, shall forfeit double as much as shall so be by him received, and not imployed; the which Forfeiture shall be to the Use of the Queen's Majesty, her Heirs and Successors. Stat. 14 Eliz. c. 11.

Dilapidations.

It is ſaid, that no Remedy is given at Common Law for Dilapidations, Suits for them being moſt proper to be brought in the Eccleſiaſtical Courts, which Suits are not to be hindred by Prohibitions; but if any Prohibition be granted, a Conſultation is to be awarded. *Regiſter of Writs* 48. *Fitz. N. B.* 52. But by *Parſons Counſellor* 95, upon Search of thoſe Precedents, it appears that no Judgment was given in any one of them; but in ſome of them there was a Verdict, and after that divers Continuances entred. But *Mich.* 3 *Jac. C. B. Rot.* 332. *Day* v. *Hollington*, Judgment was given for the Plaintiff upon Demurrer in a Suit for Dilapidations, and afterwards an Action of the Caſe was brought by the preſent Incumbent againſt him who had been Incumbent immediately before him, and had accepted another Living, and left the Houſes out of Repair; and this Cauſe being at Iſſue, and a Verdict found for the Plaintiff, it was moved in Arreſt of Judgment, that an Action at Common Law did not lie for Dilapidations; of which Opinion was the Chief Juſtice *Pollexfen*, who ſaid that the Remedy was only in the Eccleſiaſtical Court, and the reſt of the Four then inclined to be of the ſame Opinion; but *Pollexfen* and *Ventris* being dead, the Matter was moved again before *Powell* and *Rokeby* Juſtices, and they gave Judgment for the Plaintiff. *Paſch.* 2 *W. & M. C. B. Jones* v. *Hill*, 3 *Lev.* 268, and afterwards, *Hill.* 6 *W.* 3. *C. B. Okes* v. *Ange*, a Prohibition was moved to the Eccleſiaſtical Court for Dilapidations, upon Suggeſtion that the Plaintiff in the Eccleſiaſtical Court had brought a Suit at Common Law for the ſame Dilapidations, in which Action the Defendant pleaded Tender of 10 *l.* which was ſufficient to repair the ſaid Dilapidations, and the Plaintiff took Iſſue that the 10 *l.* was not ſufficient, and the Verdict found it ſufficient; upon which Judgment was given for the Defendant, and he pleaded this Judgment in Bar in the Eccleſiaſtical Court, which they refuſed; and the Court granted a Prohibition. 3 *Lev.* 413. This Conſultation therefore is to be intended where the Suit is grounded upon the Canon Law; for that an Action of the Caſe might have been brought at Common Law by the Succeſſor, againſt the Executors or Adminiſtrators of the Dilapidator, and Damages recovered, as appears by many Precedents. *Parſon's Counſellor* 97, 98. But a Curate, though he by Licence or Agreement receive the Tithes, and have an Allowance for the Repairs of the Parſonage Houſe, *&c.* yet being but at Will, and not coming by Inſtitution and Induction, ſo no Incumbent; his Executors, *&c.* are not to be ſued or charged in the Spiritual Court for Dilapidations, which I collect from *Pawly* and *Wiſeman*'s Caſe, 3 *Keb.* 614.

Whether an Action at Common Law doth lie for Dilapidations.

Divers Opinions.

Prohibition granted.

And Note; one great End of making the Statutes of 13 *Eliz. cap.* 10, and 1 *Jac.* 1. *c.* 3, (which ſee hereafter *Chap.* 41.) was for avoiding of Dilapidations; and by 35 *Eliz. cap.* 14, Dilapidations are excepted out of general Pardons. *Vide Gibſon's Codex* 793.

By Stat. 12 *Ann. ſeſſ.* 1. *ch.* 4. it is enacted, That from the Nine and Twentieth Day of September in the Year One thouſand ſeven hundred and thirteen, It ſhall be lawful for any of the Inhabitants of any Pariſh in the Weſt Riding of the County of York, wherein any ſuch Chapels of Eaſe, as aforeſaid, now are, or hereafter ſhall be erected or built, and wherein there are large Waſtes or Commons, with the Conſent of the Lord or Lords of the Manor wherein ſuch Waſte Ground lies, (and if there be above two Lords of ſuch Manor, then with the Conſent of the major Part of them), and with the Conſent of three Parts of four of all Freeholders and others, who have any Right of Common therein, according to their Number,

Waste Grounds inclosed.

and the Value of their respective Estates, to inclose any Part of the Wastes, &c. within such Parish (or Chapelry therein) not exceeding sixty Acres, or a sixth Part of such Common Land, where the said sixth Part shall not exceed sixty Acres, and to settle the same in Trustees and their Heirs, for the Benefit, and as a Maintenance and Support of such Ministers, as shall not have a settled Provision of above forty Pounds per Annum for their Maintenance, and shall reside within the same Parish or Chapelry, and perform Divine Offices in the Parish Church or Chapel therein, according to the Usage of the Church of England, and be licensed by the Archbishop of York, or the Guardian of the Spiritualties (sede vacante); any former Law or Usage to the contrary notwithstanding.

Saving unto all Lords of Manors and other Owners and Proprietors of Royalties within the said Riding, their Heirs and Assigns, all Mines and Quarries of Stone, Coal and Dye, and other Mines, with full Power, to dig, get, and sough for the same, in and through any such Inclosures that shall be made pursuant to this Act; and the same so got, with Carts, &c. to take, lead, and carry away.

And it is further enacted, That after any such Inclosure and Settlement, it shall not be in the Power of any Trustee or Minister, or any other Person whatsoever, to alienate or imploy any of the Profits of such inclosed Lands to any other Use, but only for the Support and Maintenance of the Vicar or Minister who shall serve the Cure, (if it belong to a Vicarage) and to the Minister that performs Divine Service in the Chapel, according to the Usage of the Church of England, (if it be appropriated to any Chapel) and not otherwise.

And it is further enacted, That it shall be lawful for any of the said Trustees and their Heirs, from Time to Time, by any Writing, &c. under their Hands and Seals, with the Consent of the Vicar or Minister, for whose Use such Inclosure is made, to be testified by his being made a Party to, and signing and sealing such Writing, to demise or lease any Common or Waste Grounds, or any Parcel or Parcels thereof, that shall be inclosed by Virtue of this Act, for any Term or Number of Years not exceeding one and Twenty, so as upon every such Demise or Lease, there be reserved payable half-yearly, during the said Term, as much Rent as can, at the making such Lease, be really gotten for the same; and that such Rent be made payable to or for the only Use and Benefit of such Vicar and Minister of such Vicarage or Chapelry, and their Successors, and so as no Fine, Income, or other Consideration be taken for the same.

And all Leases made of such Inclosures in any other Manner, shall be ipso facto void.

And it is further enacted, That if any Action, &c. shall be commenced or prosecuted against any Person or Persons, for any Thing that he or they shall do, or cause to be done in Pursuance or in Execution of this Act, such Person may plead the General Issue of Not Guilty; and upon any Issue joined may give this Act and the special Matter in Evidence; and if in any such Suit the Plaintiff or Prosecutor shall become Nonsuit, or forbear Prosecution, or suffer a Discontinuance, or if a Verdict shall pass against him, or Judgment upon a Demurrer, then in any of the said Cases the Defendant shall recover full Costs, for which he shall have the like Remedy as

is allowed in any Case where Costs are to be recovered by any former Law. Vacant Benefices.

And it is further enacted, That this Act shall be allowed in all Courts within this Kingdom as a Publick Act.

And whereas some Manors within the said West Riding do belong to her Majesty in Right of the Crown; It is further enacted, That by and with the Consent of her Majesty, her Heirs and Successors, and with the Consent of three Parts of four of the Freeholders and others, who have Right of Common therein, according to their Number, and the Value of their respective Estates, it shall be lawful to inclose any Part of the Waste or Common Grounds of such Manors, not exceeding sixty Acres, or a sixth Part of such Common Land, where the said sixth Part shall not exceed sixty Acres; and to settle the same in Trustees and their Heirs for the charitable Purposes aforementioned; any Law or Statute to the contrary thereof in any wise notwithstanding.

CHAP. XL.

Fruits and Profits of Benefices in Time of Vacation to whom they belong, and the Remedies how to recover them if detained. What Charges Parsons are liable to in respect of their Glebe, or Tithes; and of the Temporalties of Bishops in Time of Vacation, &c.

THough before Institution, Collation, *&c.* a Clerk hath no Right to the Profits of any Benefice; yet a legal Title when obtained hath also this Effect, that it doth so work backwards, as to give the Clerk a Right to the Profits from the Time that the Church became void of the preceding Incumbent; and this is by Virtue of the Statute of 28 *H.* 8. *c.* 11, which is as followeth: How a legal Title works backwards to the Right of the Profits.

Whereas by Reason that it is not declared who shall have the Fruits, Tithes, and other Profits of Benefices, Offices, Promotions and Dignities Spiritual, during the Time of Vacation thereof, divers of the Archbishops and Bishops of this Realm have not only, when the Time of perceiving and taking of Tithes, (that is to say, Wool, Lamb, Corn and Hay, and of Tithes usually paid at the Holy Time of Easter) hath approached, deferred the Collation of such Benefices as have been of their own Patronage, but also have, upon Presentations of Clerks made unto them by the just Patrons, protracted and deferred to institute, induct and admit the same Clerks, to the Intent that they might have and perceive to their own Use the By 28 *H.* 8. *cap.* 11. Delays of Bishops in Collating, *&c.* how practised.

Vacant Benefices.

the same Tithes growing during the Vacation; so that through such Delays, (over and above the First Fruits, which be justly due to the King's Highness) they have been constrained also to lose all, or the most Part of one Year's Profits of their Benefices and Promotions, and to serve the Cure at their and their Friends proper Costs and Charges, or utterly to forsake and give over their Benefices and Promotions, to their great Loss and Hindrance;

From what Time the Year for First Fruits shall begin. *Vide Chap.* 15.

For Reformation whereof, it is ordained and enacted by the King our Sovereign Lord, with the Assent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the Authority of the same, That the said Year, in which the First Fruits shall be paid to the King's Grace, shall begin and be accounted immediately after the Avoidance or Vacation of any such Benefice or Promotions Spiritual afore rehearsed; And that the Tithes, Fruits, Oblations, Obventions, Emoluments, Commodities, Advantages, Rents, and all other whatsoever Revenues, Casualties or Profits, certain and uncertain, affering or belonging to any Archdeaconry, Deanry, Prebend, Parsonage, Vicarage, Hospital, Wardenship, Provostship, or other Spiritual Promotion, Benefice, Dignity or Office, (Chauntries only excepted) within this Realm, or other the King's Dominions, growing, rising or coming, during the Time of Vacation of the same Promotion Spiritual, shall belong and affere to such Person as shall be thereunto next presented, promoted, instituted, inducted or admitted, and to his Executors, toward the Payment of the First Fruits to the King's Highness, his Heirs and Successors; any Usage, Custom, Liberty, Privilege or Prescription to the contrary had, used or being, in any wise notwithstanding.

And it is also enacted by the Authority aforesaid, That if any Archbishop, Bishop, Archdeacon, Ordinary, or any other Person or Persons, to their Uses and Behoof, at any time heretofore, sith the First Day of May last past, have perceived, received, or taken, or at any Time hereafter do perceive, receive or take the Fruits, Tithes, Obventions, Oblations, Emoluments, Commodities, Revenues, Rents, Advantages, Profits or Casualties, coming, growing or belonging, or which hereafter shall come, grow, affere or belong to any Archdeaconry, Deanry, Prebend, Parsonage, Vicarage, Hospital, Wardenship, Provostship or other Spiritual Promotion, Benefice, Dignity or Office (Chauntries only excepted) within this Realm, or other the King's Dominions, during the Vacation of such Archdeaconry, Deanry, Prebend, Parsonage, Vicarage, Hospital, Wardenship, Provostship, or other Spiritual Promotion, Benefice, Dignity or Office, (Chauntries only excepted) and the same, upon reasonable Request from henceforth to be made, doth not render, restore, satisfy, content and pay to the next Incumbent, being lawfully instituted, inducted or admitted to such Archdeaconry, Deanry, Prebend, Parsonage or Vicarage, or other Promotion, Benefice, Dignity or Office Spiritual, except before excepted, or do let or interrupt the said Incumbent to have the same; that then every Archbishop, Bishop, Archdeacon, Ordinary, or other Person so doing, shall forfeit and lose the treble Value of so much as he shall then have received of the Fruits of every Prebend, Parsonage, Vicarage, Hospital, Wardenship, Provostship, or other Spiritual Promotion, whereof he so shall perceive, receive or detain, let or interrupt the Incumbent

To render and satisfy for the same.

Forfeiture of treble Value.

bent to perceive, receive and have the Fruits, Tithes, Obventions, Oblations, Emoluments, Commodities, Revenues, Rents, Advantages, Profits or Casualties. The Moiety of which Forfeiture shall be to the King our Sovereign Lord, and the other Moiety thereof to the Incumbent of the same Prebend, Parsonage or Vicarage, or other Spiritual Promotion, to be recovered in any of the King's Courts by Action, Bill, Plaint, Information or otherwise; in which Action or Suit the Defendant shall not be admitted to wage his Law, nor any Protection or Essoin shall be unto the Defendant allowed. Vacant Benefices.

Provided alway, That it shall be lawful to every Archbishop, Bishop, Archdeacon and Ordinary, their Officers and Ministers, to retain in his or their Custody so much of the Tithes, Fruits, Obventions, Oblations, Emoluments, Commodities, Advantages, Rents, Revenues, Casualties and Profits, as shall amount to pay unto such Person or Persons as hath or shall serve or keep the Cure of such Archdeaconry, Deanry, Prebend, Parsonage or Vicarage, or other Spiritual Promotion, during the Vacation, his or their reasonable Stipend or Salary. And also for the Collection, gathering or levying of such Tithes, Fruits, Emoluments, Rents and other Profits, rising and growing during the Vacation aforesaid; any thing in this Act contained to the contrary in any wise notwithstanding. Retainer of Stipend for serving the Cure, &c.

Provided also, and be it further enacted by the Authority aforesaid, That in case any of the Incumbents aforesaid happen to die, and before his Death hath caused any of his Glebe Lands to be manured and sown at his proper Costs and Charges with any Corn or Grain, that then in that Case all and every of the same Incumbents may make and declare their Testaments of all the Profits of the Corn growing upon the said Glebe Lands so manured and sown; any thing contained in this present Act in any wise notwithstanding. Glebe Lands sown by former Incumbent.

Provided alway, That if the Fruits of the Vacation of the said Spiritual Promotions be not sufficient to pay the Curate's Stipend and Wages for serving the Cure the Vacation-time, that then the same to be born and paid by the next Incumbent within Fourteen Days next after that he hath the Possession of the said Promotions Spiritual. Stat. 28 H. 8. c. 11. If Fruits of Vacation be not sufficient to pay Stipends, &c.

Note, That that Part of the Statute, not here set down, concerning the Ratifying of Leases made by Spiritual Persons of their Benefices to Laymen, is repealed by 1 & 2 *Ph. & M. c.* 17. *Nota* Repeal.

Before this Statute of 28 *H.* 8. *c.* 11, the Law is said to be, That after the Death of the Dean of a Free Chapel of the King's, the King shall have the Profits of the Deanery during the Vacation, because it is at the King's Election to collate a new Dean. 33 *E.* 3. *Aid del Roy* 103. But if the Dean hath a Parsonage appropriate to him, the King shall not have the Tithes and Profits thereof. 2 *Roll.* 340. So 'tis said, that the Patron of a Donative may take the Profits thereof in the Vacation; but that if any take them from him, he cannot maintain an Action to recover them. *Britton* v. *Wade*, 2 *Cro.* 518. But I suppose this Statute gives them to the next Incumbent, for the Words are general. Profits of King's Deanery.

Though the Profits of the Church during the Vacation are in the Incumbent upon his Induction, and not due to the Patron or Ordinary; yet the Patron and Ordinary have such an Interest in the Revenues of a Interest of Patron and Ordinary at Common Law.

Vacant Benefices.

Church, as that at Common Law they might have charged the ſame in Time of Vacation, which would have bound all ſucceeding Incumbents, becauſe no other had any Intereſt at that Time but they only. *Hill.* 35 *Eliz. Anne Mayow*'s Caſe, 1 *Co.* 147. *b.* See *Paſch.* 37 *Eliz. Ford*'s Caſe. 5 *Co.* 81. *b.* And if a Man hath an Annuity out of a Parſonage, and he releaſes to the Patron in the Time of Vacation, this ſhall extinguiſh the Annuity. 2 *Roll's Abr.* 339. *K.* 340. *Ford*'s Caſe. 5 *Co.* 81. But if one that hath Right to the Glebe, releaſe to the Patron in Time of Vacation all his Right, this is not good becauſe the Patron hath not any Eſtate in the Glebe. 2 *Roll's Abr.* 240.

As to the aforeſaid Statute I do find but little in all the Books relating thereunto, yet I will venture to deliver my own Thoughts concerning ſeveral Queſtions that may ariſe upon it.

Uſurper's Clerk inſtituted, &c. to have the Profits.

Firſt then I conceive, that by this Statute, in caſe (a Church being void) a Clerk doth get Inſtitution and Induction upon the Preſentation of him that hath no Right to preſent, ſuch Clerk ſhall have the Profits due in the Vacation, and alſo all the Profits of the Church unto the Time of his Removal, and not the Clerk of him that removed ſuch firſt Incumbent by *Quare Impedit* or other Suit of Law. And ſo it is if a Writ of Error be brought, as is ſaid in *Grange* and *Howlet*'s Caſe, *Mich.* 12 *Jac. B. R.* 1 *Roll's Rep.* 61. And ſuch Incumbent is to pay Firſt Fruits, Tenths, and other Duties becoming due before ſuch Removal. *Jones* 340. And he is not to be looked upon as removed, (with reſpect to the ſaid Profits and Duties) until ſuch Time as the Clerk of him that recovers is inſtituted; for although by the Judgment in a *Quare Impedit* he be ſo removed, that the Plaintiff may preſent, and his Clerk may be inſtituted; yet until ſuch Inſtitution, *&c.* actually had, the firſt Clerk remains Incumbent *de facto*; by *Coke. Mich.* 12 *Jac. B. R.* in *Whiſtler* and *Singleton*'s Caſe, 1 *Roll's Rep.* 62. But after the ſecond Clerk is inſtituted and inducted, he may enter upon the Profits, and reap the Corn ſowed upon the Glebe by him againſt whom the Recovery was had, and that without a *Scire Facias*; by all the Juſtices. *Hill.* 41 *Eliz. Bennet* v. *Edwards*, *Moor* 571.

Who may reap upon the Glebe, *&c.*

Incumbent accepting another Benefice without Diſpenſation.

If the Incumbent of one Church of the yearly Value of Eight Pounds, or above, doth without a Diſpenſation accept another Benefice, the firſt is abſolutely void, ſo that if he doth continue as Incumbent by ſerving or providing for the Cure, taking up the Profits, *&c.* I conceive that he is in the ſame Caſe, as if upon the Death of the Incumbent of another Church he ſhould of his own Authority enter upon the Profits, and ſerve the Cure thereof as if lawful Incumbent, that is, that he is accountable to the next Incumbent for the Profits received by him, and liable to an Action upon this Statute, if he refuſe to ſatisfy the next Incumbent for the ſame. See *The King* and *Priſt*'s Caſe, *Hill.* 9 *Car. Jones* 337, 339, 340. But if any inferior Dignity, or other Benefice doth become void by Ceſſion upon the Account of the Canon Law only; as if one having one Benefice with Cure under the yearly Value of Eight Pounds, doth accept of another that is incompatible, although that in ſuch Caſe the Patron may preſent before the Church is judicially declared to be void, or Notice thereof be given by the Ordinary; yet it hath been held, that until Deprivation be made, by reaſon of the Acceptance of another Benefice incompatible, the Church is only void to the Patron, not to Strangers; and that if the Clerk doth ſue for the Tithes of the former Benefice, it is not any Bar to him to ſay, that he hath taken a ſecond

Benefice; by Juſtice *Barkley*, 13 *Car. B. R.* which Juſtice *Yelverton* in his Argument of the Caſe of *Priſt* ſaid had been ſo adjudged, 2 *Roll's Abr.* 361; from which it ſeems to be, that immediately upon ſuch Ceſſion, the Profits of the Church do not belong to the next Incumbent, but only from the Time that the Church is judicially declared to be void. But had not the aforeſaid Authority reſolved the contrary, it might have been a Doubt, whether ſuch Church had not been ſo void, that the Profits of it by this Statute had belonged to the next Incumbent from the Time that the Clerk had been inſtituted, or otherwiſe intitled to the ſecond Benefice incompatible, and not from the Time only of the Deprivation, or judicial Declaration of the Avoidance in the Court Chriſtian; for the Conſtitution of the Council of *Lateran* ſaith, *Ipſo jure ſit privatus*, not ſpeaking of any Sentence of Deprivation: And by the ſame Canon and Words a Church ſhall be void to all Purpoſes, upon conſecrating its Incumbent a Biſhop, without any judicial Proceedings, and particularly to the intitling the next Incumbent to the Profits of the Vacation from the Ceſſion, which none diſpute; why then ſhould not the ſame Canon have the ſame Conſtruction and Effect in this Caſe? Beſides, 'tis ſaid, 10 *Ed.* 3. 1, that the Conſtitution of *Lateran* is a general Sentence of Deprivation; and that if particular Deprivation for a Crime, or Reſignation of the Incumbent, doth abſolutely void a Church, much more ſhall the Conſtitution in this Caſe do it. *Hill.* 9 *Car. King* v. *Priſt*, *Jones* 337. In the Caſe of particular Deprivation for Crime, the Church is not only void to the true Patron's Preſentment, but to an Uſurper's alſo, although no Notice be given thereof. *Trin.* 44 *Eliz. Green* v. *Baker*, 2 *Roll's Abr.* 369. *Paſch.* 17 *Jac.* Sir *William Elvis*'s Caſe v. *The Biſhop of York*, &c. *Hob.* 318. And ſo it is, if the Church be void by Reſignation, and no Notice be given to the true Patron. *Paſch.* 33 *Eliz. Serven* v. *The Biſhop of Lincoln*, *Noy* 65. And by *Hobart* in Sir *William Elvis*'s Caſe v. *The Biſhop of York*, &c. *Hob.* 318. If, when the Church by Ceſſion is open to the Preſentment of the true Patron, an Uſurper doth get his Clerk inſtituted and inducted thereunto before any Declaration of the Ceſſion is made judicially, it may be worth the conſidering, whether the Church thereby ſhall be ſaid to be *plena & conſulta*, ſo that the Ordinary ſhall be a Diſturber in refuſing to admit the true Patron's Clerk; and whether, if he did admit and inſtitute him, it would not amount to a Superinſtitution, and be void. If it be ſaid, that the Church in ſuch Caſe is not full of the Uſurper's Clerk, but that the Biſhop is bound to admit the Clerk of the true Patron preſented to him, that muſt be becauſe the Inſtitution of the Uſurper's Clerk was a Superinſtitution; if ſo, then the Clerk that voided the Benefice by Ceſſion might have an Aſſize or other Action againſt him, which is hard to ſay, he being deprived by the aforeſaid Conſtitution, the Intent of which was to put the Cure and Profits into the Poſſeſſion of another; and not only to put it into the Patron's Power to preſent if he pleaſed; but if on the other Hand it be granted, that the Uſurper's Clerk is Incumbent *de facto* until the true Patron remove him by Suit; 'tis then to be confeſſed, that the Church by ſuch Ceſſion without particular Deprivation is void as to others, as well as to the true Patron, and then why not to the next Incumbent to give him a Right to the Profits immediately from the Ceſſion? But *Quære*.

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Who may receive the Profits thereof, and from what Time.

Another Conſtruction of this Canon of *Lateran*.

If upon Ceſſion an Uſurper gets his Clerk inducted before any Declaration.

Further, I conceive that if a Clerk be Simoniacally preſented to a void Church, although that he be inſtituted and inducted thereupon, that

If a Clerk be Simoniacally preſented to a void Church.

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that he hath not any Right to the Profits of the Church, neither to thoſe that did ariſe from the Time that the Church fell void until his Inſtitution, nor to thoſe ariſing after it; but in ſuch Caſe the Profits of the Church are due to the Clerk preſented by the King upon the Title of Simony, from the Time that it became void of its lawful Incumbent; the Reaſon is, becauſe that the Church to which a Perſon is Simoniacally preſented, remains void notwithſtanding the Inſtitution and Induction had thereupon, the Preſentation, Inſtitution and Induction being made void by the Statute 31 *Eliz. c.* 6. *Co. Lit.* 120. and are not only void as to the King, ſo that he may preſent upon his Title by Simony without any Deprivation, or bringing his Writ to remove the Simoniſt; but alſo as to the Pariſhioners, ſo that they may detain their Tithes, and plead the Simony, as a Bar in any Action brought by the Simoniſt to recover them. *Winchcomb* and *Pulleſton*'s Caſe, *Hob.* 166. ſame Caſe, *Noy* 25. *Mich.* 8 *Jac. Penn*'s Caſe, 1 *Brownl.* and *Goulds.* 7. *Trin.* 8 *Jac.* Dr. *Hutchinſon*'s Caſe, *Godbolt*, and *Trin.* 14 *Car.* 2. *B. R. Knight* v. *Dancer*, 1 *Keb.* 311, 312. It was there objected by *Finch*, *Solicitor General*, that a Parſon in by Simony may ſue for Tithes notwithſtanding what is ſaid by *Hobart*, which he ſaid was not Law; but this was denied by the Court, and agreed that Simony may be pleaded in Bar, in an Action of Debt for Tithes; yet 3 *Cro.* 642 ſeems to be to the contrary. But if the King doth not preſent during the Life of the Simoniſt, and then the true Patron, or an Uſurper doth preſent a Clerk, who is inſtituted and inducted; I conceive that in this Caſe ſuch Preſentee hath Right to the Profits of the Church from the Time that it was firſt void of a lawful Incumbent; and that if the King before the Death of the Patron's or Uſurper's Clerk doth remove him by *Quare Impedit*, and preſent another, as he may, (if the Patron, *&c.* be not within the Relief of the Statute 1 *W. & M. c.* 16.) *Paſch.* 14 *Jac. Winchcomb* v. *Pulleſton*, *Hob.* 165. ſame Caſe, *Noy* 25, and 1 *Brownl.* and *Goulds.* 164, the King's Clerk can claim the Profits only from his Inſtitution.

In all Caſes where the Inſtitution, *&c.* are *ipſo facto* void.

So I conceive in all Caſes, when notwithſtanding Inſtitution and Induction the Church doth remain void, for that the Inſtitution and Induction are declared by Law to be *ipſo facto* void, the Profits from the Time that the Church was void before ſuch Inſtitution, and after, go to the Perſon next legally inſtituted. (And when a Church notwithſtanding Inſtitution doth remain void, ſee *Chap.* 20.)

Voidance thro' Omiſſion of ſome legal Duty.

But when the Admiſſion, Inſtitution and Induction of a Clerk to a Church are not abſolutely void, although that the Church afterwards through the Omiſſion of ſome legal Duty doth become void, the Profits ariſing in the Vacation go to the Perſon ſo admitted, *&c.* and from the Time of the Avoidance through ſuch Omiſſion, to the next Incumbent, altho' the Perſon admitted doth ſerve the Cure after the Avoidance as Incumbent, (and when a Church by ſuch Omiſſion becomes void is ſhewed before, *Chap.* 15.) But whenſoever any Perſon doth receive the Profits of a Church when he hath no Title thereto, ſuch Perſon ſhall be ſubject to pay the Tenths due to the King; ſo alſo to a Diſtreſs for a Rent-Charge, and to all other Charges and Payments which are payable out of ſuch Benefice, and that, from the Reaſon of his taking up the Profits thereof; and ſo ſhall every one that enters upon a Benefice without Inſtitution or other Title. But neither the one nor the other may bring an Action of *Juris utrum*, or a *Writ of Annuity*, nor may he ſue for the Tithes, nor can he plead in Bar in a *Quare Impedit* as Incumbent in Poſſeſſion, as was ſaid *Hill.* 9 *Car.* in *The King* and *Priſt*'s Caſe, *Jones* 339, 340.

Note;

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Note, That although the Words in this Statute be in the Disjunctive, preſented, inſtituted, inducted or admitted; yet I conceive that a bare Admiſſion, which is that Act by which the Ordinary doth approve of a Clerk preſented to him, as fit to ſerve the Cure, is not here to be underſtood, as if ſuch Admiſſion alone was ſufficient by this Statute to give the Clerk the Profits of the Vacation; for then the ſame may be ſaid of being only preſented, but is added with reſpect to thoſe Preferments, which are not taken by the way of Inſtitution and Induction; and ſo is not here to be taken in its general, but reſtrained Signification with reſpect to ſuch Preferments only; and probably it may be thought, that where a Perſon is to be made complete Incumbent of a Church by the Way of Preſentation, Inſtitution and Induction, the Words *preſented*, *inſtituted*, *inducted*, in this Statute, ſhall be taken in a Copulative Senſe; ſo that the new Incumbent to give him a Capacity to ſue for the Profits of the Church ariſing in the Vacation, muſt be as well lawfully inducted as inſtituted; and it is doubtleſs the ſafeſt way to get Induction before any Proceedings at Law be for ſuch Profits; yet it is reaſonable to judge, that a Clerk by Inſtitution only hath the ſame Right to the Profits ariſing in the Vacation, as to thoſe Profits ariſing after his Inſtitution; and by *Coke*, by Inſtitution he hath a Right to enter upon or take the Profits, though not to ſue for them. *Hitchin* and *Glover*'s Caſe, *Paſch.* 13 *Jac.* 1 *Roll's Rep.* 227. Alſo by Inſtitution a Church is *plena & conſulta*, and a Perſon is then ſaid to be promoted to it; and beſides, the Profits of the Vacation are given by this Statute towards the Payment of the Firſt Fruits, which are due upon Inſtitution, and before Induction, by *Stat.* 26 *H.* 8. *c.* 3.

If a bare Admiſſion is ſufficient to give the Clerk the Profits of the Vacation.

If the Words may be in a Copulative Senſe.

But if Inſtitution before Induction ſhall be ſaid to intitle a Clerk to ſuch Profits, ſo that he may take them, or diſcharge the Payment thereof, though not to ſue for the ſame; a farther Queſtion may be made, whether the ſame ſhall be extended to Benefices which are of the King's Gift, *viz.* Whether a Church be ſo filled by Inſtitution upon the Preſentation of the King, or of an Uſurper, to a Benefice of the King's Gift, as to intitle the Party inſtituted to the Profits of the Vacation, and to charge him with the Payment of Firſt Fruits, *&c.* becauſe the Church is not ſo filled by Inſtitution only againſt the King, but that the King may, when he pleaſeth, before Induction preſent to his own Benefice, upon his own, or an Uſurper's Preſentee to the outing of him.

If Inſtitution will extend to the Profits of Benefices of the King's Gift.

As to which Queſtion I think rather, that ſuch Clerk is intitled to the Profits ariſing in the Vacation, and is chargeable with the Payment of Firſt Fruits, *&c.* yea, although that the King ſhould actually out him by preſenting another Clerk before his Induction, for tho' the King hath ſuch Prerogative, that he may before Induction preſent another Clerk to the outing of his own Preſentee, or an Uſurper's, without being put to his Writ for the Removal of them; yet I apprehend, that the Church in ſuch Caſes is filled by Inſtitution alone as to other Purpoſes: Firſt, I ſuppoſe that it will be granted, that ſuch Clerks have the Cure of Souls by Inſtitution, and may not be interrupted in ſerving the Cure, even as Clerks of other Patrons being only inſtituted, elſe the Cure is not actually committed to them, and to ſuch when inſtituted (as well as to other Clerks) the Biſhop ſaith, *Accipe curam tuam & meam*; and they may (even as others) be puniſhed by their Ordinary for the Neglect of the Cure, *&c.* before Induction, even by Deprivation. And if ſo be, that they may be deprived, it muſt be of that they were intitled to before; therefore it ſeems to follow, that the Preſentee of the King, or of an Uſurper upon the King's Right, hath the ſame Intereſt in the Profits,

And it ſeems it may.

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and is ſubject to the ſame Charges and Payments, which a Clerk inſtituted upon any other private Patron's Preſentment hath, or is ſubject to.

How a Church of the King's Gift is full by Inſtitution.

Farther it will appear, that a Church of the King's Gift is full by Inſtitution as to all Purpoſes but againſt himſelf, if we conſider, that the Inſtitution of another Clerk upon the Preſentment of an Uſurper to the ſame Living to which the King's Clerk is inſtituted, is a Superinſtitution, and ſo void, and makes no Uſurpation upon the King, although that Induction alſo thereupon be had; alſo if a Clerk being poſſeſſed of a Benefice with Cure, doth after take a Church of the King's only by Inſtitution, (Diſpenſation not intervening) his firſt is void thereby, and if ſuch Inſtitution alone be ſufficient to void a former full Church, it muſt be ſufficient to make a void Church full, ſaving in the Caſe of the King's Prerogative, and ſo ſeems to have all the Effects which Inſtitution in other Caſes may be ſaid to have, *viz.* until the King's Preſentment comes. And ſo the Caſe of a Preſentee to a Living of the King's Gift taken only by Inſtitution, ſeems to be like the Caſe of him that by Uſurpation is preſented, inſtituted and inducted to a Benefice, who until a Recovery is had, and the Clerk of the Recoverer inſtituted, is Incumbent to all Purpoſes: Or it may be ſaid to be like the Caſe of him who is collated and inducted by the Uſurpation of the Ordinary, who thereby is Incumbent to all Purpoſes, that is, hath Right to the Profits in and after the Vacation, and as I conceive is obliged to pay Firſt Fruits; and yet if the true Patron's Clerk be received by the Ordinary, his Incumbency ceaſeth.

What Remedy and Right to the Profits by the ſecond Clauſe of the Statute.

By the ſecond Clauſe of this Statute as here ſet down, the Clerk that hath Right to the Profits of the Church during the Vacation, hath his Remedy given him, if upon reaſonable Requeſt made they be not rendred to him, or Satisfaction for them, which Remedy is not only againſt Archbiſhops, Biſhops, Archdeacons and other Ordinaries, but alſo againſt all and every other Perſon or Perſons, and therefore againſt any Lay-Perſon that ſhall take up ſuch Profits without Commiſſion of the Ordinary; and againſt any Clerk that ſhall take them up without ſuch Authority, or legal Title, as pretending himſelf to be Incumbent. Yet if the Caſe be, that the Ordinary hath ſequeſtred the Profits of a void Church, and hath given Commiſſion to the Church-wardens, or other Perſons to take them up, and the Profits be taken up accordingly, and remain in ſuch Perſons Poſſeſſion until a new Incumbent is made, to whom the Church-wardens or other Perſon will not render them or their Value, it may be doubted whether the Action for them may not be brought by the new Incumbent againſt the Ordinary under whom ſuch Perſon acted, and not only againſt the Church-wardens, or other authorized Party, theſe being but as the Ordinary's Servants, and to give an Account to him, and to ſue for them (if need be) in the Ordinary's Name. (For ſuch Sequeſtrators authorized by the Ordinary, may ſue for Tithes, and other Profits of the Church if detained, in the Spiritual Court at leaſt, if not at Common Law: But ſuch Suits are generally brought in the Name of the Ordinary, or his Vicar General, *&c.* at the Relation of the Sequeſtrator.) For if the Ordinary in reſpect of his Miniſters or Servants, be not chargeable, I do not ſee how he ſhould be chargeable at all, in regard that it cannot (nor could it by the Makers of this Statute) be preſumed, that an Archbiſhop, Biſhop, *&c.* would take them up in their proper Perſons, but that they would order ſome Perſon under them ſo to do, who ſhould anſwer them to him, or in his Name to the next Incumbent, to whom he became by his Commiſſion anſwerable for them; and

and if the Party appointed by the Ordinary be by this Statute chargeable, from the Reaſon of his taking up the Profits, and his Accounting for them to the Ordinary, from whom he received his Commiſſion and Authority, be not a ſufficient Diſcharge to him, it cannot be Reaſon that he pay them, or the Value of them, to the Ordinary, for that he is ſtill the Perſon that took them up, and may remain liable to anſwer for them. Upon which Doubt, for the Security of the Ordinary, and Benefit of new Incumbents, it ſeems to be adviſeable for the Ordinary to give his Authority of taking up the Profits, and of providing a Curate (if need be) to ſome diſcreet Clergyman near the void Benefice, rather than commit it to Church-wardens, who are ſometimes unreſponſible for the Profits, ſometimes ſell or diſpoſe them much under the Value, to them that ſhould pay them, or to others, and often againſt the Law imploy ſome unqualified Perſon to ſerve the Cure, and allow him ſo extravagantly, that upon the whole Account it frequently falls out, that Clerks have little or no Benefit by this Statute made in their Favour, but are ſometimes run in Arrear, as when more is paid for ſerving the Cure than the Profits do amount unto.

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Though the Ordinary, or other Perſon taking up the Profits, be puniſhable by this Statute, if upon reaſonable Requeſt Satisfaction be not made to the next Incumbent; yet if any Pariſhioner hath not ſet forth or paid his Tithes, or if other Perſon hath not paid other Profits of the Church payable by him or them to the Ordinary, or others commiſſioned by him, before the Church be full of an Incumbent, (at which Time the Biſhop's Authority ceaſeth) I conceive, that ſuch Pariſhioners or other Perſons refuſing to ſatisfy the new Incumbent, is not ſubject to the Penalty of this Statute, *viz.* the treble Value of the Profits, but only to ſuch Actions for them which Incumbents may have for Profits ariſing after their Incumbency, although their Right to them is by this Statute; becauſe, this Clauſe ſeems only to reach thoſe that do receive the Profits during the Vacation, and he from whom they are due, and who ought to pay them to the Ordinary, or his Miniſters, during the Vacation, by retaining them cannot be ſaid to be a Receiver of them.

If treble Value ſhall be recovered where a Pariſhioner retains his Tithes during the Vacation.

If the Incumbent of a Benefice be put to ſue, either for any of the Profits of his Church received during the Vacation, or for ſuch as are not paid by any one, it is ſafe for him to recite this Statute in his Declaration, leſt it ſhould be thought not to be a general Statute whereof the Judges are bound to take Notice, becauſe it extendeth not to all the Spiritualty, *viz.* not to Biſhops; and alſo to aver, that he is the next lawful Incumbent, and that he made a Demand thereof, and the Non-payment of the ſame, eſpecially if he ſue for the treble Value.

How ſafeſt for the Incumbent to declare.

From the third Clauſe of the Statute, as here ſet down, I conceive, that though the Ordinary or his Miniſters may detain ſo much of the Profits they receive, as ſhall amount to pay him or them who ſhall ſerve the Cure his or their reaſonable Stipend, and for collecting the Profits, yet that if the Ordinary or his Miniſter doth detain or allow upon ſuch Account more than the new Incumbent ſhould think reaſonable, he may try it by Action at Law grounded upon this Statute.

Alſo if ſuch Parſon as did attend the Cure was not then twenty-four Years of Age, or was only appointed by the Church-wardens or other Perſon, and not duly licenſed and admitted thereunto by the Ordinary, or did not duly qualify himſelf according to the Statute 14 *Car.* 2. *c.* 4. I conceive neither the Ordinary nor his Miniſter may detain any Part of the Profits in reſpect thereof, for that his Licence (he not being duly qualified)

is

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is void, *Stat.* 13 *Eliz. c.* 12. and *Stat.* 14 *Car.* 2. *c.* 4. and his Serving the Cure an unlawful Act. And if the Biſhop's Commiſſioner doth employ ſome neighbouring Miniſters that have Cures of their own, to ſerve ſuch Cure for the Time, without Admiſſion as aforeſaid by the Ordinary, I ſuppoſe that their Caſe is the ſame, although that they performed the legal Acts aforeſaid to ſettle them in their own Churches, and that alſo they may be queſtioned upon *Stat.* 14 *Car.* 2. *cap.* 4. if upon ſuch Occaſion the reading either of Morning or Evening Prayers in their own Churches be neglected.

Note alſo, That if any other Perſon than the Ordinary, or ſuch as he ſhall appoint as his Officer or Miniſter to his Buſineſs, do take up the Profits aforeſaid, that he by this Statute is not allowed to detain any Part thereof, upon the Account either of ſerving the Cure or collecting the Profits.

As to the Incumbent's Will of Corn ſowed on the Glebe.

As to the next Clauſe about Incumbents declaring their Wills of Corn ſown on the Glebe, it is to be noted, that if an Incumbent hath ſown his Glebe, and his Church doth become void by Deprivation or Reſignation, and another be inducted, it is ſaid by *Coke*, in the Caſe of *Moyl* v. *Ewer*, *Hill.* 11 *Jac.* 2 *Bulſtr.* 184. that the new Incumbent ſhall have Tithes of his Predeceſſor: And a *Quære* is made by *Rolle*, Whether there be not a Difference where the Incumbent dies before the *Annunciation*, and where he dies after? *Hill.* 11 *Jac. B. R. per Cur.* 1 *Roll's Abr.* 655, 656. The Reaſon of which *Quære* I ſuppoſe to be, from what is ſaid by *Littleton*, 34 *H.* 6. 38. *b. viz.* That if a Parſon die before the Feaſt of the Conception of the Bleſſed Virgin, by the Law of the Church the Succeſſor ſhall have the Emblements as well of the Glebe as of the Tithes, which differs from our Law, which makes no Diſtinction as to what Time of the Year the Dying happens to be in.

If the Fruits of the Vacation be not ſufficient for the Stipend.

As to the laſt Clauſe concerning paying for the Cure, if the Fruits of the Vacation be not ſufficient for it, it muſt be remembered what is before ſaid, *viz.* That he who ſerves the Cure in the Vacation muſt be duly qualified, admitted, *&c.* otherwiſe, I ſuppoſe, the new Incumbent need not pay him, but may plead his Incapacity in Bar. So if one, pretending to be Incumbent of a void Church, doth cauſe a Clerk to be duly admitted to ſerve the Cure thereof as his Curate, and after the Intruſion being detected, the Church is filled, and the Curate imployed by the pretended Incumbent is not paid his Salary or Wages, I conceive that this Clauſe will not relieve ſuch Curate againſt the new Incumbent, although that the Caſe ſhould be, that ſo much of the Fruits did not ariſe in the Vacation as were ſufficient to pay his Salary: For this Clauſe hath Relation to the former; and therefore, as the former Clauſe doth not enable any Intruder or meer Treſpaſſer to detain any of the Profits, either for him that ſerves the Cure, or for his taking up the Profits, but only the Biſhop and his Miniſter, as hath beed ſaid; ſo this Clauſe cannot well be thought to be added to relieve Intruders, by providing for the Payment of ſuch Curates as are ſet up by them with Deſign to injure the next Incumbent, and to fruſtrate this Law for whoſe Benefit it was made, but is ſtrictly to be underſtood to provide for ſuch Curate only as ſhall be appointed by the Ordinary, in caſe the void Church ſhall be ſo ſuddenly filled, that the Fruits that did ariſe in the Vacation were not ſufficient for the Payment of him.

But if ſuch Profits be ſufficient, and not taken up.

But ſuppoſe that the Profits that did ariſe in the Vacation were ſufficient to pay the Curate's Stipend, yet becauſe no one did take up ſuch Profits, they remain in the Hands of thoſe from whom they were due, and the Curate

Curate is not paid before a new Incumbent enters; yet I conceive, although the Words of the Statute may not, ſtrictly taking them, reach this Caſe, that yet by an equitable Conſtruction thereof the Curate may be relieved againſt the new Incumbent. Vacant Benefices.

Notwithſtanding this Statute, upon the filling of a void Biſhoprick, not the new Biſhop, but the King, by his Prerogative, hath the Temporalties thereof, from the Time that the ſame became void, to the Time that a new Biſhop ſhall receive them from the King, and the Perſon or Perſons that execute the Power of Order and Juriſdiction have the Perquiſites that happen by the Execution of ſuch Power, until the new elected Biſhop may by Law execute the ſame. And a Biſhop's Temporalties are all ſuch Things as the Biſhops have by Livery from the King, as Caſtles, Manors, Lands, Tenements, Titles, and ſuch other Certainties of which the King is anſwered during the Vacation; and the Spiritualties are all manner of Juriſdiction of Courts, as Granting of Adminiſtration, Proving of Wills, Granting Licences to marry, *&c.* and all ſuch Things as are managed by the Guardian of the Spiritualties, during the Vacation, are Spiritualties. *Savil, Caſe* 109. *fol.* 52. King to have the Temporalties of a void Biſhoprick, *&c.* What are Temporalties, and what are Spiritualties.

And it hath been enacted, **That the King ſhall have Eſcheats of Lands of the Freeholders of Archbiſhops and Biſhops, when ſuch Tenants be attainted for Felony in Time of Vacation, whiles their Temporalties were in the King's Hands to give at his Pleaſure, ſaving to ſuch Prelates the Service that thereto is due and accuſtomed.** Stat. 17 Ed. 2. cap. 14. Accordingly (the Temporalties being in Queen *Elizabeth*'s Hands) a Copyhold eſcheated which was granted by the Queen, and it was held to be good. *Paſch.* 42 *Eliz. B. R. Covert*'s Caſe, 3 *Cro.* 754. If a Biſhop making a Leaſe of Lands of his Biſhoprick, doth reſerve a yearly Rent to himſelf and Succeſſors, with a Proviſo therein, that in the Time of the Vacation of the Biſhoprick the Rent ſhall be paid to the Dean and Chapter, this Proviſo is void and repugnant, and ſhall not bar the King of the Rent. *Paſch.* 4 *Eliz.* 1 *Anderſon, f.* 9. *Eyre*'s Caſe, *Moor p.* 51. *Paſch.* 5 *Eliz. Ayer* v. *Ome, Dyer* 221, 222. 4 *Leon.* 71, 72. *Stat.* 17 *E.* 2. *cap.* 14.

Though the King hath the Temporalties of a Biſhoprick during the Avoidance, yet during ſuch Time Waſte may not be committed; to prevent which it hath been enacted, **The Keeper, ſo long as he hath the Cuſtody of the Land of ſuch an Heir ſhall keep up the Houſes, Parks, Warrens, Ponds, Mills, and other Things pertaining to the ſame Land, with the Iſſues of the ſame Land; and he ſhall deliver to the Heir, when he cometh to his full Age, all his Land ſtored with Ploughs and all other Things, at the leaſt as he received it. All theſe Things ſhall be obſerved in the Cuſtodies of Archbiſhopricks, Biſhopricks, Abbeys, Priories, Churches and Dignities vacant, which appertain to us; except this, that ſuch Cuſtody ſhall not be ſold.** Stat. 9 H. 3. cap. 5. And after it was enacted, **Becauſe that in the Petition of the ſaid Prelates and Clergy it is contained, that Eſcheators and other Keepers, in the Time of Vacation of Archbiſhopricks, Biſhopricks, and other Prelacies, have done great Waſte and Deſtruction in the ſame in Time paſt; We will and grant for us, and for our Heirs, that at all Times from henceforth, when ſuch Voidances ſhall happen, that our Eſcheators and the Eſcheators of our Heirs, which for the Time ſhall be, ſhall enter and cauſe to be well kept the ſaid Voidances, without doing Waſte or Deſtruction in the Manors, Warrens, Parks, Ponds or Woods.** 9 *H.* 3. *cap.* 5. Againſt Waſte to be committed by Keepers. 14 *Ed.* 3. *c.* 4 & 5. Againſt Eſcheators doing Waſte.

Vacant Benefices.

And that they ſell no Underwood, nor hunt in the Parks or Warrens, nor fiſh in Ponds nor Free-Fiſhings, nor ſhall rack nor take Fines of the Tenants free nor bond, but ſhall keep and ſave as much as pertaineth to the ſaid Voidances, without doing Harm, or any manner of Oppreſſion. And if the Dean and Chapter of Churches Cathedral, Priors, Subpriors, Prioreſſes, Subprioreſſes, and Covents of Prelacies, Abbies, or Priories, whoſe Voidance pertaineth to us and our Heirs, will render to us and our Heirs the Value of the ſaid Voidance, as other will reaſonably yield, then the Chancellor and Treaſurer ſhall have Power to let the ſaid Dean and Chapter, Prior or Subprior, Prioreſs or Subprioreſs, and Covent, the ſaid Voidances by good and Sufficient Surety, ſo that they ſhall have the ſame before all other, yielding to us the Value of them, according as ſhall be found by Remembrances of the Exchequer, or by Inqueſt to be taken upon the ſame, if need be, without making Fine. And in caſe they will not accord to yield to the Value, nor find ſuch Surety, then the Chancellor and Treaſurer ſhall cauſe to be ordained the good Preſervation of ſuch Voidances, by Eſcheators, or other ſufficient Keepers, to anſwer the King of that to him pertaineth reaſonably, without doing Waſte or Deſtruction, or other Thing which may turn in Diſheriſon of the Churches whereof ſuch Voidances ſhall happen.

Power given to let the Vacations of Biſhopricks, &c.

Item, Wholly to ſhew the Affection and Good-will which we have, that that pertaineth to God and Holy Church be ſafely kept without Waſte or Deſtruction, or Impeachment to be made thereof by us or our Miniſters, we will, and by theſe preſent Letters do grant full Power to our ſaid Chancellor and Treaſurer, which taking to them other of our Council ſuch as to them ſhall ſeem beſt to be taken, by good Information of Remembrances of the Exchequer, and other Informations as to them ſhall ſeem beſt, ſhall let the Vacations of Archbiſhoprics, Biſhoprics, Abbacies, Priories, and other Houſes, which Voidances pertain unto us, to the Dean and Chapter, Prior or Subprior, Prioreſs or Subprioreſs, and Covent, to yield a Certain of every Voidance by the Year, Quarter or Month, during the Vacations, according as to them ſhall ſeem beſt, without making any Fine. So that no Eſcheator, nor other Miniſter, in the Time of Vacations ſhall have Cauſe to enter or meddle to do any Thing which ſhall be in Prejudice of the Churches whereof ſuch Voidances ſhall happen; ſaving to us and to our Heirs the Knight Fees, Advowſons of Churches, Eſcheats, Wards, Marriages, Reliefs and Services of the ſaid Fees. In Witneſs whereof we have made theſe our Letters Patents, dated at Weſtminſter the Sixteenth Day of April, the Fourteenth Year of our Reign of England, and the Firſt of France. *Stat. for the Clergy*, 14 *Ed.* 3. *cap.* 4 & 5.

If a Biſhop be attaint of Treaſon.

And it is ſaid, that the King's Grant of the Temporalties of a Biſhoprick in the Life of the Biſhop is good. *Jenkins*, *Cent.* 5. *Caſe* 44. *p.* 210. But though, if a Biſhop be attainted of Treaſon, the King ſhall have his Temporalties *in Jure Coronæ*. But a Biſhop having to him and his Succeſſors *Bona Felonum de ſe*, commits Treaſon, and then the King makes a Grant to the Almoner of Felons Goods, then the Biſhop is attainted; *H.* the Biſhop's Leſſee for Years, is *Felo de ſe*; in this Caſe, not the Almoner, but the King, ſhall have this Leaſe; for the King's Grant after the Treaſon committed, and before the Attainder, was before the King had any Right, which accrued to him by the Attainder only, ſo was but as a

remote Poſſibility in the King at the Time of his Grant not grantable. But *Quære*, Inſomuch as the Attainder hath Relation to the Time of the Treaſon committed. *Dyer* 107. *Jenkins*, *Cent.* 4. *Caſe* 11. *Hughes Abr.* 959. Note, That it is agreed in the Caſe above, that if a Biſhop be attaint of Treaſon, the King ſhall have the Forfeitures of the Lands of the Biſhoprick during the Life of the Biſhop only. See the Statutes 26 *H.* 8. *c.* 13. and 5 *Ed.* 6. *c.* 11.

Vacant Benefices.

When a new Biſhop is made, he may not *de Jure* before his Conſecration claim the Temporalties of his Biſhoprick, although that *ex gratia* the King by his Letters Patent may grant them unto him after his Confirmation, and before his Conſecration, and the Grant then made is good: But after that he is conſecrated, inveſted and inſtalled, he may ſue for his Temporalties out of the King's Hands by a Writ *de Reſtitutione Temporalium*, directed to the Eſcheator. *F. N. B.* 169. Yet upon ſuch Writ the Temporalties are not *de Jure* to be delivered until the Metropolitan hath certified the Time of his Conſecration, although that the Freehold of the Temporalties be in him by the Conſecration. 38 *Ed.* 3. *Godbolt. Parſon's Law*, *cap.* 1. *Quære*, If ſuch Certificate be neceſſary upon a Tranſlation?

When a new Biſhop may claim the Temporalties.

Having before ſhewed what Charges Incumbents are liable to, and ought to allow when they enter upon their Benefices, it will be neceſſary to ſhew what other Temporal Charges every Perſon, in reſpect of his Tithes and Glebe, is liable to. By the Common Law, Spiritual Perſons are exempted from Toll, Murage, Pontage, and Cuſtoms for their Eccleſiaſtical Goods, or other Things by them bought for their neceſſary Subſiſtence, which appears by the *Regiſter of Writs* 260. and *Fitz. Nat. Br.* 228. But whatever Privilege or Exemption Clergymen had at Common Law, yet they, both in reſpect of their Tithes and Glebe, are liable to all Charges impoſed by Act of Parliament: They are to contribute to Watch and Ward, to Repairing of the Highways, and may be rated or taxed by the Commiſſioners of Sewers; they as well as Laymen are chargeable to the poor maimed Soldiers or poor Priſoners, Conſtable Rates, and ſhall contribute towards ſatisfying for a Robbery committed within the Hundred, and all other publick Charges impoſed by Act of Parliament; and that hath been reſolved upon Debate, as *Hale* Chief Juſtice ſaid before all the Judges, *Trin.* 27 *Car.* 2. in the Caſe of *Web* v. *Batchelor*, 3 *Keb.* 476, 507. and 1 *Ventris* 273. 2 *Levinz* 139. *Trin.* 25 *Car.* 2. *Dominus Rex* v. ———, 3 *Keble* 255. *Degg's Parſon's Counſellor* 277. *Callis Lecture on the Statute of Sewers* 230, 232. *Mich.* 1649. *Harwood* v. *Payte*, *Stile* 161, 162.

What other Temporal Charges Clergymen, *&c.* are liable to in reſpect of their Tithes and Glebe.

CHAP.

Church Leaſes.

CHAP. XLI.

What Eſtates Eccleſiaſtical Perſons might have made at Common Law, and how their Power is inlarged or leſſened by Acts of Parliament, and the ſeveral Acts of Parliament relating thereunto.

Clergyman being legally poſſeſſed may let the Lands and Profits to others.

OF a Clergyman's being legally poſſeſſed of an Eccleſiaſtical Benefice, the Effect is not only that the Lands and other Profits of the Church are veſted in him, ſo that he may enter upon and convert the ſame to his own proper Uſe, but alſo that upon ſuch Induction or Poſſeſſion only, and not before, he may let and diſpoſe of them to others, and that not only during his own Incumbency, but in ſome Caſes to bind the Succeſſors alſo. That this is an Effect of a legal Poſſeſſion or Seiſin, will be evident from many Caſes hereafter mentioned: As firſt, King *Edward* the Sixth having by his Letters Patent appropriated a full Church to a Biſhop and his Succeſſors, to hold the ſame after it ſhould become void, the Biſhop made a Leaſe by Indenture for forty Years, to commence from the Time that the ſaid Parſonage ſhould come to the Hands of the ſaid Biſhop or his Succeſſors, by the Death of the Incumbent or otherwiſe, (which Leaſe was confirmed by the Dean and Chapter); the Biſhop and Incumbent being dead, the ſucceeding Biſhop entred, and made a new Leaſe. The Opinion of all the Juſtices in this Caſe was, that the firſt Leaſe was void, for that the Leſſor had no Right to, or Intereſt in the Parſonage appropriate during the Life of the Incumbent, who ſurvived him, and who alone was ſeiſed of it for his Time. The like Caſe was after in the Chancery between *Jobſon* and *Michael*, and was referred to *Dyer* and *Welſh*, Juſtices, who determined it according to the ſaid Opinion, *Mich.* 7 & 8 *Eliz. C. B. Dyer fol.* 244. See *Rector of Chedding-ton's* Caſe, 2 *Co.* 155. And ſo it was held by all the Juſtices, that the Grant of a Prebendary before his Inſtallation (which gives the Poſſeſſion) was void, and did not charge the Prebend. *Trin.* 20 *Eliz. C. B. Hare* and *Buckley*, *Plowden* 529. And the like Law is ſaid to be in the Caſe of a Dean and Chapter, becauſe during the Life of the Incumbent they have nothing in the Rectory, the Appropriation not being executed, nor executable, but by their Entry after the Church becomes void. *Mich.* 18 & 19 *Eliz. C. B. Grendon* v. *The Biſhop of Lincoln*, *Plowden* 500. *b.*

What Eſtates Churchmen formerly, and at this Day may make to others of their Poſſeſſions.

But what Eſtates Churchmen at this Day may make to others of their Poſſeſſions, comes now to be declared: In order to which, for the better apprehending thereof, I ſhall firſt remember what Eſtates they might anciently have made, before their Power in this Reſpect was either inlarged or leſſened by Acts of Parliament. In brief therefore, all Eccleſiaſtical Perſons had in former Times as full Power and Authority to leaſe, grant or alien, any or all of their Eccleſiaſtical Eſtates of which they were ſeiſed in Fee, as any Perſon ſeiſed of a Temporal Eſtate in his natural Capacity then had, or as yet hath; that is, if the Grant made by

a ſole Corporation was with the Conſent of others, whoſe Confirmation was in ſuch Caſe neceſſary. For though Deans and Chapters, Maſters and Fellows of Colleges, Maſters and Brethren of Hoſpitals, and ſuch like Corporations aggregate of many, might of themſelves alone, without the Conſent or Confirmation of any, have made long Leaſes for Lives or Years, or Gifts in Tail, or Eſtates in Fee to others of their Poſſeſſions, according to their own Wills, yet Biſhops, Deans, *&c.* ſeiſed in the Right of their Biſhopricks, Deaneries, *&c.* ſo Archdeacons, Prebends, Parſons, Vicars, *&c.* if they made the ſame Grants, muſt have had the Conſent and Confirmation of others that had Power of confirming in that Behalf, and then their Grants were as good as the Grants made by aggregate Corporations. But the Law, as to the Capacity of Clergy-men with reſpect to their Eſtates, is at this Day much altered, *viz.* by ſeveral Statutes, and the firſt of them is 32 *H.* 8. *c.* 28, and in theſe Words following. Church Leaſes.

Where great Number of the King's Subjects have heretofore taken Leaſes of Lands, Tenements, and other Hereditaments, for Term of Years, and divers of them for Term of Lives, and have given and paid great Fines and great Sums for the ſame, and alſo have been at great Coſts and Charges, as well in and about great Reparations and Buildings upon their ſaid Ferms, as otherwiſe concerning their ſaid Ferms; yet notwithſtanding the ſaid Fermors, after the Deaths or Reſignations of their Leſſors, have been and be daily with great Cruelty expulſed and put out of their ſaid Ferms and Takings by the Heirs or Succeſſors of their ſaid Leſſors, or by ſuch Perſons as have Intereſt therein after the Deaths or Reſignations of their ſaid Leſſors, by reaſon of privy Gifts of Entail, or for that the Leſſors had nothing in the Lands, Tenements, or other Hereditaments, ſo letten at the Time of the Leaſes thereof made, but only in the Right of their Wives, or ſuch other like Cauſe, to the great Impoveriſhment, and in manner utter undoing of the ſaid Fermors: For Reformation whereof, be it ordained, eſtabliſhed and enacted by the King our Sovereign Lord, the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by Authority of the ſame, That all Leaſes hereafter to be made of any Manors, Lands, Tenements, or other Hereditaments, by Writing indented under Seal for Term of Years, or for Term of Life, by any Perſon or Perſons, being of full Age of One and twenty Years, having any Eſtate of Inheritance either in Fee-ſimple or in Fee-tail in their own Right, or in the Right of their Churches or Wives, or jointly with their Wives, of an Eſtate of Inheritance made before the Coverture or after, ſhall be good and effectual in the Law againſt the Leſſors, their Wives, Heirs and Succeſſors, and every of them, according to ſuch Eſtate as is compriſed and ſpecified in every ſuch Indenture or Leaſe, in like Manner and Form as the ſame ſhould have been if the Leſſors thereof, and every of them, at the Time of the making of ſuch Leaſes, had been lawfully ſeiſed of the ſame Lands, Tenements and Hereditaments compriſed in ſuch Indenture, of a good, perfect, and pure Eſtate of Fee-ſimple thereof to their own only Uſes.

Provided always, That this Act, or any Thing therein contained, ſhall not extend to any Leaſes to be made of any Manors, Lands, Tenements, or Hereditaments being in the Hands of Fermor or Fermors by Vertue of any old Leaſe, unleſs the ſame old Leaſe be expired, ſurrendered, or ended within one Year next after the making of the ſaid new Leaſe; nor ſhall extend to any Grant to be made of any Reverſion To what Leaſes, *&c.* this Act ſhall not extend.

Church Leases.

Reversion of any Manors, Lands, Tenements, or Hereditaments, nor to any Lease of any Manors, Lands, Tenements, or Hereditaments, which have not most commonly been letten to Ferm, or occupied by the Fermors thereof, by the Space of Twenty Years next before such Lease thereof made; nor to any Lease to be made without Impeachment of Waste, nor to any Lease to be made above the Number of One and twenty Years, or three Lives at the most, from the Day of making thereof. And that upon every such Lease there be reserved Yearly during the same Lease, due and payable to the Lessors, their Heirs and Successors, to whom the same Lands should have come after the Deaths of the Lessors, if no Lease had been thereof made, and to whom the Reversion thereof shall appertain, according to their Estates and Interests, so much Yearly Ferm or Rent, or more, as hath been most accustomably yielden or paid for the Manors, Lands, Tenements, and Hereditaments so to be letten within Twenty Years next before such Lease thereof made; and that every such Person and Persons to whom the Reversion of such Manors, Lands, Tenements, or Hereditaments, so to be letten shall appertain, as is aforesaid, after the Deaths of such Lessors or their Heirs, shall and may have such like Remedy, Advantage, to all Intents and Purposes against the Lessees thereof, their Executors and Assigns, as the same Lessor should or might have had against the same Lessees.

How to the Leases of Parsons and Vicars.

Provided also, That this Act extend not to give any Liberty or Power to any Person or Persons to take any more Ferms, Leases, or Takings of any Manors, Lands, Tenements, or other Hereditaments, than he or they should or might lawfully have done before the making of this Act; nor extend to any Liberty or Power to any Parson or Vicar of any Church or Vicarage, for to make any Lease or Grant of any of their Messuages, Lands, Tenements, Tythes, Profits, or Hereditaments, belonging to their Churches or Vicarages, otherwise, or in any other Manner, than they should or might have done before the making of this Act; any Thing contained in this Act to the contrary notwithstanding. Stat. 32 H. 8. c. 28.

That this is an enabling Statute to sole Corporations.

As to this Statute it may be noted, that the same is an enabling Statute; for whereas before the making thereof no sole Corporation could have made any Gift, Alienation, or so much as Lease for Years or Lives to bind their Successors, without the Assent or Confirmation of others *Quorum Interest. Trin.* 11 *Jac. C. B.* the Bishop of *Salisbury*'s Case, 10 *Co.* 60. By this Statute any Person that is seized of an Estate in Fee-simple in the Right of his Church (Parsons and Vicars excepted) are enabled to make Leases for Three Lives or One and twenty Years of their own single Authority, without any Confirmation, Respect being had to the several Qualifications therein mentioned, *Trin.* 21 *Eliz. Fox* v. *Collier*, *Moor* 107. And those that in the Intent of this Statute are said to be seised of an Estate in Fee-simple in the Right of their Churches, are only Bishops, who are seised in the Right of their Bishopricks, Deans seised of their sole Possessions in the Right of their Deaneries, and so Archdeacons, Prebendaries, and all other sole Corporations, except Parsons and Vicars; for they by a special Proviso are excepted out of the Statute; for though a Prebend, *&c.* is not seised *in Jure Ecclesiæ*, but *Prebendæ*, *&c.* yet because Parsons and Vicars are especially excepted, and none others, Prebends, *&c.* are within the Statute even as Bishops; and *Popham* said in Dr. *Dale*'s Case, that for an House near *Paul*'s it was so adjudged, and so had been twice adjudged

ed in his Experience; and *Fenner* ſaid, it was ſo adjudged in the Caſe of a Treaſurer of a Church, *Trin.* 31 *Eliz. C. B. Acton* and *Pricher*'s Caſe, 4 *Leonard* 51. *Mich.* 36 & 37 *Eliz. B. R. Watkinſon* v. *Man*, 3 *Croke* 350. But 1 *Inſtitute* 300, is to the contrary, *Mich.* 15 *Car.* 2. *B. R. Biſco* Leſſor *de Strode* v. *Doctor Dale*, 1 *Levinz* 112, where 'tis ſaid, that a Prebend is ſeiſed in the Right of his Church within the Words of the Statute 32 *H.* 8. *c.* 28. So likewiſe was it adjudged in the Caſe of a Chancellor, and of a Precentor, by reaſon theſe were but Offices and Names of Dignity annexed to the Prebendaries; but it was then ſaid by *Twiſden* Juſtice, that he did not remember that it had been ſo adjudged in the Caſe of a Treaſurer. *Mich.* 15 *Car.* 2. *B. R. Bis* v. *Holt*, 1 *Sid.* 158. 1 *Keb.* 576. But as to the Caſe of a Precentor, it was ſaid by *Hide* in the ſame Caſe, that it muſt be intended thoſe who are in of an old Foundation, not thoſe who are of new Foundations. 1 *Levinz* 113. But as to Corporations aggregate, as Deans and Chapters, though they be ſeiſed in Right of their Churches, this is no enabling Statute; for ſuch, by the Conſent of the major Part of them, might have made any Leaſes or Grants of their Eſtates without Limitations before this Statute was made, and till by later Statutes they were reſtrained, might have done ſo afterwards, this Statute being meerly enabling, and not at all reſtraining them. And though by this Statute the ſole Corporation before mentioned could not, without Conſent and Confirmations of others, have made Leaſes for above Three Lives or One and Twenty Years, yet with Confirmation they might have made longer Leaſes, or abſolute Alienations of any of their Poſſeſſions, until other Statutes did reſtrain them.

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And for the reſtraining of Biſhops was firſt made the Statute of 1 *Eliz. cap.* 19, which is as followeth: **That all Gifts, Grants, Feoffments, Fines, and other Conveyance or Eſtates, from the firſt Day of this preſent Parliament, had, made, done, or ſuffered, or to be had, made, done, or ſuffered, by any Archbiſhop or Biſhop, of any Honours, Caſtles, Manors, Lands, Tenements, or other Hereditaments, being Parcel of the Poſſeſſion of his Archbiſhoprick or Biſhoprick, or united, appertaining or belonging to any of the ſame, to any Perſon (other than to the Queen, her Heirs or Succeſſors) whereby any Eſtate ſhould or might paſs from the Archbiſhop or Biſhop other than for Term of One and twenty Years or Three Lives, from ſuch Time as any Leaſe, Grant, or Aſſurance ſhall begin, and whereupon the old accuſtomed yearly Rent, or more, ſhall be reſerved, payable yearly during the ſaid Term of One and twenty Years or Three Lives, ſhall be utterly void; any Law, Cuſtom, &c. notwithſtanding.**

1 *Eliz. c.* 19. For reſtraining of Biſhops.

But this Statute leaving Biſhops to their former Power of granting to the Queen, her Heirs and Succeſſors, took little Effect, for that many Eſtates were granted to the Queen upon Deſign that the Queen ſhould grant them over to others, and therefore the Statute of 1 *Jac. c.* 3. for the reſtraining of Biſhops was made, which is as followeth.

Of little Effect.

Whereas all the Archbiſhoprics and Biſhoprics within this Realm of England were in ancient Times founded by his Majeſty's moſt noble Progenitors, Kings of this Realm, and in reſpect thereof his Majeſty is lawful and rightful Patron of all and every of the ſame; and where alſo by the Laws and Statutes of this Realm, no Archbiſhop or Biſhop can make any Conveyance, Aſſurance, or Eſtate whatſoever, of any Honours, Caſtles, Manors, Lands Tenements, or Hereditaments, Parcel of the Poſſeſſions of his Archbiſhoprick or Biſhoprick, or united, appertaining or belonging to any

Further Remedy by 1 *Jac.* 1. *c.* 3.

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any of the same, to any Subject whatsoever, whereby any Estate should or might pass from any Archbishop or Bishop, other than for Term of One and twenty Years or Three Lives, with such Reservations of Rent, and in such Manner and Form, as by the Laws and Statutes are provided: His most excellent Majesty understanding that divers Persons have with great Suit and Importunity sought to frustrate the true End and Intent of the said good Laws and Statutes in that Behalf, of his Christian and Princely Piety and Care, minding so to patronize and protect the said Possessions from Alienation or Diminution, as that the same may, according to the true Intent of the Founders, remain and continue in Succession to the Archbishops and Bishops of this Realm, and their Successors, for the better Maintenance of God's true Religion, keeping of Hospitality, and avoiding of Dilapidations, and thereby for ever hereafter to avoid all Suits and Importunities for or concerning any of the said Possessions, hath out of his own meer and godly Motion, and of his blessed Disposition for the publick Good, without all Regard of any private Respect, vouchsafed and is pleased, That it may be enacted and established by his Majesty, by and with the Assent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled;

To prevent such Grants, &c. to the King, his Heirs or Successors.

And be it enacted and established by the Authority of the same, That every Archbishop and Bishop within this Realm, and their and every of their Successors, shall be, from and after the End of this present Session of Parliament, for ever wholly and utterly disabled in Law to make, do, levy, or suffer, any Act or Acts, Thing or Things, whereby, or by Means whereof, any of the said Honours, Castles, Manors, Lands, Tenements, or Hereditaments, or any Part of them, or any of them, shall or may be aliened, assured, given, granted, demised, charged, or in any Sort conveyed to our said Sovereign Lord the King, his Heirs or Successors: And that all Alienations, Assurances, and Gifts, Grants, Leases, Charges, and Conveyances whatsoever, from and after the End of this present Session of Parliament, to be done, suffered, or made to our said Sovereign Lord the King, his Heirs or Successors, by any Archbishop or Bishop, or their or any of their Successors, of or out of any of the said Possessions, or of or out of any Part or Parcel of them, or any of them, and all and every Confirmation and Confirmations of the same, shall be from and after the End of this present Session of Parliament utterly void and of none Effect, to all Intents, Constructions and Purposes; any former Law, Statute, Act, Ordinance, or other Matter or Thing to the contrary notwithstanding. Stat. 1 Jac. c. 3.

These Statutes are meerly restraining of Bishop's Leases, &c.

These Statutes are meerly restraining, so that although Bishops might with the Confirmation of the Dean and Chapter have made any Lease or perpetual Grants, yet now with Confirmation they cannot alien or make other Leases than for Three Lives or One and twenty Years. If the Statute of 32 *H.* 8. (of which Statute this of 1 *Eliz.* makes no Alteration) which did under several Limitations enable Bishops to let Leases for Three Lives or One and twenty Years without Confirmation, had not been made before this of 1 *Eliz.* they could not by this have made any Lease to bind their Successors without the Confirmation of the Dean and Chapter, (this Statute being meerly disenabling;) and therefore, if a Bishop doth make a Lease for One and twenty Years or Three Lives, according to the Statute of 1 *Eliz.* yet if all the Limitations prescribed by the Statute of

32 *H.* 8. be not duly purſued, as if it be not all in Poſſeſſion, or that the old Leaſe be not expired or ſurrendered within One Year when a new one is made, (which is not prohibited by the Statute of 1 *Eliz.*) ſuch Leaſe ſhall not bind the Succeſſor, unleſs it be confirmed by the Dean and Chapter. *Trin.* 11 *Jac. C. B.* the Biſhop of *Salisbury*'s Caſe, 10 *Co.* 60. *Trin.* 21 *Eliz. Fox* v. *Collier*, *Moor* 108. Note, That this Statute 1 *Eliz.* is but a private or particular Statute, and muſt be eſpecially pleaded, elſe the Court will not take Notice thereof. *Hill.* 3 *Jac. Valentine* v. *Denton*, 2 *Cro.* 112. *Trin.* 30 *Eliz. B. R. Elmer*'s Caſe, 5 *Co.* 2. ſame Caſe, *Moor* 253. 4 *Co. Holland*'s Caſe, 76. 2 *Roll's Abr.* 466. But this Statute being made only for the diſenabling Biſhops, another diſabling Statute was made to extend to all other Eccleſiaſtical Perſons, as alſo to Colleges, *&c.* which is as followeth.

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Another diſabling Statute extending to all other Eccleſiaſtical perſons, as alſo to Colleges to make long Leaſes. 13 *Eliz. c.* 10.

And for that long and unreaſonable Leaſes made by Colleges, Deans and Chapters, Parſons and Vicars, and other having Spiritual Promotions, be the chiefeſt Cauſes of the Dilapidations, and the Decay of all Spiritual Livings and Hoſpitalities, and the utter impoveriſhing of all Succeſſors Incumbents of the ſame; Be it enacted by the Authority aforeſaid, That from henceforth all Leaſes, Gifts, Grants, Feoffments, Conveyances of Eſtates, to be made, had, done or ſuffered by any Maſter and Fellows of any College, Dean and Chapter of any Cathedral or Collegiate Church, Maſter or Guardian of any Hoſpital, Parſon, Vicar, or any other having any Spiritual or Eccleſiaſtical Living, or any Houſes, Lands, Tythes, Tenements, or other Hereditaments, being any Parcel of the Poſſeſſions of any ſuch College, Cathedral Church, Chapel, Hoſpital, Parſonage, Vicarage, or other Spiritual Promotion, or any Ways appertaining or belonging to the ſame or any of them, to any Perſon or Perſons, Bodies Politick or Corporate, (other than for the Term of One and twenty Years, or Three Lives, from the Time as any ſuch Leaſe or Grant ſhall be made or granted, whereupon the accuſtomed yearly Rent or more ſhall be reſerved, and payable yearly during the ſaid Term) ſhall be utterly void, and of none Effect, to all Intents, Conſtructions and Purpoſes; any Law, Cuſtom, or Uſage to the contrary any Ways notwithſtanding.

Provided nevertheleſs, and be it enacted by the Authority aforeſaid, That this Act, nor any Thing therein contained, ſhall be taken or conſtrued to make good any Leaſe or other Grant to be made by any ſuch College or Collegiate Church within either of both the Univerſities of Oxford **and** Cambridge, **or elſewhere within the Realm of** England, **for more Years than are limited by the private Statutes of the ſame College.**

Provided always, That this Act ſhall not extend to any Leaſe hereafter to be made upon Surrender of any Leaſe heretofore made, or by reaſon of any Covenant or Condition contained in any Leaſe heretofore made, and now continuing, ſo that the Leaſe to be made do not contain more Years than the Reſidue of the Years of the former Leaſe now continuing ſhall be at the Time of ſuch Leaſe hereafter to be made, nor any leſs Rent than is reſerved in the ſaid former Leaſe. Stat. 13 Eliz. cap. 10.

This Statute not to extend to Biſhops.

First note, that though this Statute hath general Words, **And all others having any Spiritual or Eccleſiaſtical Livings**, &c. yet doth it not extend to Biſhops, becauſe it begins with others of inferior Order to them, and ſo thoſe general Words after ought to be ſupplied with Intention of other inferior, or at leaſt but equal to thoſe that are ſpecified before by *Coke*, *Hill.* 43 *Eliz. Gouldsborough* 171. and ſo it is ſaid, 13 *Jac. Warren* v. *Smith*,

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v. *Smith*, or *Magdalen* College's Caſe, 1 *Roll's Rep.* 151, yet it hath been adjudged, that this Statute is a general Law, 4 *Co. Dumper's* Caſe, 20. 4 *Co. Holland's* Caſe, 76. 2 *Roll's Abr.* 465, *dubitatur. Paſch.* 32 *Eliz.* 2. *Carter* v. *Dame Cromwel, &c. Savil's* Caſe, 198. 1 *Leon.* 306. *Trin.* 27 *Car.* 2. *C. B. The Chapter of the Collegiate Church of Southwel* v. *Biſhop of Lincoln, &c.* 1 *Mod. Rep.* 204.

This Statute always conſtrued largely.

Secondly note, This Statute hath always been conſtrued largely and beneficially, to prevent all Inventions and Evaſions againſt the true Intention of it; therefore, whereas the Statute ſaith, **Maſters and Fellows of any College**, be the College incorporate by the ſame Name, or by the Name of Warden and Fellows, or Warden and Scholars, or Warden, Fellows and Scholars, or Provoſt and Scholars, or by any other Name of Corporations; and be the College Temporal for the Advancement of the Liberal Arts and Sciences, or meer Eccleſiaſtical, or mix'd, it is ſaid to be often held that every ſuch College is within the Proviſion of this Act; and ſo where the Statute ſaith, **Maſter or Wardens of any Hoſpital**, be the Hoſpital incorporate by any other Name, or be it a ſole Corporation, or a Corporation aggregate of many, the Statute doth extend to it, and ſo of the reſt. The Caſe of the Maſter and Fellows of *Magdalen* College in *Cambridge*, *Paſch.* 13 *Jac.* 11 *Co. fol.* 76.

Queen bound by this Statute.

So though the King is not named in this Act, yet it was reſolved in Parliament, 43 *Eliz.* by *Popham* and *Anderſon*, that the Queen was bound thereby; and this Reſolution was allowed of by the Lords and Commons in Parliament, which was the Reaſon why thoſe Perſons that were reſtrained by this Act, were not put into the Statute of 1 *Jac.* with Biſhops; for at the Parliament held 1 *Jac.* it was, upon making the Act for to bar Biſhops from alienating to the King, reſolved again by the Juſtices Aſſiſtants, that by the 13 *Eliz. cap.* 10. they were already in that Caſe reſtrained: The Caſe of the Maſter and Fellows of *Magdalen* College in *Cambridge*, *Paſch.* 13 *Jac.* 11 *Co.* 75. ſame Caſe, 1 *Roll's Rep.* 151. But it ſeems the Law for ſome Time was taken to be, that the King was not bound by this Statute of 13 *Eliz.* and for that Reaſon when a Dean and Chapter had leaſed Land to the King for a valuable Conſideration, at ſuch Time when the Law was taken to be that the King was not bound by this Statute, and the King did aſſign it over, the Aſſignee (after the Law was taken to be that the King was bound thereby) had his Leaſe made good to him by the Court of Chancery againſt the Statute, for that he could not know the Law in a Matter ſo dubious, but decreed that he ſhould pay Two hundred Pounds to the Dean and Chapter. *Mich.* 16 *Jac. Long* v. *The Dean and Chapter of Briſtol*; and the like Decree was made between *Magdalen College* and *Wood*, 1 *Roll's Abr.* 378.

Alters not 32 *H.* 8.

Thirdly note, That this Statute makes no Alteration of the Statute of 32 *H.* 8. but leaveth it as a Pattern in many things for Leaſes to be made by Eccleſiaſtical Corporations aggregate, which are not within the Statute.

Fourthly note, That no Leaſe made according to this reſtraining Statute of 13 *Eliz.* by any ſingle Corporation, as Dean, Archdeacon, *&c.* if it be not with Regard to the Limitations in 32 *H.* 8. is good, without the Confirmation of thoſe who by Law are to confirm the ſame.

Fifthly note, That as to Houſes in Cities and great Towns, the Statute of 13 *Eliz. cap.* 10. is altered by a Clauſe in the Statute of 14 *Eliz. cap.* 11. which is in theſe Words:

Alteration of 13 *Eliz.* by 14 *Eliz. c.* 11. as to Houſes in Cities and great Towns.

Whereas in an Act made 13 Eliz. **entituled, An Act againſt fraudulent Gifts, to the Intent to defeat Diſlapidations of Eccleſiaſtical Livings, and for Leaſes to be granted by Collegiate Churches, there**

is one Branch to avoid certain Leases to be made by Masters and Fellows of Colleges, Deans and Chapters of Cathedral or Collegiate Churches, Masters or Guardians of any Hospital, or by any Parson, Vicar, or any other having any Spiritual or Ecclesiastical Living; Be it enacted, That the said Branch, nor any Thing therein contained, shall not extend to any Grant, Assurance or Lease of any Houses belonging to any Persons, or Bodies Politick or Corporate aforesaid, nor to any Grounds to such Houses appertaining, which Houses be situate in any City, Borough, Town Corporate, or Market-Town, or the Suburbs of any of them, but that all such Houses and Grounds may be granted, demised, and assured, as by the Laws of this Realm, and the several Statutes of the said Colleges, Cathedral Churches and Hospitals, they lawfully might have been before the making of the said Statute, or lawfully might be if the said Statute were not, so alway that such House be not the Capital or Dwelling-House used for the Habitation of the Persons abovesaid, nor have Ground to the same belonging, above the Quantity of Ten Acres; any Thing in the said Act to the contrary notwithstanding.

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Provided alway, and be it enacted, That no Lease shall be permitted to be made by Force of this Act in Reversion, nor without reserving the accustomed yearly Rent at the least, nor without charging the Lessee with the Reparation, nor for longer Term than Forty Years at the most; nor any Houses shall be permitted to be alienated, unless that in Recompence thereof there shall be afore, with, or presently after such Alienation, good, lawful and sufficient Assurance made in Fee-simple absolutely to such Colleges, Houses, Bodies Politick or Corporate, and their Successors, of Lands of as good Value, and of as great a Yearly Value at the least, as so shall be alienated; any Statute to the contrary notwithstanding.

Proviso against Leases in Reversion and Alienations, &c.

Note, That this Statute of 14 *El.* doth make no Alteration of the Statute of 1 *El. c.* 19. nor hath any Relation to it, but only to the Statute of 13 *El. c.* 10. and therefore gives no Power to Bishops to let Houses, otherwise than according to the said Statute of 1 *El.* nor to exchange for any Recompence.

Gives no further Power to Bishops.

Note also, That this Statute need not to be found by Verdict, being it is a general Law. *Pasch.* 39 *Eliz. C. B. Hunt* v. *Singleton*, 3 *Cro.* 564.

14 *Eliz.* a general Stat.

By this Statute it seems no Leases may be made of Houses in Reversion, which was not restrained by the Statute of 13 *Eliz.* as appears by the Statute of 18 *Eliz. cap.* 11. by which Statute that Mischief is provided for, as not provided for before, as followeth.

Sithence the making of which Statute (viz. 13 Eliz. cap. 10.) divers Ecclesiastical and Spiritual Persons, and others having Spiritual or Ecclesiastical Livings, have from Time to Time made Leases for the Term of One and twenty Years or Three Lives, long before the Expiration of the former Years, contrary to the true Meaning and Intent of the said Statute: Be it therefore enacted by this present Parliament, That all Leases hereafter to be made by any of the said Ecclesiastical, Spiritual, or Collegiate Persons, or others, of any the said Ecclesiastical, Spiritual, or Collegiate Lands, Tenements or Hereditaments, whereof any former Lease for Years is in Being, not to be expired, surrendred or ended within Three Years next after the making of any such new Lease, shall be void, frustrate, and of none Effect; any Law, Usage or Custom to the contrary notwithstanding.

18 *Eliz. c.* 11. To make void all new Leases where the former Lease did not expire within Three Years, &c.

And be it likewise enacted by the Authority aforesaid, That all and every Bond and Covenant whatsoever hereafter to be made, for renewing

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newing or making of any Lease or Leases, contrary to the true Intent of this Act, or of the said Act made in the Thirteenth Year, shall be utterly void; any Law, Statute, Ordinance, or other Thing whatsoever, to the contrary in any wise notwithstanding.

Provided always, That this Act, nor any Thing therein contained, shall extend or be prejudicial to make frustrate or void any Lease or Leases heretofore made by any of the said Spiritual or Ecclesiastical Person or Persons, or any of them, but that the same, and every of them, are of the like Force and Effect as they or any of them were before the making of this present Statute; this Act or any Thing therein contained to the contrary notwithstanding.

And whereas in one other Statute made in the said Thirteenth Year of her Majesty, intitled, An Act touching Leases of Benefices, and other Ecclesiastical Livings with Cure, one Clause is contained, That the Incumbent offending the Purport of the said Statute, shall for the same lose One Year's Profit of his said Benefice, to be distributed by the Ordinary among the Poor of the Parish, as by the said Branch in the said last recited Statute appeareth: Be it therefore enacted by the Authority aforesaid, That after Complaint made to the Ordinary, and Sentence given upon any Offence committed by the Incumbent, whereby he shall or ought to lose One Year's Profit of his Benefice, as afore shewed; that the Ordinary within Two Months after such Sentence given, and Request to him made by the Church-wardens of the said Parish, or one of them, shall grant the Sequestration of such Profits to such Inhabitant or Inhabitants within the Parish where such Benefice shall be, as to him shall seem meet and convenient; and upon Default therein by the Ordinary, that it may and shall be lawful to every Parishioner where the Benefice is, to retain and keep his or their Tithes, and likewise for the Church-wardens of the said Parish to enter and take the Profits of the Glebe Lands, and other Rents and Duties of every such Benefice, to be imployed to the Use of the Poor, as aforesaid, until such Time as Sequestration shall be committed by the Ordinary, and then as well the Churchwardens as Parishioners to yield Account of, and make Payment to him or them, to whom such Sequestration shall be committed; and that he or they to whom such Sequestration shall be committed from Time to Time, shall justly and truly imploy and bestow the said Profits, or the true and just Value thereof, without Fraud or Guile, to such Uses as by the said Statute is limited and appointed, upon Pain of Forfeiture of the double Value of such with-holden Profits, to be recovered in the Ecclesiastical Court by the Poor of the said Parish.

Whether the Statute of 18 *Eliz.* extends to 14 *Eliz.*

As the Statute of 14 *Eliz. c.* 11, is in respect of Houses in Cities, *&c.* a new Law of itself, differing from 13 *Eliz. c.* 10, so this Statute of 18 *Eliz.* hath no Relation to that of 14 *Eliz.* therefore the Clause in 18 *Eliz.* which makes Bonds and Covenants void, which are made for the renewing or making of Leases contrary to the Statutes, doth not extend to Houses mentioned by this Statute; accordingly, when the Case was, that the Dean and Chapter by their special Names had covenanted jointly and severally to make a Lease of an House in *London*; and upon an Action brought against the Dean and one of the Prebendaries, the Lease and Covenant was upon Demurrer argued to be void by the Statute of 18 *Eliz.* but it was adjudged, that the Covenant was good in Law, because

cauſe it was not within the Statute of 18 *Eliz.* being made concerning an Houſe in *London*; for it was ſaid, though the Statute of 13 *Eliz. c.* 10, be general againſt all Leaſes and Grants, other than for One and Twenty Years or Three Lives, of all the Poſſeſſions of Deans and Chapters, *&c.* yet there is a Statute of 14 *Eliz. c.* 11, which is ſhuffled into an Act of Continuance of Statutes, that enacts, **That that Statute** 13 Eliz. (meaning it) **ſhall not extend to any Houſes in Cities, or Towns,** &c. **but that the ſame may be granted, demiſed or aſſured as they might lawfully have been before, and as if that Statute had not been made**; ſo that Statute ſets all looſe touching ſuch Houſes in Cities as againſt the Statute of 13 *Eliz.* and therefore that Statute of 14 *Eliz. cap.* 11, makes a new Law of itſelf for them. Then comes the Statute of 18 *Eliz.* which recites, that ſince the making of the Statute of 13 *Eliz.* divers Leaſes were made long before the Expiration of the former, againſt the Meaning of the Statute of 13 *Eliz.* and enacteth, **That all Leaſes made of Lands whereof any former Leaſe was then in Being, and not to be ended within Three Years, ſhould be void, and that all Bonds and Covenants for making Leaſes againſt the Intent of** 18 or 13 Eliz. **ſhould be void**; ſo that this Statute toucheth not the Statute of 14 *Eliz.* which permitted not Leaſes in Reverſion, and ſo voids not Bonds and Covenants which touch Houſes in Cities, *&c. Trin.* 14 *Jac. Crane* v. *Taylor*, *Hob.* 269, but *Trin.* 25 *Car.* 2. *B. R.* in *Bayly* and *Munn*'s Caſe, 1 *Vent.* 246. My Lord Chief Juſtice *Hale* inclined to be of a contrary Opinion, *viz.* that the Statute of 18 *Eliz.* did extend to that of 14 *Eliz.* which ſee after in *Chap.* 42. So upon the Statute of 14 *Eliz. cap.* 11, the Caſe being, that a Parſon covenanted with *A.* that he ſhould have his Tithes for Thirteen Years, and afterwards reſigned, and another Parſon was inducted, by which Means *A.* being ouſted of his Tithes, brought an Action of Covenant againſt his Leſſor, to which the Defendant pleaded the Statute of 18 *Eliz.* in Bar. And it was adjudged by *Coke*, *Dodderidge* and *Haughton*, that this Covenant was not made void by the Statute, for that Statute, as appears by the Preamble of it, intended to make Bonds and Covenants void contrary to the Proviſion of 13 *Eliz.* but doth not extend to Bonds and Covenants made for the Injoyment of Leaſes, which do become void by Reſignation, *&c.* which are Voidances by the Common Law. *Trin.* 14 *Jac. B. R. Rudge* v. *Thomas*, 3 *Bulſt.* 202. So a Leaſe made for Sixty Years before the Statute of 13 *Eliz.* and confirmed by the Patron and Ordinary; and the Succeſſor became bound in a Bond after the Statute of 14 *Eliz.* that the Leſſee ſhould injoy the Leaſe during the Term, and after is non-reſident above Eighty Days in one Year: Adjudged, that this Bond was not void by the Statute of 14 *Eliz.* becauſe the Leaſe was a good Leaſe; and the Bond given for the Injoyment of that Leaſe, which the Succeſſor could not avoid, is a good Bond. *Paſch.* 42 *Eliz. Coſtard* v. *Wingate*, 3 *Cro.* 775. ſame Caſe, *Moor* 606.

Church Leaſes.

Practices it ſeems have been uſed to avoid this Statute of 18 *Eliz.* and the Clauſe making void Bonds and Covenants againſt the Proviſion of it, and alſo 13 *Eliz. c.* 10, to make them of none Effect, but in vain; for the Caſe was, that the Dean and Chapter of *Windſor*, in the 35th Year of the Queen, made an Agreement amongſt themſelves by Lots, to have an Aſſurance of a Leaſe to each of them of certain Part of the Poſſeſſions of their Church, which after the Lots caſt, whereby every one knew his Leaſe, they executed the Aſſurance in this Manner: The Corporation enters into an Obligation of 500 *l.* to every Canon that was to

Practices uſed againſt 18 *El.* but in vain.

Church Leaſes.

have a Leaſe, and the Payment limited to be within a ſhort Time before the Expiration of the old Leaſe in Being; and the Canon the ſame Day entred into an Obligation to pay to the College the Sum of 510 *l.* at the ſame Time, if they did make a Leaſe according to a Schedule annexed, which Schedule was *verbatim* the Demiſe agreed to be made. And it was further proved, that the Intent and Agreement betwixt them was, That the one 500 *l.* ſhould be ſtopped for the other 500 *l.* and that the Corporation ſhould only have the 10 *l.* for the Leaſe; upon which Matter (*Egerton* Chancellor) made a Decree, that the Obligation of 500 *l.* made by the Dean and Canons to each Canon was void by the Statute of 18 *Eliz.* And there was viewed the Precedent of a Caſe between *Fry* and *The Dean and Canons of Wells*, decreed 44 *Eliz.* in Chancery, which was thus: *Fry* gave to the Dean and Canons of *Wells* 1000 *l.* and took an Obligation of 2000 *l.* with Condition to repay 1000 *l.* and for Non-payment he brought an Action of Debt againſt the Dean and Prebends, and obtained a Judgment, and made a Defeaſance of the Judgment, that if they make to him a Leaſe of Land that was then in Leaſe to Sir *Amias Pawlet* for Fifteen Years to come, that then the Judgment ſhould be void. And the Truth of the Caſe was, that the Thouſand Pounds were paid, and that Six hundred Pounds thereof were imployed in Payment of Tenths due by the Church; yet by the Opinion of *Popham*, *Anderſon* and *Pirryan* it was decreed in *Chancery*, that the Judgment was void by the Statute of 18 *Eliz.* which ſaith, that Bonds and Covenants, *&c.* ſhall be void, which are made for making of a Leaſe againſt this Statute, or the Statute of 13 *Eliz. c.* 10. But by Way of Arbitrament they awarded to *Fry* the 600 *l.* which was paid and imployed in the Affairs of the Church. *Hill.* 4 *Jac. The Dean and Canons of Windſor* v. *Gilbert Penvin*, *Moor* 789.

18 *Eliz.* a general Statute.

And note, That this Statute of 18 *Eliz. c.* 11, is a general Statute, 4 *Co. Holland's* Caſe, 76. 2 *Roll's Abr.* 465.

Stat. 39 *Eliz. c.* 7. *ſect.* 8.

To the foregoing Statutes of 13, 14, and 18 *Eliz.* &c. we may well add the following Clauſe of 39 *Eliz. cap.* 7. viz. **Provided alſo, and be it enacted, That this Act or any Thing therein contained, ſhall not extend to give any Power or Authority to make any Sale, Conveyance or Aſſurance of any Manors, Lands, Tenements, or Hereditaments of any Archbiſhop, Biſhop, Dean and Chapter, or of any other Eccleſiaſtical Perſon, whereof he or they, or any of them be, or hereafter ſhall be ſeiſed in the Right of his or their Biſhoprick, Church, or other Corporation Eccleſiaſtical whatſoever.**

Clauſes of 22 *Car.* 2. *c.* 11, for making long Leaſes by Dean and Chapter of St. *Paul's.*

And alſo the following Clauſes in the Statute 22 *Car.* 2. *cap.* 11, **That for ever hereafter the Mayor and Commonalty, and Citizens of** London, **may and ſhall have a Market to be kept Three or Four Days in the Week, as to them ſhall ſeem convenient, upon the Ground now ſet out by the Aſſent of the Dean and Chapter of the Cathedral Church of St.** Paul's London, **for a Market-Place within** Newgate; **And that the ſaid Dean and Chapter ſhall make and give one or more Leaſe or Leaſes of the ſaid Ground to the ſaid Mayor, Commonalty and Citizens, and alſo of the Wall of the ſaid Church-Yard, abutting ſeverally upon** Pater-noſter Row, **and the** Old Change, **for the Term of Forty Years, reſerving the yearly Rent of Four Pounds for the Ground of ſaid Market-Place, and Two-pence for every ſuperficial Foot of the Ground or Soil of the ſaid Wall, as it is now ſet out by the Surveyors of the City, and of the ſaid Dean and Chapter; and ſo from Forty Years to Forty Years for ever, at**

the like yearly Rent, and one Year's Rent after the Rates aforesaid, to be paid by Way of Fine for each of the said Grounds respectively, upon the making every new Lease thereof; which said Lease and Leases shall be good and effectual in the Law as against the said Dean and Chapter, and their Successors, and all Persons claiming by, from or under them: And that no House, Shed, or other Building, shall stand, or hereafter be erected and fixed upon the said Market-Place, other than the Market-House already built, without the Consent of the said Dean and Chapter; any Thing in this or any other Act to the contrary notwithstanding.

Bishops Leases.

And whereas the said Parsons and Vicars, or some of them (meaning Parsons and Vicars within the City of *London*) are interessed in several Glebe Lands or Grounds, the which they cannot rebuild themselves, nor let such Lease or Leases as may be an Incouragement for others to rebuild the same; Be it enacted by the Authority aforesaid, That the said Parsons and Vicars, and every of them respectively, be impowered, and are hereby impowered to let such Lease or Leases of their said Glebe Lands or Grounds, with the Consent and Approbation of the Patron or Patrons and Ordinary, for any Term not exceeding Forty Years, and at such yearly Rents without Fine as can be obtained for the same: And that no Lapses incurred upon any Non-presentation, in due Time of any of the Patrons of the said Livings since the said Fire, shall any Ways prejudice or make void the Presentations that the said Patrons have since made, whereupon any Incumbent is since instituted and inducted; any Law or Statute to the contrary in any wise notwithstanding. 22 Car. 2. cap. 11.

And Parsons and Vicars of Glebe Lands or Grounds in *London*.

CHAP. XLII.

What Leases and Estates Bishops, &c. *may make; and the Rules to be observed in making such Leases and Estates, and what Offices,* &c. *they may grant.*

HAving in the foregoing Chapter set down the several Statutes, which either inlarge or lessen the Capacity of Clergymen with respect to their Estates, I shall next consider them together. And from all these Statutes so considered it will appear, that (whatever the Law was) at this Day, generally speaking, no Ecclesiastical or Collegiate Person, or Corporation, can alien any of their Manors, Lands or Tenements, by any Ways or Means whatsoever; for though before the Statute of 1 *Eliz. cap.* 19, and 13 *Eliz. cap.* 10, were made, they might have aliened, yet by the said Statutes they are now restrained.

That since 1 *Eliz. c.* 19, and 13 *Eliz. cap.* 10, no Ecclesiastical Person, &c. can alien Lands, &c.

But note, That if any Person obtain a Grant to build Houses on Church or College Land, and this is confirmed, (in case the Grants of the Grantor need to be confirmed,) this Grant makes no Alienation, but

Where Grants to build make no Alienation.

Biſhops Leaſes.

but is only as a Licence or Covenant and no other, for the Soil remains in the Grantor, and ſo by conſequence the Houſes are alſo in him; by *Hutton. Mich.* 3 *Car. C. B. The Mayor and Commonalty of Wincheſter*'s Caſe, *Hetly* 57.

14 *El. c.* 11, gives ſome Liberty to alien in Fee.

However, by the Statute of 14 *Eliz. cap.* 11, all but Biſhops, *viz.* ſuch as are reſtrained by 13 *Eliz.* have ſome Liberty given them, as to alienating of Houſes mentioned in the ſaid 14 *Eliz.* for there 'tis ſaid, **That by this Statute not any Houſes ſhall be permitted to be alienedy unleſs that in Recompence thereof there ſhall be afore, with, or preſently after ſuch Alienation, good, lawful and ſufficient Aſſurance made in Fee-ſimple abſolutely to ſuch Colleges,** &c. **and their Succeſſors, of Lands to as great Value as the Houſes alienedy.** So that with ſuch Recompence they may alien in Fee, which was not permitted by the Statute of 13 *Eliz. Trin.* 4 *Jac.* in *Crane* and *Taylor*'s Caſe, *Hob.* 269. But this Liberty given, ſeems to be reſtrained to ſuch Houſes only, as by the ſaid Statute may be let for Forty Years, *viz.* to Houſes in Cities, *&c.* however they are not enabled to exchange any Lands by this Statute, but remain diſabled as to that by Statute of 13 *Eliz.* as 'tis ſaid, *Trin.* 40 *Eliz. C. B. Turther*'s Caſe, *Noy* 5. And *Quære*, whether Houſes may be exchanged for Lands of greater Value without Licence againſt the Statutes of Mortmain. However, if a Pariſh be upon the Deſign of incloſing, and a Parſon hath Tithes in Kind, and Common for Beaſts in the Fields, a Decree may be had in *Chancery*, that he ſhall take a Quantity of Ground in Lieu thereof. *Underhil* v. *Joyner*, *Tothil* 251. Tit. *Tithes.* And when one had a Leaſe of Tithes in Kind, it was ordered in *Chancery*, that a Commiſſion ſhould go forth, for ſetting out Meadows and other Grounds in lieu thereof. 12 *Jac. Hungate* v. *Croke*, *Tothil* 251. Tit. *Tithes.*

Succeſſors not to be bound by Fine and Non-claim.

As Eccleſiaſtical Perſons cannot at this Day alien their Poſſeſſions; ſo though before theſe Statutes 1 and 13 *Eliz.* ſome of them were even as others bound by Fine and Non-claim. *Paſch.* 13 *Jac. B. R. Warren* v. *Smith*, or *Magdalen College*'s Caſe, 1 *Roll's Rep.* 171. Yet at this Day, albeit a Fine be levied of their Poſſeſſions, and no Claim be made in Five Years, the Succeſſors ſhall not be bound thereby: For by the Words of both Statutes, *viz.* 1 and 13 *Eliz.* they are reſtrained from ſuffering their Poſſeſſions to paſs from them, and by Nonclaim an Eſtate is ſo permitted or ſuffered.

As to Perſons within the 13 *Eliz.*

And as to Perſons within the Statute of 13 *Eliz.* there was this Caſe. The Maſters and Fellows of the College of St. *Mary Magdalen* in the Univerſity of *Cambridge*, being ſeiſed of a Meſſuage with the Appurtenances in their Demeſne as of Fee in the Right of the ſaid College, in the 17th Year of *Eliz.* by their Deed between the ſaid Queen of the one Part, and the ſaid Maſters and Fellows of the other Part, and inrolled in *Chancery*, did give and grant unto the ſaid Queen all that their Meſſuage, *&c.* with the Appurtenances, to have and to hold for ever, yielding and paying a certain Rent yearly at a Day, with Clauſe of Diſtreſs, and under this Condition, or Proviſo, That if the Queen, her Heirs and Succeſſors, ſhall not ſufficiently convey, and aſſure by Letters Patent under the Great Seal of *England* the ſaid Meſſuage, with the Appurtenances, to one *Spinola* and his Heirs, before the Firſt Day of *April* next inſuing, that then their Indenture, and every Gift, Grant, and Article therein contained, ſhall ceaſe, and be utterly void and of none Effect, *&c.* whereupon the Queen granted the ſaid Meſſuage accordingly to the ſaid *Spinola*, which he did bargain and ſell to the Earl of *Oxon* and his Heirs, by force

force whereof the ſaid Earl entred, and was thereof ſeiſed, and being ſo ſeiſed, *A. B.* and his Wife levied a Fine of the ſaid Houſe with the Appurtenances to the ſaid Earl and his Heirs, with Proclamations according to the Statute; and after the ſaid Earl leaſed the ſame for Fifty Years, after which Leaſe, the Maſter of the College that made the Leaſe died, and a new Maſter being made, the Earl's Tenant paid to him 15*l.* of Rent which was received by the ſaid new Maſter, who by a Writing under his Hand, without Seal, acknowledged the Receipt thereof, and within Five Years after he was elected Maſter, and after he had received the ſaid Rent, did enter into the ſaid Meſſuage, and leaſed the ſame to another, *&c.* In this Caſe it was adjudged, that the ſaid Fine and Non-claim of Five Years ſhould not bind the Right of the Maſter and Fellows of the ſaid College for ever, and that for two Cauſes; Firſt, the Words of the Act of 13 *Eliz.* are, **That all Leaſes, Gifts, and Conveyances of Eſtates had, made, done or ſuffered by any Maſters or Fellows of any College,** &c. **ſhall be utterly void and of none Effect, to all Intents, Conſtructions and Purpoſes; any Law, Cuſtom or Uſage to the contrary notwithſtanding;** and in this Caſe there is a Conveyance and Eſtate permitted or ſuffered by the Maſter and Fellows of the ſaid College; and that theſe Words ſhall not be extended only when the Maſters and Fellows ſuffer a Recovery, *&c.* againſt themſelves as Party thereunto, but generally, according to the Letter, when they ſuffer others to levy a Fine with Proclamation, and five Years to paſs without Claim; and although that the Concluſion of the Purview of the Act is, **Shall be utterly void and of none Effect, to all Intents, Conſtructions and Purpoſes;** yet by Conſtruction it ſhall be taken, that the ſaid Fine levied with Proclamation, *&c.* ſhall be void and of none Effect to bind the Right of the Maſter and Fellows of the ſaid College; for it ſhould have been to no Purpoſe to have prohibited them to bar the Right of their Colleges by Conveyances made by the Maſter and Fellows themſelves, and to have left them Power by their Permiſſion or Sufferance, or Non-claim to bar it; and to that Purpoſe theſe Words [*permitted or ſuffered*] were added.

Biſhops Leaſes.

That a Fine and Non-claim ſhould not bind their Right for two Reaſons.

The ſecond Reaſon was, That foraſmuch as the ſaid Eſtate conveyed to the Queen was of Force during the Life of the Maſter that made the Leaſe, and that he was alive at the Time of the Fine levied, and all the Proclamations paſſed in his Time, ſo that none could have made an Entry or Claim during his Life; and that the ſucceeding Maſter within Five Years after his Death did enter into the ſaid Houſe, claiming the ſame as the Right of him and his Fellows of the ſaid College. For theſe Cauſes and Reaſons it was alſo reſolved, that this Entry hath avoided the Fine. *Paſch.* 13 *Jac. The Caſe of the Maſter and Fellows of Magdalen College* in *Cambridge*, 11 *Coke* 66. The ſame Caſe is in 1 *Roll's Rep. p.* 151. See *Stowel*'s Caſe, *Plowd. Com.* 374, 376, and *Croft* and *Howel*'s Caſe, *Plowd. Com.* 538. And in this Caſe of *Magdalen* College it was alſo ſaid by *Coke*, *Dodderidge*, and *Haughton*, that before the Statute of 13 *Eliz. cap.* 10, Colleges, and ſuch Corporations (which have the true Right, as *Dodderidge* ſaid, and now at this Day Corporations which be not within the ſaid Statute of 13 *Eliz.*) ſhall be bound by a Fine and Non-claim, where they have Right to enter by the Statute of 4 *H.* 7, *of Fines*, altho' the Statute doth not mention Corporations, as *Haughton* ſaid; and by *Dodderidge* the Diverſity in *Croft* and *Howel*'s Caſe is good Law, that ſuch Corporation which hath the true Right ſhall be bound by Non-claim; but otherwiſe it is of ſuch Corporations which have not the

What Corporations, *&c.* ſhall be bound by Fine and Non-claim.

Biſhops Leaſes.

true Right, nor may have a *Writ of Right*, but their Conveyance ought to be confirmed by another. *Paſch.* 13 *Jac. B. R. Warren* v. *Smith*, or *Magdalen College*'s Caſe, 1 *Roll's Rep.* 171. And ſo it ſeems, that Biſhops ſhall not be bound by Fine and Non-claim, altho' they be not within the Statute of 13 *Eliz. Goulds. p.* 171, becauſe regularly their Conveyances ought to be confirmed by the Dean and Chapter, and the Words of the Statute of 1 *Eliz.* are, **All Gifts, Grants, Fines, Feoffments,** &c. **had, made, done or ſuffered, or to be had, made, done or ſuffered of any of their Poſſeſſions, other than for the Term of Three Lives or One and twenty Years,** &c. **ſhall be void.** And note, That what is ſaid as to Maſters and Fellows of Colleges with reſpect to 13 *Eliz.* in *Magdalen College*'s Caſe, holds good, as to all other Perſons reſtrained by the ſaid Statute, and it is particularly ſaid in the ſame Caſe as reported by *Rolle*, that Non-claim upon a Fine by a Parſon or Vicar doth not bind the Succeſſor.

Not the Succeſſors of a Parſon or Vicar.

As Eccleſiaſtical Perſons are not bound, by ſuffering Fines to paſs of their Poſſeſſions; ſo if, to avoid this Act, a *Writ of Annuity* be brought againſt a Parſon or Vicar who prays in Aid of the Patron and Ordinary, and upon Default Judgment is given for the Plaintiff. This is not within the Words of the Statute, for that it is not any of their Poſſeſſions, yet it is within the Equity of it, as *Haughton* ſaid, and *Dodderidge* granted, *Magdalen College*'s Caſe, 1 *Roll's Rep.* 171, and ſo 'twas held *Paſch.* 14 *Eliz.* in *Elmer*'s Caſe, as is ſaid by *Coke* in the Caſe of *Eccleſiaſtical Perſons*, 5 *Co. Rep.* 14, and alſo in the Biſhop of *Saliſbury*'s Caſe, 10 *Co.* 60, it is there held, that if a *Writ of Annuity* be brought againſt a Biſhop upon Title of Preſcription or otherwiſe, and Judgment be given againſt him upon Verdict or Confeſſion, the ſame is reſtrained by the Statute of 1 *Eliz.* becauſe that the Biſhop is charged with the Annuity in reſpect of his Biſhoprick, and therefore the Succeſſor would be charged with the Arrearages incurred in the Life of the Predeceſſor, as it is agreed, 48 *Ed.* 3. 26, and ſo tendeth to the Diminution of the Revenues, and Impoveriſhing of the Succeſſors, *George* Biſhop of *Chicheſter* and *Freeland*'s Caſe, 1 *Car. Bridgm.* 30, and it hath been alſo held, that a Rent granted by ſuch Corporation is againſt the Equity of the ſaid Statutes. 5 *Co. f.* 15. *Magdalen College*'s Caſe, 1 *Roll's Rep.* 171. So if a Biſhop doth confirm an Eſtate to a Diſſeiſor, it is within the Statute of 1 *Eliz. Mich.* 37 & 38 *Eliz.* Sir *Edward Denny* v. *Eakenſtal*, 3 *Cro.* 430. And upon the ſame Reaſon I take the Law to be, that Eccleſiaſtical Perſons are not bound by any of the Statutes of Limitations, which limit and appoint ſeveral Actions to be brought, and Entries to be made within ſuch a certain Time; otherwiſe that would be a Side Wind to evade the Statutes made to prohibit their Alienations.

What is within the Equity of the Act.

Rules of Leaſes to bind the Succeſſors, &c.

Though Eccleſiaſtical Perſons may not alien or grant any Rent out of their Poſſeſſions to bind their Succeſſors, and their Succeſſors be not bound by Fine and Non-claim, or by Recoveries, or the Statutes of Limitations, yet they may make Leaſes to bind their Succeſſors, but with reſpect to theſe following Rules.

(1.) It muſt be by Deed indented.

Firſt, Such Leaſe muſt be by Deed indented, and not by Word of Mouth; for though the Statutes of 1 and 13 *Eliz.* do not appoint the Leaſe to be made by Writing, yet muſt it therein and in the other following Properties and Qualities required by *Stat.* 32 *H.* 8, follow the Pattern thereof, (concurrent Leaſes only excepted.) 1 *Inſt.* 44. A Deed is an Inſtrument written in Parchment, or Paper, conſiſting of three Things, *viz.* Writing, Sealing and Delivery, and comprehending a Contract,

tract, or Bargain between Party and Party; of which there are two Sorts, Deeds Indented, and Deeds Poll; which Names ariſe from the Form or Faſhion of them; the one being cut in and out in the Top or Side which we call indented, the other being plain, the Indenting being as it were polled or cut off. A Deed indented, is a Deed conſiſting of two Parts or more (for there are Tripartite and Quadripartite Deeds) in which it is expreſſed, that the Parties thereto have to every Part thereof ſet their Hands and Seals; and if it be not really indented, though the Words of the Deed be, *This Indenture*, &c. yet it is not a Deed indented; but if the Deed be indented, it Matters not whether it ſpeaks itſelf to be an Indenture or not, 'tis however a Deed indented. Biſhops Leaſes.

Notwithſtanding this firſt Rule, a Parſon, or Vicar, may for a Sum of Money contract without Deed, that the Perſon that ought to pay Tithes to him may retain his Tithes; and if a Parſon doth aſſume to the Pariſhioner upon a valuable Conſideration that he ſhall be diſcharged of the Tithes of his Lands, and after doth ſue him in the Eccleſiaſtical Court for the Tithes; this Suit, although he doth not thereby compel him to pay the Tithes, is a Breach of the *Aſſumpſit*. *Mich.* 10 *Jac. B. R. Brown* v. *Kinnon*, 1 *Roll's Abr. p.* 430. But ſuch Diſcharge can have no Continuance for more than one Year, for want of a Deed; and if it be made for more Years it is void; by *Fenner*, *Paſch.* 3 *Eliz. Woodward* v. *Nelſon*, *Owen* 103. *Hawks* v. *Brayfield*, 2 *Cro.* 137, and 2 *Roll's Abr.* 63. *Trin.* 30 *Eliz. B. R. Woodward* v. *Buggs*, 2 *Leon.* 29. Dr. *Langworth*'s Caſe, 2 *Roll's Abr.* 63. *Paſch.* 13 *Car.* 2. *B. R. Barnard* v. *Ewen*, 1 *Keb.* 5, and 21 *Raym.* 14. 2 *Lev. Rep.* 24, that is, ſuch a Contract is not good to have Continuance as a Leaſe for more than one Year, yet being made to him who ought to pay the Tithes is good as a Contract to diſcharge him from the Penalty of the Statute 2 *E.* 6, for not ſetting forth his Tithes as is adjudged in the ſaid Caſe of *Bernard* v. *Evans*; and it hath alſo been held upon Motion to arreſt Judgment in an Action of the Caſe grounded on a ſpecial Promiſe to have Tithes for Six Years, that although ſuch an Agreement be not as a Leaſe, nor doth any Intereſt paſs thereby in the Tithes, yet 'tis good to ground an *Aſſumpſit* upon, and Judgment was given for the Plaintiff accordingly. *Trin.* 35 *Car.* 2. *B. R. Eaton* v. *Sherwin*. And if this Contract be made before the Occupier of Land hath ſowed his Corn, ſuch Contract for a Year is not good; by *Coke*, *Forſter* v. *Warberton*; where alſo the former Opinions and Reſolutions are allowed, *viz.* that a Leaſe for One Year may be of Tithes without Deed, but not for more. *Trin.* 21 *Jac. B. R. Hughes*, *p.* 354. It is alſo ſaid to have been ruled in the *Common Pleas*, between *Weſtled* and *Pepper*, that a *Concordatum & Agreatum* between the Parſon and Pariſhioner, that for Twenty Shillings Rent he ſhall have his Tithes for Twenty Years, if the Parſon ſo long live, was void. *Bugg* and *Nelſon* v. *Howre*, *Trin.* 32 *Eliz. B. R.* 3 *Cro.* 188, 249. And by all the Juſtices it was agreed, that ſuch a Contract or Agreement without Deed for the Tithes of any other than of the Party himſelf, who was Party to the Agreement, was void; and that ſuch a Parol Agreement ought to be made by Way of retaining or keeping them back only. *Mich.* 2 *Car. B. R. Bellamy* v. *Bulford*, *Godb.* 374. *Mich.* 8 *Jac. B. R. Brownl.* and *Goulds.* 2 *Part*, *p.* 11, 17. For if they be granted to a Stranger but for one Year without Deed, 'tis void. *Mich. B. R. Hawkes* v. *Brayfield*, *per Curiam.* 2 *Roll's Abr.* 63. *Trin.* 20 *Car.* 2. *B. R. Angel* v. *Rolf*, 2 *Keb.* 376. Yet if the Stranger ſue for them in the Spiritual

Yet a Patron or Vicar may contract without Deed.

How ſuch Parol Agreement ought to be made.

Biſhops Leaſes.

ritual Court, and the Defendant plead that all the Right to the Tithes which that Stranger hath is a Grant of them without Deed, and the Spiritual Court will not allow this Plea, no Prohibition lies; becauſe the Defendant ought to ſet forth his Tithes, not regarding who hath Title to them, and if he doth ſo, he hath diſcharged himſelf, but not otherwiſe. *Trin.* 26 *Eliz. B. R. Withy* v. *Saunders*, 1 *Leon.* 23. And by *Jones* Juſtice, it is ſaid, that though they may not be demiſed to a Stranger without Deed, yet that they paſs to him by Way of Contract. *Hill.* 2 *Car. Bulthorp* v. *Bellamy*, *Bendloe* 202. And it is ſuch an Agreement upon which an Action of the Caſe may be grounded, though it do not actually transfer the Intereſt of the Tithes. 1 *Keb.* 21.

Impropriator may not leaſe Tithes for One Year.

A Difference I find to be made between Church-Men, as Parſons, Vicars, *&c.* and an Impropriator; the firſt may, as hath been ſhewed, leaſe their Tithes for One Year without Deed, yet an Impropriator cannot, but 'tis meerly void, *per Curiam. Mich.* 2 *Car. B. R. Rot.* 179. *Bellamy* v. *Bulthorp*, *N.* 89, ſame Caſe, *Godb.* 374. And 'tis there ſaid to be ſo ruled, 20 *Jac.* in the ſame Caſe of *Bennet* v. *Spell*; much leſs is the Contract good without Deed, if it be made by ſuch Perſon for more Years. *Trin.* 26 *Eliz. Withy* v. *Saunders*, 1 *Leon.* 13. According to the Caſes mentioned, a Parſon by Parol did leaſe his Tithe Hay to the Vicar, and the Vicar paid the Rent for the firſt Year; but finding that the Rent was more than the Tithe was worth, refuſed to hold the Bargain any longer, and being ſued in the Court of Requeſts (which was a Court of Equity) for the Rent, did not plead there any Notice of his Refuſal; and Sentence being given for the Parſon, the Vicar prayed a Prohibition, and it was agreed by the Court, that if the Leſſee had received the Profits, he was ſuable in the Court of Requeſt for the Rent; and that if he had given Notice of the Refuſal of the Bargain, he had been diſcharged of the Rent from the Time of the Notice given, becauſe he had no Remedy for the Tithes, for that it was a void Contract in Law. And *Dodderidge* and *Jones* ſaid, the Caſe is the ſame, if he had not given Notice. The Vicar of *Anford's* Caſe, *Latch* 115. *Paſch.* 2 *Car. Harris* and *Dilworthy*'s Caſe, *Palm.* 423.

That yet a Contract to retain Tithes for ſeveral Years is good.

Though by all theſe Caſes before mentioned it ſeems to be allowed, that a Leaſe or Agreement to retain Tithes more than for one Year without Deed is not good; yet on the contrary it hath alſo been adjudged, that a Contract for divers Years without Deed, that the Owner ſhall retain his Tithes, is a good Contract. 22 *H.* 6. *fo.* 43. *Mich.* 3 *Car. Booth* v. *Frankling*, *Hetly* 31. *Mich.* 14 *Jac. Hawkes* v. *Brothwith*, *Yelv.* 94. *Mich.* 4 *Jac. B. R. Tanner* v. *Small*, *Yelv.* 95. where it is ſaid to have been ſeveral Times ſo adjudged, *Trin.* 21 *Jac. Honycomb* v. *Sweet*, 2 *Cro.* 668. and by *Wray*, *Trin.* 30 *Eliz. B. R. Woodward* and *Bugg*'s Caſe, 2 *Leon.* 29. *Mich.* 4 *Car. C. B. Stone* v. *Walſinham*, *Hetley* 107, 122. *Paſch.* 5 *Jac. B. R. Small*'s Caſe, *Noy* 121. *Mich.* 8 *Jac. B. R. Brownl.* and *Goulds.* 2 *Part* 11. And it is ſaid to be the Opinion of the whole Court, that by Way of Agreement Tithes may paſs for Years without Deed, but not by Way of Leaſe Parol, *Trin.* 21 *Jac. B. R. Hughes* 354; by *Dodderidge*, *Jones* and *Whitlock*. And it was ſaid, that a Parſon may leaſe, *&c.* his Rectory, conſiſting of Glebe and Tithes by Parol for Years; for then the Tithes paſs as annexed to the Rectory. 2 *Roll's Abr.* 63. *Mich.* 2 *Car. B. R. Bellamy* v. *Bulthrop*, *Latch* 173. And becauſe Tithes and Offerings are incident to a Parſonage, by a Leaſe of the Parſonage, though but by Parol, they ſhall paſs, though they be not

Tithes paſs by a Leaſe of a Parſonage, *&c.* though by Parol.

expreſly

expreſly named. 15 *H.* 7. 8. *Br. Incidents, &c.* 7. And if a Portion of Tithes hath been for a long Time uſed with a Chapel, it ſhall paſs by the Grant of the Chapel, and all Tithes thereunto belonging, though otherwiſe the Name *Portion of Tithes* is neceſſary in Grants. *Bradford*'s Caſe, *Clayton, ſect.* 25. However he that by ſuch Contract may retain his Tithes, cannot leaſe or aſſign them over to another, 2 *Roll. Abr.* 63. *Mich.* 4 *Jac. B. R. Hawkes* v. *Brothwith*, *Yelv.* 94, or at moſt not without Deed, *Trin.* 26 *Eliz. B. R. Withy* and *Saunder*'s Caſe, 1 *Leon.* 23. yet it is ſaid to be the Opinion of the Court, that if one contract with the Parſon for the Diſcharge of the Tithes of his Lands for Years, and then demiſes his Lands to another, he ſhall not have Tithes of his Leſſee, for the Diſcharge runs with the Land; but if one takes a Leaſe of his Tithes by Deed, and makes a Demiſe of his Land, he ſhall have Tithes of his Leſſee. *Mich.* 3 *Car. B. R. Booth* v. *Franklin*, *Hetly* 31. So 'tis held, that the Aſſignee of a Leaſe may take the Advantage of a Contract by Parol made by the firſt Leſſor for him and his Aſſigns. *Trin.* 21 *Jac. B. R. Honycomb* v. *Sweet*, 2 *Cro.* 668. 2 *Roll's Abr.* 63. But though it be admitted by the laſt Caſe, that the Parſon's Contract to retain Tithes for Seven or more Years be good to bind him; yet it is generally held, that if the Contract or Retainer for the Parſon's Life be by Parol only, that ſuch Contract is void. *Trin.* 30 *Eliz. Woodward* and *Bagg*'s Caſe, 2 *Leon.* 29. *Paſch.* 5 *Eliz. Small*'s Caſe, *Noy* 121. *Mich.* 8. *C. B. Brownl.* and *Goulds.* 2 *Part*, *p.* 17, where *Coke* ſaid, that it was ſo adjudged in *B. R.* in Parſon *Booth*'s Caſe, and in *C. B.* in *Wellow*'s Caſe, *Trin.* 32 *Eliz. B. R. Bagg* and *Nelſon* v. *Woodward*, 3 *Cro.* 188, and *Paſch.* 4 *Jac. B. R. Hawkes* and *Brayfield*'s Caſe, 2 *Cro.* 137, and *Yelv.* 94. So if a Parſon doth let his Glebe for ſo many Years as he ſhall be Parſon of the Church, this is void for the Incertainty. 1 *Inſt.* 45. Alſo where a Parſon did aſſume that the Owner of the Land and his Aſſigns ſhould be diſcharged of the Tithes thereof during the Parſon's Life, and the Aſſignee of the Land being ſued in the Spiritual Court for the Tithes, and a Prohibition granted, it was reſolved that a Conſultation ſhould be awarded. *Aldriſh* v. *Ray*, *Palm.* 36, and 'twas ſaid 31 *Eliz.* that it was ſo adjudged in *Woodward*'s Caſe.

Biſhops Leaſes.

Contractor may not leaſe them over.

Contract of Retainer by Parol for Life void.

When a Parſon did contract by Parol only with *A.* his Executors and Aſſigns, that for Ten Shillings yearly to be paid, he, his Executors and Aſſigns, ſhould be quit from the Payment of Tithes of certain Lands during the Parſon's Life, the Executor demiſes the Land at Will to one whom the Parſon ſued in the Spiritual Court. And by *Lea*, *Dodderidge* and *Houghton*, a Prohibition lies, becauſe the Parſon hath Remedy againſt the Executors upon the Compoſition by Action upon the Caſe; and *Dodderidge* ſaid, that during the Life of the Parſon the Contract is on Foot, but that the Aſſignee could not ſue the Parſon upon this Contract, yet may have a Prohibition to ſtop him in the Spiritual Court, and ſo drive him to ſue the Executor at the Common Law for his Ten Shillings upon the Contract, for that he hath no Remedy againſt the Tenant at Will; but the Executor hath his Remedy againſt the Tenant at Will. *Trin.* 21 *Jac. B. R. Snell* and *Bennet*'s Caſe, *Palmer* 377. A Prohibition was prayed to a Suit for Tithes, ſuggeſting a Parol Agreement to retain; the Court inclined to grant it, but being an unſettled Point, it was adjourned: But reſolved, that in an Action brought upon the Statute of 2 *E.* 6. *c.* 13, to recover the treble Value, and *Nil debet* pleaded, ſuch an Agreement is good Evidence

Simile, and that Aſſignee might have a Prohibition, though he could not ſue the Parſon upon the Contract.

Biſhops Leaſes.

to excuſe the Defendant from the Penalties of that Statute, and is ſuch an Agreement on which an Action of the Caſe may be grounded, though it doth not transfer the Intereſt of the Tithes; alſo if Execution of ſuch an Agreement by ſeveral Years be ſuggeſted, a Prohibition ought to be. *Paſch.* 13 *Car.* 2. *C. B. Barnard* v. *Ewen*, 1 *Keb.* 21. *Raym.* 14. *Paſch.* 24 *Car.* 2. *Knight & al'* v. *Peeps*, 3 *Keb.* 24. But I am informed, that the conſtant Practice of the Courts of *Weſtminſter* at this Day is not to grant Prohibitions upon the Suggeſtion of ſuch an Agreement, but to leave it to the Spiritual Court to determine; and if the Party think himſelf there grieved, he may appeal. And the Law is holden, as I take it, according to the Caſes firſt cited, *viz.* that a Parol Agreement to retain Tithes for more Years than one is void, and not only for all the Years after the firſt, but in the whole; for the Contract being intire muſt be void in all, or good in all, and ſhall not be made good and void by Parcels. But however, theſe Doubts concerning Leaſes by Parol, and their Continuance, ſeem to be much taken away by Act of Parliament; for it is enacted, **That from and after the Four and twentieth Day of** June, **which ſhall be in the Year of our Lord One thouſand ſix hundred ſeventy and ſeven, all Leaſes, Eſtates, Intereſts of Freehold, or Terms of Years, or any uncertain Intereſt of, in, to, or out of any Meſſuages, Manors, Lands, Tenements or Hereditaments made or created by Livery and Seiſin only, or by Parol, and not put in Writing, and ſigned by the Parties ſo making or creating the ſame, or their Agents thereunto lawfully authorized by Writing, ſhall have the Force and Effect of Leaſes, or Eſtates at Will only, and ſhall not either in Law or Equity be deemed or taken to have any other or greater Force or Effect; any Conſideration for making any ſuch Parol Leaſes or Eſtates, or any former Law or Uſage to the contrary notwithſtanding.**

What the conſtant Practice is.

Theſe Doubts taken away by Stat. 29 *Car.* 2. *c.* 3.

Except nevertheleſs all Leaſes not exceeding the Term of Three Years from the making thereof, whereupon the Rent reſerved to the Landlord, during ſuch Term, ſhall amount unto Two Third Parts at the leaſt of the full improved Value of the Thing demiſed. Stat. 29 Car. 2. c. 3. Intitled, *An Act for Prevention of Frauds and Perjuries.*

(2.) How Leaſes to bind Succeſſors ought to commence.

Secondly, Leaſes made by Eccleſiaſtical Perſons to bind their Succeſſors muſt be made to begin from the making, or Day of the making thereof, for ſo we find the Statutes are ſeverally penned; but the Exceptions of the Statutes of 1 *Eliz.* and 13 *Eliz.* do differ from the Statute of 32 *H.* 8. in that the Leaſes for Years to be made, according to the Exceptions of the Statutes 1 and 13 *Eliz.* muſt begin from the making, and not from the Day of the making, but by Force of Stat. 32 *H.* 8. from the Day of the making. 1 *Inſt. fo.* 45.

When from the Delivery incluſive.

For the better Underſtanding whereof, theſe Things are to be known touching Commencement of Leaſes; That if the *Habendum* be for One and twenty Years without mentioning when it ſhall begin, it ſhall begin from the Delivery; ſo where the *Habendum* is for One and twenty Years from the making, or from henceforth, which is as much as to ſay, from the making, for the Delivery is the making: And in theſe Caſes the Day of the Delivery ſhall be taken incluſive, ſo that if a Leaſe be delivered the 20th of *June*, that ſhall be taken for One Day, and the Leaſe ſhall end upon the 19th of *June*; and though the Leaſe was delivered at Four of the Clock or after in the ſaid 20th Day, yet ſhall that be accounted a whole Day, for the Law in this Computation rejects all Fractions or Diviſions of a Day for the Incertainty. So

when a Leaſe in Reverſion was made to commence *ad Feſtum Annunciationis* after the former Leaſe ſhould be determined, it was objected, that it ought to be *a Feſto Annunciationis*, yet the Court held it to be all one, for that there ſhall be no Fraction of a Day. *Trin.* 14 *Car. B. R. Lloyd* v. *Gregory*, 1 *Cro.* 502. But if the *Habendum* be for One and twenty Years *a Die Confectionis*, or from the Date, or *a Die Datus*, then it ſhall not begin till the next Day after the Day of Delivery in the firſt Caſe, and the next after the Day that it bears Date in the other Caſe; ſo that the Day of the Making, and the Day of the Date in the ſaid Caſe ſhall be taken excluſive, and not Part of the Term; ſo that if the Deed be delivered upon the 20th of *June*, or bear Date the 20th of *June*, the Term ſhall not be ended till the 20th of *June*. 1 *Inſt.* 46. *b.*

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A Die Confectionis or *Die Datus* are excluſive.

When a Leaſe by Indenture was made by a Parſon of the Tithes of 200 Acres of Land, to the Owner of the Land of which he, his Wife, and his Heirs, were ſeiſed, *Habendum* from *Michaelmas* next following, to him and his Heirs during the Life of the Parſon; the Queſtion was, Whether the Leaſe was void, becauſe it was to commence from a Day to come, and was for Lives? And by *Flemming*, *Fenner* and *Williams*, the Leaſe was void; for although Tithes be ſpiritual, and be not extinct in the Land, yet in the Conveyance of them they ought to follow the Nature of the Land, and of other Hereditaments which be *in Eſſe*, as 8 *H.* 7. 3. is, and cannot be granted for Life, to commence from a Day to come, and as 21 *H.* 6. 46. Tithes be always *in Eſſe:* But *Yelverton* and *Croke contra*; for the Leaſe (ſaid they) being made to the Owner of the Land, doth not enure by way of Intereſt, but by way of Diſcharge and Retainer, and a Diſcharge may well commence from a Day to come. But by *Flemming* and *Williams*, As the Leaſe is pleaded, it cannot be taken to enure by way of Diſcharge; for the Plaintiff pleaded, by Force of which the Owner of the Land was ſeiſed of the Tithes to him and his Heirs for the Life of the Parſon; ſo that the Plaintiff having pleaded it by way of Intereſt, they as Judges cannot conſtrue it otherwiſe. And by *Flemming*, This Leaſe cannot enure by way of Diſcharge, for there be not any ſuch Words in the Leaſe; which proves that it was intended by the Parties to operate but by way of Intereſt, and this was more beneficial to the Leſſee; for if it ſhall enure by way of Diſcharge only, this is ſuch a Privilege annexed to the Land which cannot be granted over. And this appears was the Intention of the Parties in this Caſe; for the Leſſee being dead, his Wife had 200 Acres of Land out of which the Tithes iſſued by way of Jointure, but his Son took upon him to be Owner of the Tithes, which could not be, if the firſt Leaſe had enured by way of Diſcharge. And *Yelverton* inclined much to this, that the Pleading of the Leaſe, and of the Seiſin by Force of the Leaſe, was not good. *Trin.* 6 *Jac. B. R. Edmonds* v. *Booth*, *Yelverton* 131.

If a Leaſe for Life of Tithes may commence from a Day to come.

The Rule, That a Leaſe muſt begin from the making, or Day of the making thereof, doth not hold as to Leaſes for Years of Houſes, which by the Statute of 14 *Eliz.* are permitted to be letten for forty Years; for though by the Statute of 13 *Eliz.* Leaſes muſt be made according to this Rule, yet 14 *Eliz.* as to Houſes there ſpoken of, is a new Law, and Leaſes thereof made for a Time to come are good thereby. *Hill.* 35 *Eliz. Thompſon* v. *Strafford*, *Popham* 8.

To what Houſes the Rule of Commencement holds not.

Note, That a Leaſe for Lives being avoided at Common Law, for that it was to commence from a Time to come, an Injunction was granted out of Chancery to continue Poſſeſſion. 23 *Eliz. Bury* v. *Coniſby*, *Tothil* 180.

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(3.) That the old Leaſe muſt be ſurrendred, &c.

A third Rule to be obſerved is, That if there be an old Leaſe in Being it muſt be ſurrendered, or expired, or ended, within a certain Time after the making of a new Leaſe, according as the Caſe ſhall be; therefore if any Biſhop, Archdeacon, or other ſole Corporation, (except Parſons and Vicars, who are excepted out of the Statute of 32 *H.* 8.) do make their Leaſes according to the Liberty given them by the ſaid Statute, *viz.* for One and twenty Years or Three Lives, without any Confirmation of the Dean and Chapter, and an old Leaſe be in Being, it muſt be ſurrendred, expired, or ended, within a Year after the making of the new Leaſe.

Where Confirmation makes the Biſhop's Leaſe good.

But to begin with the Biſhop, If he hath made a new Leaſe of Lands for One and Twenty Years, and after, *viz.* when Four Years of the ſaid Term are to come, doth let the ſame Lands to another Perſon for One and Twenty Years, and his latter Leaſe be confirmed by the Dean and Chapter, the Confirmation makes it a good Leaſe, although the old Leaſe was not to end within a Year of the making of the new one. 28 *Eliz. C. B. Grindal Biſhop of York*'s Caſe, 4 *Leonard* 78. For the Statute of 32 *H.* 8. which ſet this Rule, that the old Rule muſt be expired, ſurrendred, or ended, within One Year after the making of the new Leaſe, to make the new Leaſe good, being a Statute made meerly to inable the Perſons aforeſaid, who before without Confirmation could not grant or leaſe any Thing to bind their Succeſſors, doth inable them to grant Leaſes for One and twenty Years or Three Lives, under the Qualifications therein mentioned, without the Confirmation of any: But we muſt ſo underſtand it, that the ſaid Qualifications, of which this is one, are not by Vertue of this Statute of Neceſſity to be obſerved in all Leaſes, *viz.* when the Liberty given by the Statute is not uſed, but that the Leaſe is confirmed according to the Common Law; for after the making of the Statute of 32 *H.* 8. Biſhops and others mentioned therein, by Confirmation might have let their Lands for a Thouſand Years, and have made concurrent Leaſes at their Pleaſure, until, as touching Biſhops, the Statute of 1 *Eliz.* was made as a reſtraining Statute, which being the ſole Statute that reſtrained their Power, (for Biſhops are not in the Statute of 14 or 18 *Eliz.* as hath been ſhewed) if the latter Leaſe before mentioned was void, as being Four Years before the Expiration of the former, it muſt be made void by this Statute, in reſpect of the Letter or Intent thereof; and 'tis not void by the Letter, for the Words of the Statute are not that the Leaſe ought to be for One and twenty Years ſimply, without ſaying more, but for One and twenty Years from the Time as ſuch Leaſe, Grant or Aſſurance ſhall begin; and this is a Leaſe for Twenty-one Years from ſuch Time, for it is not all one in common Senſe, for a Man to ſay that he hath a Leaſe for Twenty-one Years, and to ſay that he hath a Leaſe for Twenty-one Years from ſuch a Day, which is before the making of the Leaſe, no more than a Leaſe abſolute, and a Leaſe upon Condition, ſhall be intended to be the ſame Leaſe. 14 *H.* 8. 18. 1 *Anderſon* 66. For in caſe a Leaſe being made to a Perſon for Twenty-one Years from the Feaſt of St. *Michael* laſt, and the Leſſee doth enter, and is outed, and brings his *Ejectione firmæ*, he ought to declare upon the Leaſe as it is, *viz.* for Twenty-one Years from ſuch a Day, and not upon a Leaſe for Twenty-one Years, without ſaying more, for then he hath failed of his Purpoſe; for the Defendant may plead Not guilty, and he ſhall be found Not guilty; and as ſuch concurrent Leaſe is not void by the Letter of the ſaid Statute, ſo neither by the Intent of it, becauſe it is not prejudicial to himſelf or Succeſſor, who may make the like Leaſe; for there is not a longer Eſtate granted againſt the Succeſſor than for Twenty-one Years or Three Lives, according to the Statute; nor

That the Qualifications need not be obſerved when the Liberty given by the Statute is not uſed.

Declaration upon a Leaſe for Twenty-one Years from, &c.

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is the Leſſor, or his Succeſſor, by ſuch concurrent Leaſe barr'd of their annual antient Rent; and though they have by this Means but one Rent in Intereſt, yet they have another for the Four Years by Eſtoppel. *Fox* and *Collier*'s Caſe, 1 *Anderſon* 65. *Moor* 107. *Hill.* 22 *Jac. Evans* and *Aſcough*'s Caſe, *Latch* 242. and *Palmer* 466. So that if a Biſhop doth make a Leaſe for Years, which is confirmed by the Dean and Chapter, and after doth make a Leaſe of the ſame Land to another for Twenty-one Years, to commence after the firſt Years ſhall be determined, and after and before any Confirmation of the ſecond Leaſe is had, the Biſhop doth make a third Leaſe for Lives to a third Perſon of the ſame Lands, to commence immediately, and the laſt Leaſe is firſt confirmed, and then the ſecond Leaſe in Reverſion is alſo confirmed; in this Caſe the ſecond Leaſe is good, and the Confirmation of it made it effectual, although the laſt Leaſe was firſt confirmed; becauſe no Intereſt is given by the Confirmation, but that is only to make the Leaſe durable and effectual. *Trin.* 6 *Eliz. Moor* 66.

Biſhops Leaſes for Twenty-one Years to commence after a confirmed Leaſe of Twenty-one Years.

Where a Leaſe for Years, but not for Lives, & *econtra.*

Although a Leaſe for Years is in Being, and is not ſurrendred, or ended within Four, Five or more Years, yet a Biſhop may make another Leaſe for Years, to commence after the firſt Term ſhall be expired, if ſuch a Leaſe be confirmed, but not for Lives, to bind the Succeſſor, tho' it be confirmed by the Dean and Chapter; ſo if there be a Leaſe for Life in Being, and the Biſhop doth make a Leaſe for Years, the Leaſe for Years may be avoided; by *Whitlock*, *Hill.* 22 *Jac. Evans and Kiffin* v. *Aſcuith*, *Palmer* 468. Firſt, Becauſe the Statute of 1 *Eliz.* is in the Disjunctive for Twenty-one Years or Three Lives, and therefore the Biſhop cannot make both. Secondly, Becauſe the Rent reſerved upon ſuch Leaſe for Years is not payable within the Meaning of the ſaid Act, *viz.* annually; for that if the Rent be not paid, neither the Leſſor, nor his Succeſſor, can diſtrain, or have their Action of Debt for it, during the Continuance of the Leaſe for Lives. And though *ex vi termini* the Rent is payable, becauſe that after the Leaſe for Lives determined, the Leſſor ſhall diſtrain for all the Arrearages of Rent reſerved upon the Leaſe for Years, yet it is not payable ſo as was intended by the Statute, for the Statute was made to maintain Hoſpitality, and to avoid Dilapidations, and that cannot be by Poſſibilities without a continual Revenue yearly payable, and not in Expectancy, or in future Poſſibilities; and in this Caſe the Biſhop ſhall have no more but a Poſſibility. *Trin.* 30 *Eliz. B. R. Elmer*'s Caſe, 5 *Co.* 2. *Mich.* 30 & 31 *Eliz. Marler* v. *Right*, 1 *Anderſon* 193. the ſame Caſe, 3 *Cro.* 141. and *More* 253. But *Coke* is ſaid to have argued, that ſuch Leaſes for Lives are good, becauſe the Biſhop hath a Poſſibility of recovering the Rent; and *Egerton*, Solicitor General, is ſaid to aſſent to this. *Paſch.* 29 *Eliz. B. R. Bunny* v. *Wright and Stafford*, 1 *Leonard* 59. But the former Caſe is more to be depended upon; and it ſeems alſo in this Caſe to be held, that if there be a Leaſe for Years, that ſhall be ſurrendred, expired, or ended within One Year after a Leaſe for Lives is made, that the Leaſe for Lives is good without Confirmation, by the Statute of 32 *H.* 8. *Quære.*

When this Rule of an old Leaſe to be ſurrendred, &c. is good with Confirmation or without.

This Rule, that if there be an old Leaſe in Being, it muſt be ſurrendred, expired or ended within a certain Time after the making of the new Leaſe, holds good, not only when Biſhops, and other Corporations ſole, mentioned in 32 *H.* 8. make Leaſes by Authority of that Statute for Twenty-one Years or Three Lives, without the Aſſent or Confirmation of others; but alſo when any Spiritual or Eccleſiaſtical Corporation ſole (other than Biſhops) do make Leaſes with the Aſſent and Confirmation of thoſe who are by Law to confirm the ſame; and alſo when any Spiri-

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tual, Eccleſiaſtical or Collegiate Corporation aggregate make Leaſes of their Poſſeſſions, whoſe Leaſes were never to be confirmed by any; for though by the Statute of 13 *Eliz.* theſe were not reſtrained from making concurrent Leaſes, no more than Biſhops were by 1 *Eliz.* yet by 18 *Eliz.* they are reſtrained, though Biſhops are not reſtrained from making any Leaſe of any of their Lands, *&c.* whereof any former Leaſe is in Being, not to be expired, ſurrendred or ended within Three Years next after the making of any ſuch new Leaſe. And it is ſaid by *Coke* Juſtice, that if there be Two Years in Being of a former Leaſe, and a Leaſe for Lives is made, this Leaſe for Lives is void by 18 *Eliz.* and he alſo ſaith, that if a Dean and Chapter, or others reſtrained by the Statute of 18 *Eliz.* from making concurrent Leaſes, unleſs the firſt ſhall be expired, ſurrendred and ended within Three Years of the making of any ſuch new Leaſe, do make a new Leaſe for Years of Lands of which there was a Leaſe in Being for Four, Five or more Years at the making thereof, that this Leaſe in Reverſion may be made good, if the Leſſor doth, at any Time within Three Years after the making thereof, cauſe the former Leaſe to be ſurrendred. *Paſch.* 10 *Jac. C. B.* in *Water's* Caſe v. *Dean and Chapter of Norwich, Brownlow* and *Gouldſborough*, 2 *Part* 164.

Of what Houſes and Land concurrent Leaſes may not be.

Though Deans and Chapters, Maſters and Fellows, Maſters and Wardens of any Hoſpitals, Archdeacons, Prebendaries, Parſons, Vicars, or other like Order, having any Spiritual Living, may make concurrent Leaſes of their Lands, *&c.* generally ſpeaking, in caſe the firſt Leaſe ſhall be expired, ſurrendred or ended within three Years after the making of the new Leaſe; yet of ſuch Houſes as by 14 *Eliz.* they may let for Forty Years, and of ſo much Land as they may and ſhall let with them for the ſame Term, they may not make Leaſes in Reverſion, or concurrent Leaſes; and the Reaſon is, becauſe that after the Statute of 13 *Eliz.* was made, the Parſons aforeſaid might or did make concurrent Leaſes at their Pleaſure, that Statute notwithſtanding, and then for the preventing ſuch concurrent Leaſes at Pleaſure, comes the 18 *Eliz.* which ſays, that the firſt Leaſe made by the Perſons aforeſaid muſt be expired, ſurrendred or ended within three Years after the making of the new Leaſe, or that the new Leaſe ſhall be void. But then this Statute of 18 *Eliz.* hath Relation only to the Statute of 13 *Eliz.* which hath not any Reſpect to the Statute of 14 *Eliz.* by which the ſaid Perſons are expreſly and abſolutely forbidden to make Leaſes in Reverſion of ſuch Houſes and Land to them belonging as are therein mentioned; and the Statute of 18 *Eliz.* is only a diſabling Statute, and makes no Shew of giving Power to thoſe Perſons to make Leaſes in Reverſion, or concurrent Leaſes of Houſes againſt the Statute of 14 *Eliz.* for then there muſt have been Words ſufficient to repeal the ſame as to this Particular, and that the Statute of 18 *Eliz.* toucheth not the Statute of 14 *Eliz.* was adjudged, *Trin.* 14 *Jac. Crane* v. *Taylor*, *Hobart* 296. And *The Dean and Chapter of Weſtminſter's* Caſe, *Mich.* 16 *Car.* 2. *C. B. Carter's Rep.* 9. And ſo was the Opinion of three Judges, *Trin.* 25 *Car.* 2. in *Baily* and *Munn's* Caſe, 1 *Ventris* 246. and 3 *Keb.* 107. But the Lord Chief Juſtice *Hale* doubted, and inclined to be rather of the contrary Opinion, *viz.* that the Statute of 18 *Eliz.* doth extend to the 14th of *Eliz.* Firſt, Becauſe the 14th of *El.* is as an Appendix to the 13th of *El.* and doth inlarge it as to Houſes in Cities, Market-Towns, *&c.* wherefore, the 18th reciting the 13th, doth by Conſequence recite the 14th alſo. His ſecond Reaſon was, upon the Connexion betwixt all the Statutes concerning Leaſes of Eccleſiaſtical Perſons, that they may have been taken into the Conſtruction of one another. Thirdly, From the great Romage it would make in Leaſes, if a Leaſe ſhould be void, when there was never ſo little of a former Leaſe unexpired.

If 18 *Eliz.* extends to 14 *Eliz.*

unexpired. Fourthly, There is no Authority to the contrary; *Crane* and *Taylor*'s Caſe being concerning Covenants only.

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And let it be noted, That though the Statute of 14 *El.* doth only prohibit Leaſes in Reverſion, and doth not mention concurrent Leaſes; yet if an Houſe be let for Forty Years to commence immediately, when there is a former Leaſe in Being for Ten Years, this Leaſe for Forty Years (though properly ſpeaking it be a concurrent Leaſe as it preſently commences in Intereſt, yet) is in Law a Leaſe in Reverſion, and ſo within the Words of the Statute, and therefore void, as was adjudged, *Paſch.* 39 *El. Hunt* v. *Singleton*, 3 *Cro.* 564. And *Dean and Chapter of Weſtminſter*'s Caſe, *Carter's Rep.* 11 & 14, it is agreed by *Bridgman* Chief Juſtice and *Terill*, that whatſoever is not a Leaſe in Poſſeſſion within the Statute 18 *El.* is a Leaſe in Reverſion, and that all Leaſes where there is a particular Eſtate out, are Leaſes in Reverſion; and in *Baily* and *Munn*'s Caſe, 1 *Ventris* 246, *Twiſden* Juſtice is of the ſame Opinion, to which the other two Juſtices inclined. But by the Opinion of *Hale* Chief Juſtice in the ſame Caſe, as reported 2 *Levinz* 62. a former Leaſe in Being makes not the ſecond Leaſe to be a Leaſe in Reverſion; but a concurrent Leaſe, if the ſecond Leaſe be to begin preſently, to which, by this Report of the Caſe, the other Judges ſaid nothing, only *Twiſden* doubted. And on the other Hand, if an Houſe that by 14 *El.* may be let for Forty Years, be let but for Twenty Years, and Ten Years before the Expiration thereof another Leaſe is made for Twenty Years, not to commence preſently, but after the Expiration of the former Leaſe, this is properly a Leaſe in Reverſion, and yet ſaid to be good, and to ſtand well with the Statute of 14 *Eliz.* for that theſe Contracts do not intermix, but the one doth well ſtand with the other, and both Leaſes do not exceed the Forty Years comprized in that Statute, which doth not hinder Leaſes from being made from a Day to come. *Hill.* 35 *El. Thompſon* v. *Strafford*, *Popham* 8. The above Opinion in *Popham* is denied to be Law in *The Dean and Chapter of Weſtminſter*'s Caſe, *Carter's Rep.* 12, 15, and alſo in *Baily* and *Munn*'s Caſe before cited, 1 *Ventris* 246. and 3 *Keb.* 107, 197.

Whether a former Leaſe in Being, makes a ſecond Leaſe to be in Reverſion.

Note alſo, That this Statute of 14 *El.* doth not extend to Biſhops, ſo as either to inable them to let any Houſe for Forty Years, or to reſtrain them from making Leaſes of their Houſes in Reverſion, or concurrent Leaſes for Years, nor may they hereby alien their Houſes by way of Exchange, or for any Recompence, and the Reaſon why they are not within this Statute, is becauſe they are not, as hath been ſhewed, within the Statute of 13 *El.* to which this of the 14th of *El.* hath immediate Relation.

From what Time concurrent Leaſes are to take Effect in Intereſt.

And note, That in all Caſes when concurrent Leaſes are made, the new Leaſe, although it may be made *a Die Confectionis*, is not to take Effect in Intereſt till the old Leaſe be expired, ſurrendred or ended, that is, the new Leſſee cannot enjoy the Land, *&c.* till ſuch Time, for the new Leaſe does commence preſently by Eſtoppel only, not in Intereſt, yet it ſeems that the Rent is due from the firſt Commencement of the Leaſe, ſo that the Biſhop, *&c.* Leſſor is intitled to two Rents, and may bring an Action of Debt to recover the Rent reſerved upon the ſecond Leaſe, during the Continuance of the former; for the Rent muſt be reſerved and made payable during the Term, and not only from the Determination of the former Leaſe, elſe ſuch concurrent Leaſes will be void, as contrary to the Statute, and being a Rent reſerved upon a Leaſe for Years, an Action of Debt or Covenant will lie for it; and there can be no other Remedy to recover it, during the Continuance of the firſt Leaſe, for which Reaſon a concurrent Leaſe for Lives is not good, by Reaſon Debt will not lie for ſuch Rent, and there is no Remedy to recover it during the firſt Term, tho' it ſeems, according to *Elmer*'s

How the Rent to be payable.

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Elmer's Caſe, 5 *Co.* 2. that after the firſt Leaſe ended, the Leſſor may diſtrain for all the Arrears grown due before ſuch Leſſee came into Poſſeſſion. (But note, that by a late Statute made *Anno* 8 *Annæ Reginæ*, it ſhall be lawful for any Perſon or Perſons having Rent in Arrear, or due upon any Leaſe or Demiſe for Life or Lives, to bring an Action of Debt for ſuch Arrears of Rent, in the ſame Manner as they might have done in caſe ſuch Rent were due and reſerved upon a Leaſe for Years.) *Trin.* 21 *Eliz. Fox* v. *Collier*, *Moor* 107. *Trin.* 25 *El.* 1 *Anderſon* 65. ſame Caſe, *Paſch.* 9 *El. C. B. Dyer* 261. *Degg's Parſon's Counſellor* 116. So if a Perſon hath a Leaſe for Years in Being, and afterwards doth take another Leaſe for Years to himſelf of the ſame Land, *&c.* the latter Leaſe is not a concurrent Leaſe, or a Leaſe in Reverſion, and therefore ſuch ſecond Leaſe of the ſame Land made by a Biſhop, or other Perſon inabled by 32 *H.* 8. to make Leaſes for Twenty-one Years or Three Lives, is a good Leaſe without Confirmation, although it be made divers Years before the former Leaſe would have expired. So if any Perſon inabled by 14 *El.* to make Leaſes of Houſes for Forty Years, doth firſt make a Leaſe for Twenty Years, and Seven Years after doth make another Leaſe to the ſame Perſon of the ſame Houſe for Twenty Years, to commence from a Day to come, the ſecond Leaſe cannot be ſaid to be a concurrent Leaſe, or a Leaſe in Reverſion, becauſe by the Tenant's Acceptance of the ſaid Leaſe, the firſt Leaſe is *ipſo facto* ſurrendred, determined and gone, for the laſt Contract with the ſame Perſon doth diſſolve the firſt, when the one and the other cannot ſtand together, as they cannot here, becauſe the one doth intermix with the other; nor doth the firſt Leaſe remain good to the Day to come, on which the ſecond Leaſe is to commence, but by the Leſſee's Acceptance of his new Leaſe, doth immediately become void in the whole; for the firſt Contract, which was intire, cannot be diſſolved in Part, as to that which the Party hath, (by *Popham*, *Clinch* and *Gawdy*) to which the Juſtices of the Common Bench agreed, and ſo was the Opinion of the Common Bench about 1 *El.* in the Caſe of *The Abbey of Barking*, ſaith *Popham*. *Hill.* 35 *Eliz. Thompſon* v. *Troford*, *Popham* 8. And from hence we may note, that Leaſes may be ſurrendred by two Means, that is, not only by Deed, which is when an Eſtate, whether for Years or Lives, is yielded up by expreſs Words into the Poſſeſſion of him who hath the next or immediate Remainder, or Reverſion thereof, and is called *a Surrender in Deed*, but alſo by Operation of Law, and this is called a *Surrender in Law*; which is done by taking of a ſecond or new Leaſe of the ſame Eſtate; therefore if a Leſſee for Twenty Years preſently take a Leaſe for Ten Years, this is in Law a Surrender of the whole Term of Twenty Years; and the ſame Law it is, tho' the ſecond Leaſe be made to begin Ten Years after, becauſe by his Acceptance of ſuch ſecond Leaſe to begin at a Day to come within his former Term, he doth affirm that the Leſſor hath Power to make ſuch ſecond Leaſe, which he cannot have without Surrender of the former; and, as hath been ſaid, there ſhall not be any Fraction of the Eſtate, ſo as to make the former Leaſe good for the firſt Ten Years, and ſurrendred for the Reſidue. 5 *Co.* 11. *b. Ives*'s Caſe. *Paſch.* 40 *Eliz. Maton* v. *Hutchins*, 2 *Roll's Abr.* 496. Yea the Acceptance of a voidable Leaſe is a good Surrender of a good and ſure Leaſe, *Dyer* 140 (43.) but if the new Leaſe accepted of be merely void, the Acceptance thereof makes no Surrender of a former Leaſe. *Mich.* 13 *Car. B. R. Flood* v. *Gregory*. *Per Cur.* 2 *Roll's Abr.* 495.

Upon 14 *Eliz.* of Leaſes for 40 Years to the ſame Perſon.

Firſt Leaſe determined,

Surrender in Deed and in Law.

But Infants cannot ſurrender by Deed.

But what hath been thus ſaid of Surrenders, is not to be extended generally to all Perſons, for Infants having a future Intereſt in a Leaſe, cannot ſurrender it by Deed, but ſuch Surrender is void; ſo if an Infant

fant that hath a Leaſe that is to take Effect at a Day to come, ſhould before ſuch Day accept a new Leaſe for the ſame Term upon the ſame Rent and Covenants, this Acceptance of a new Leaſe by the Infant is void, and no Surrender in Law of the former Leaſe, becauſe it is without Increaſe of his Term, or Decreaſe of his Rent; and where there is no apparent Benefit, or Semblance of a Benefit to the Infant, his Acts are void; and though the Caſe be, that the Infant come of Age before the Leaſe can take Effect, and then the former Leaſe being expired, enters and claims by the ſecond Leaſe, and pays the Rent for divers Years, which is accepted, yet the ſecond Leaſe is void, and the firſt not ſurrendered, by Reaſon of the Infancy. *Trin.* 14 *Car. B. R. Lloyd* v. *Gregory*, 1 *Cro.* 502, ſame Caſe, *Jones* 405. If a Leaſe be ſurrendered by Deed in order to the having of a new Leaſe, or that the Eſtate may be granted to another, the Surrender ought to be abſolute, not conditional, for a conditional Surrender is not ſufficient within 32 *H.* 8, and the other Statutes; for the Mind of the Makers of theſe Laws was, that the Surrender ſhould be effectual, not illuſory, which might be avoided. *Trin.* 30 *Eliz. C. B. Elmer*'s Caſe, 5 *Co.* 11. And ſuch an abſolute Surrender may be ſafely made unto a Corporation aggregate upon their Promiſe to make a new Leaſe; for though no Action at Law can be brought againſt ſuch a Corporate Body grounded barely upon a Promiſe, as in ſuch Caſe it might be againſt any ſingle Perſon; yet the Court of *Chancery* will compel to make ſuch new Leaſe; as for Inſtance, a Dean and Chapter hath made a Leaſe to one, who upon their Promiſe of a new Leaſe doth abſolutely ſurrender it, and then the Dean and Chapter will not perform their Promiſe, but lets the Eſtate to another Perſon, although in this Caſe no Action at the Common Law doth lie againſt the Dean and Chapter upon the Breach of this their Promiſe as *Coke* ſaid, for that a Corporation cannot be bound without Deed, yet the Party who ſurrendred may well ſue in a Court of Equity for a ſpecifick Performance of ſuch their Promiſe, to compel them to make the new Leaſe, and as is ſaid, may bring his Suit againſt any particular Perſon of the Corporation, for the Corporation itſelf cannot be ſo ſued; and in this Caſe, if their ſecond Leſſee be one of their Body, yet he may be ſo ſued, altho' he was not one of them at the Time of the Promiſe made, becauſe the Corporation never dies, and this new Member having the Leaſe is the Cauſe of the Grief. *Mich.* 12 *Jac. B. R.* Sir *G. Frevil* v. *Ewebank*, 1 *Roll's Rep.* 82.

Biſhops Leaſes.

Not Acceptance where no Benefit.

Corporation not bound without Deed.

And here let it be noted, that it hath been enacted, by *Stat.* 29 *Car.* 2. *c.* 3. **That no Leaſes, Eſtates or Intereſts either of Freehold or Term of Years, or any uncertain Intereſt not being Copyhold or Cuſtomary Intereſt, of, in, to, or out of any Meſſuages, Manors, Lands, Tenements or Hereditaments, ſhall at any Time after the ſaid Four and twentieth Day of** June **be aſſigned, granted or ſurrendred, unleſs it be by Deed, or Note in Writing ſigned by the Party ſo aſſigning, granting or ſurrendring the ſame, or their Agents thereunto lawfully authorized by Writing, or by Act and Operation of Law.** See the ſaid Stat. 29 Car. 2. Intitled, *An Act for Prevention of Frauds and Perjuries.*

29 *Car.* 2. *c.* 3. *ſect.* 2. Surrender by Deed or Note in Writing, *&c.*

A fourth Rule to be obſerved for the making of theſe Leaſes good in Law, is, that they do not exceed Three Lives, or Twenty-one Years, from the making thereof; therefore if a Leaſe be made by a Biſhop for Four Lives, and one of them doth die in the Life of the ſame Biſhop, ſo that when the Biſhop dies there is but Three Lives in Being, yet the Leaſe is void againſt the Succeſſor; for being void by 1 *Eliz.* at the

(4.) Leaſes not to exceed Three Lives, or 21 Years, *&c.*

Biſhops Leaſes.

Time when it was made, no ſucceeding Accident can make it good. *Trin.* 11 *Jac. The Biſhop of Saliſbury's* Caſe, 10 *Co.* 62. Or if new Leaſes be made for Three Lives, thus, To one for Life, the Remainder to a ſecond for Life, Remainder to a third for Life; this Leaſe is void by the Statutes. *Mich.* 3 *Car. C. B. Owen* v. *Tho. ap Reeves*, 1 *Cro.* 95. *Dorothy Owen's* Caſe v. *Owen Price*, *Trin.* 3 *Car. C. B. Hetley* 22. So if an Archdeacon doth make a Leaſe for Three Lives according to the Statutes, and the Leſſees do make a Leaſe for an Hundred Years, which is confirmed by the Archdeacon, Biſhop, Dean and Chapter, yet ſuch Leaſe ſhall not bind the Succeſſor, for if that ſuch Conveyances ſhould not be conſtrued to be againſt the Statutes, the Statutes would be of no Effect, and the good Intent and Purview thereof would eaſily be defeated and defrauded; ſo in like Manner it is ſaid to have been adjudged, that if a Biſhop makes a Leaſe for Three Lives, reſerving the antient Rent, and then he makes a Leaſe for an Hundred Years, if Three Men ſo long live, which is confirmed by the Biſhop and Chapter, the Succeſſor may avoid this Leaſe. *The Biſhop of Hereford* and *Stacy's* Caſe, vouched in *The Biſhop of Chicheſter* and *Freeland's* Caſe, *Paſch.* 1 *Car. Ley* 74.

For Ninety-nine Years, &c.

So if a Leaſe be made for Ninety-nine Years determinable upon Three Lives, it is ſaid that this Leaſe is not good within any of the Statutes. 8 *Co. f.* 70. But in 26 *Car.* 2. *B. R. Threadneedle* and *Lineham's* Caſe, 3 *Keb.* 595, there it was ſaid by the Court, that they would not diſpute, whether a Leaſe made by a Biſhop for Ninety-nine Years determinable on Three Lives was good or not (which doth imply that the Law is not ſettled as to ſuch a Leaſe.) But if a Leaſe be made to *A.* for the Life of *B. C.* and *D.* it is a good Leaſe; and it is held, that a Leaſe to one for the Lives of Three others, and a Leaſe to Three for their Three Lives, is all one within the Intent of the Statute. *Trin.* 3 *Jac. B. R. Baugh* v. *Haynes*, 2 *Cro.* 76. And a Leaſe being made for Forty Years by the Maſter and Brethren of an Hoſpital was allowed good in *Chancery*. *Tothil*, *p.* 140. Tit. *Leaſe*. But *Quære*, Whether the Leaſe was for Houſes or Land, and if for Lands, upon what Reaſon it was made good?

Leaſe for fewer Years or Lives good.

And note, That though by the Words of the Statutes, **All Leaſes let, other than for Twenty-one Years or Three Lives, from the making, ſhall be void**; yet a Leaſe for fewer Years or Lives, is good, for that it was the only Intent of the Statute to reſtrain Church-Men for making Leaſes for longer Terms, and not from making them for fewer Years or Lives. *Mich.* 32 & 33 *Eliz. C. B. Carter* and *Chaycole's* Caſe, 1 *Leon.* 306. If a Leaſe be made to one for Three Years, and ſo from Three Years to Three Years, and ſo from Three Years to

12 Years.

Three Years during the Leſſor's Life, this is a good Leaſe for Twelve Years. *Per Cur. Mich.* 13 *Jac. Wrathbone* v. *Newberry*, 3 *Bulſt.* 158. See 28 *H.* 8. *Dyer*, *f.* 24, and *Plowd. f.* 273. Or if the Leaſe be for Three Years, and ſo from Three Years to Three Years ſo long as he ſhall be Parſon, this is a good Leaſe for ſix Years, and for the Reſidue uncertain, and but an Eſtate at Will. 1 *Inſt.* 45. *b.* But if the Leaſe be for Three Years, and from Three Years to Three Years, till Nine Years be expired, this is a Leaſe for Nine Years. *Paſch.* 1 *Jac. C. B. Wilcox's* Caſe, 1 *Roll's Abr.* 850. And if a Leaſe be made for Three Years, and after for Three Years, and ſo from Three Years to Three Years until Ten Years be expired, it is a Leaſe but for Nine Years, and the odd Year ſhall be rejected and not accounted, becauſe it cannot happen to be determined by Three Years; the ſame if it had been for Twenty Years,

&c. the odd Years ſhall be rejected. *Noy* 143. Yet it hath ſince been adjudged, that where a Leaſe was made for Twenty-one Years, and ſo from Twenty-one Years to Twenty-one Years, till Ninety-nine Years was paſſed, that this was a Leaſe for Ninety-nine Years, which was a Time certain, although the Twenty-one Years could not determine in Ninety-nine Years, but the odd Years ſhould be rejected. *Hill.* 30 & 31 *Car.* 2. *B. R. College de Mancheſter* v. *Trafford*, 2 *Lev.* 241. And if a Leaſe be made for Three Years, and at the End of thoſe Three Years for other Three Years, *Et ſic de* 39 *Annis in tres Annos* during the Life of the Leſſor, this is not a Leaſe for Life, but a Leaſe for Twelve Years, the Firſt being for Six Years. *Hill.* 13 *Jac. B. R. Newberry* and *Wrothbone*, 1 *Roll's Rep.* 287.

Biſhops Leaſes.

12 Years.

If a Leaſe had been made for the Life of one or more other Perſons, and the Leſſee had died, *Ceſtuy que vie* being living, he that firſt entred ſhould have held the Land during the Life of him for whoſe Life it was taken as general Occupant; ſo if Tenant for his own Life had granted over his Eſtate to another, if the Grantee had died before the Leſſee of whom he had the Eſtate, he that firſt enters ſhould have had it during the Life of the firſt Leſſee. 2 *Bulſt. f.* 11, 12. *Blunt's Dictionary*, *Occupant*. Or if a Tenant for another's Life makes a Leaſe for Years and dies, the Leſſee for Years being in Poſſeſſion ſhould have had the Term as Occupant. *Chamberlain* v. *Ewre*, 2 *Roll's Abr.* 151. But if the Leſſee for Years had made a Leaſe at Will, and after that the Leſſee for the other's Life had died, the Leſſee at Will being in Poſſeſſion ſhould have been the Occupant, and not the Leſſee for Years, but he ſhould have had it in the Nature of a Reverſion, and ſo the Leaſe for Years not extinct. But if Tenant for another's Life had died, not having made any Grant of his Eſtate, he that firſt enters, albeit he claimed it in the Right of another, ſhould have been the Occupant upon the Account that he firſt entred, and not he in whoſe Name he claimed. *Mich.* 10 *Jac. B. R. Chamberlain* v. *Ewre*, 2 *Roll's Abr.* 151. But at this Day in all theſe Caſes before-mentioned, concerning general Occupancy, the Law by Act of Parliament is changed, and it ſhall go to the Executors or Adminiſtrators of the Party ſo dying that had the Eſtate thereof by Virtue of the Grant, and ſhall be Aſſets in their Hands, that is, in caſe there be no ſpecial Occupant thereof; and ſpecial Occupancy is, where an Eſtate for Lives is made to a Man and his Heirs, in ſuch Caſe the Heir ſhall have the Eſtate after the Deceaſe of the Anceſtor as ſpecial Occupant, or as a Perſon particularly deſcribed to whom the ſaid Eſtate ſhall go after the Leſſee's Death, and ſuch Leaſe ſhall be as Aſſets by Deſcent in the Hands of the Heir. *Stat.* 29 *Car.* 2. Intitled, *An Act to prevent Frauds and Perjuries*, which is as followeth: **Be it farther enacted by the Authority aforeſaid, That from henceforth any Eſtate** per auter vie **ſhall be deviſable by a Will in Writing, ſigned by the Party ſo deviſing the ſame, or by ſome other Perſon in his Preſence, and by his expreſs Directions, atteſted and ſubſcribed in the Preſence of the Deviſor by three or more Witneſſes; and if no ſuch Deviſe thereof be made, the ſame ſhall be chargeable in the Hands of the Heir, if it ſhall come to him by Reaſon of a ſpecial Occupancy, as Aſſets by Deſcent, as in caſe of Lands in Fee-ſimple; and in caſe there be no ſpecial Occupant thereof, it ſhall go to the Executors or Adminiſtrators of the Party that had the Eſtate thereof by Virtue of the Grant, and ſhall be Aſſets in their Hands, and by** 14 Geo. 2. ch. 20.

Occupancy general upon a Leaſe for Life, &c.

Law of Occupancy changed.

Heir chargeable.

And

Biſhops Leaſes.

And whereas by an Act made in the Twenty-ninth Year of the Reign of King Charles the Second, Intituled, An Act for Prevention of Frauds and Perjuries, amongſt other Things, It is Enacted, That Eſtates per auter vie, whereof no Deviſe ſhould be made, ſhould, in Caſe there ſhould be no ſpecial Occupant thereof, go to the Executors or Adminiſtrators of the Party that had the Eſtate thereof, by Virtue of the Grant, and ſhould be Aſſets in their Hands: And whereas Doubts have ariſen, where no Deviſe has been made of ſuch Eſtates, to whom the Surplus of ſuch Eſtates, after the Debts of ſuch deceaſed Owners thereof are fully ſatisfied, ſhall belong; It is enacted, That ſuch Eſtates per auter vie, in caſe there be no ſpecial Occupant thereof, of which no Deviſe ſhall have been made, according to the ſaid Act for Prevention of Frauds and Perjuries, or ſo much thereof as ſhall not have been ſo deviſed, ſhall go, be applied, and diſtributed in the ſame Manner, as the perſonal Eſtate of the Teſtator or Inteſtate.

(5.) Of what Things theſe Leaſes muſt be.

A fifth Rule to be obſerved in the making of theſe Leaſes, is, that it muſt be of Lands, Tenements, or Hereditaments manurable or corporeal, which are neceſſary to be letten, and whereout a Rent by Law may be reſerved, and not of Things that lie in Grant, whereout a Rent cannot be reſerved; therefore if a Biſhop by Deed indented doth make a Leaſe of a Fair, Parcel of the Poſſeſſions of his Biſhoprick with all Profits thereof for Three Lives, rendring the old accuſtomed Rent, though this Leaſe be confirmed by the Dean and Chapter, yet the Succeſſor ſhall avoid it; by 1 *Eliz.* for a Fair is but a Franchiſe or Liberty not manurable, out of which a Rent cannot be reſerved, and for the Rent reſerved out of ſuch Fair, the Leſſor or his Succeſſors have not any Remedy, either by Diſtreſs, or Aſſize; and all Leaſes of ſuch Inheritances out of which the antient and accuſtomed Rent cannot be well and lawfully reſerved and made payable to the Succeſſor, during the Continuance of ſuch Leaſe for Twenty-one Years, *&c.* the Succeſſor ſhall avoid it; for altho' in ſuch Leaſes the Rent reſerved may be good by Way of Contract between the Leſſor and Leſſee, yet it is not incident to the Reverſion, nor ſhall go with it, therefore the Succeſſor ſhall not be bound by ſuch Leaſe. *Trin.* 30 *Eliz. B. R. Jewel*'s Caſe, 5 *Co.* 3. If a Biſhop be ſeiſed of a Manor, and hath by Grant from the King *primam tonſuram ſive veſturam* of certain Acres of Land belonging thereunto (but not the Feeding thereof, which was to another); here the Biſhop hath not the Soil; for although in the Caſe of a common Perſon by the Grant *de prima veſtura* the Soil ſhall paſs, yet not in the Caſe of the King; but if the Grant had been of the firſt Veſture to ſuch a Day certain, the Soil had paſſed; and when the Biſhop hath only *primam tonſuram* and not the Soil, and makes a Leaſe thereof for Three Lives rendring Rent, this Leaſe is void, as not being an Hereditament within the Statute to be leaſed; but where the Grant is *de veſtura*, from a certain Time to a certain Day, it is then an Hereditament that may be letten, and may be fed with Cattle, and upon which the Succeſſor may diſtrain in caſe the Rent be not paid. *Paſch.* 19 *Jac. B. R. The Biſhop of Oxford*'s Caſe, *Palmer* 174. Upon this Account alſo it is, that if a Biſhop be ſeiſed of Tithes in the Right of his Biſhoprick, and doth by Indenture demiſe them for Three Lives rendring the antient Rent, this is a void Leaſe againſt the Succeſſor; by *Yelverton*, *Williams* and *Tanfield*, becauſe the Leaſe being made for Lives, and nothing demiſed but Tithes which lie in *prender*, there is not any Remedy for the Rent, for there is not any Place wherein a Diſtreſs may be taken, nor can any

Avoided by Succeſſor.

Grant *de prima veſtura.*

Leaſe thereof.

Action of Debt be brought becauſe it is a Freehold, nor an Aſſize, becauſe there is not any Seiſin; and if there was Seiſin, yet the Aſſize would fail, becauſe there is not any Land to be put in View; but if the Leaſe had been made for Years, it had been good, becauſe then an Action of Debt lies for the Rent, and ſo it is of all other Things which lie in *Prender* or *Render*, where no Diſtreſs can be taken. *Hill.* 3 *Jac. B. R. Tailentine* v. *Denton*, 2 *Cro.* 111. ſame Caſe, *Moor* 778. *Trin.* 5 *Jac. B. R. Rickman* v. *Garth*, 2 *Cro.* 173. *Hill.* 19 & 20 *Car.* 2. *Holden* v. *Smallbrook*, *Vaughan* 204, *The Biſhop of Oxford*'s Caſe, *Paſch.* 19 *Jac. B. R. Palmer* 175, and *Paſch.* 15 *Car.* 2. *Scacc. Morice* v. *Antrobus*, *Hardres Rep.* 326, and *Hill.* 26 & 27 *Car.* 2. *Cartwright* v. *Pinkney*, 3 *Keb.* 488. Note, That it being admitted that a Leaſe for Years of Tithes made by a Biſhop rendring Rent is good againſt the Succeſſor, that doth admit that it is ſuch a Rent as ſhall go along with the Reverſion, and not as a Sum in groſs by reaſon of the Contract only; for if ſo, it could not go to the Succeſſor, for a ſucceeding Biſhop is not privy to the Contracts of his Predeceſſor, but hath a Privity of Eſtate only, *viz.* the Reverſion, as was argued by *Saunders*, to which the Court ſeemed to incline. *Hill.* 22 & 23 *Car.* 2. *Dean and Chapter of Windſor* v. *Gover*, 2 *Saunders* 304, ſame Caſe, 2 *Keb.* 737. *Trin.* 13 *Car.* 2. *Tipping* v. *Grover*, *Raym.* 18, ſame Caſe, 1 *Keb.* 62.

Biſhops Leaſes.

Biſhop's Leaſe for Years of Tithes.

If a Biſhop, *&c.* grant the next Avoidance of a Benefice to another, although the Grant be confirmed by the Dean and Chapter, yet it is void againſt the Succeſſor by *Stat.* 1 *Eliz.* becauſe 'tis ſuch an Intereſt out of which a Rent cannot be reſerved. *Trin.* 11 *Jac. The Biſhop of Saliſbury*'s Caſe, 10 *Co.* 6. *Paſch.* 32 *Eliz. Sale* and *The Biſhop of Coventry* and *Marſh*, 1 *Anderſon* 241. And for the ſame Reaſon it hath been held, 37 & 38 *Eliz.* in a Caſe between *The Dean and Chapter of Hereford* and *The Biſhop of Hereford* and *Bullard*, that a Grant of a next Avoidance of a Benefice by a Dean and Chapter is within the Purview of the Statute of 13 *Eliz.* and ſo void. 3 *Cro.* 440. 1 *Mod. Rep.* 204.

Biſhop's Grant of the next Avoidance.

If a Biſhop doth create a new Office, or doth grant a new Fee, or a Rent-Charge, *&c.* out of his Land, the Statute doth extend to make them void by the Equity thereof as againſt the Succeſſor; for if the Biſhop might grant Rents or Fees out of the Land, at his pleaſure, the Statute would be to little or no Purpoſe, for the Land by ſuch Grants might be made of ſmall or no Value to the King and Succeſſor. *Paſch.* 32 *Eliz. Sale* v. *The Biſhop of Coventry* and *Marſh*, 1 *Anderſon* 241. *Trin.* 12 *Jac. Humphry*---v. *Powel*, *Brownl.* and *Goulds.* 1 *Part* 182. Yet if an antient Office be granted, and the antient Fee be increaſed, the Grant is notwithſtanding good for the Office, and for ſo much of the Fee as hath been antiently granted with the Office, and void for the reſt that is new. *Mich.* 8 *Car. Young* v. *Stowel*, 1 *Cro.* 280. 1 *Car. George Biſhop of Chicheſter* v. *Freeland*, *Bridgm.* 32. *Mich.* 9 *Jac. C. B. The Biſhop of Ely*'s Caſe, *Brownl.* and *Goulds.* 2 *Part* 137. But this it ſeems is to be underſtood, where the Office and antient and new Fee are as ſeveral Grants, and not conjoined or mixed in the ſame Sentence, or in ſeveral Sentences, the one depending upon the other. But if an Office be granted with a Fee of Five Pounds, when the antient Fee was a leſs Sum, becauſe it is intire in the Grant, it is void for all; by *Hutton* and *Yelverton*. *Mich.* 2 *Car. C. B. George Biſhop of Chicheſter* v. *Freeland*, 1 *Cro.* 50. So when a Biſhop having the Inheritance of the Diſpoſal of Two Offices, as of Steward and Under-Steward, did grant both to Two Perſons, whereof one is within Age, and after the Grant was con-

Grant of a new Office, Fee, or Rent.

Aliter of an antient Office.

Bishops Leases.

Grant of Two Offices.

firmed at his full Age in the Life of the same Bishop, yet the Grant was adjudged void; and 'twas also then said, when Two Offices are granted to one Man by one Grant, that they are void, for the Statute hath been strictly expounded. *Scambler* and *Wat*'s Case, 41 *Eliz.* vouched in the Bishop of *Chichester* and *Freeland*'s Case, *Ley* 76, and 1 *Cro.* 50.

Of a Rent-Charge, &c. by Dean and Chapter.

Also if a Dean and Chapter do grant a Rent-Charge out of their Possessions, this is restrained by the Equity of *Stat.* 13 *Eliz.* and yet the Rent is not any Part of their Possession within the Words thereof, *Elmer*'s Case, 5 *Co.* 2. Or if a Bishop being seised of a Rent doth grant the same in Fee, this Grant is void as to the Successor. *Pasch.* 44 *Eliz.* in the Case of Fines, 3 *Co.* 85. The like may be said of all other Ecclesiastical Persons that are within the said Statute of 13 *Eliz.* If an Annuity be granted to one for his Life *pro Consilio impenso & impendendo*, this Grant is void against the Successor by an equitable Construction of the Statutes. Bishop of *Salisbury*'s Case, *Trin.* 11 *Jac.* 10 *Co.* 60. And generally all Leases and Grants not permitted by the Words in the Statute of 13 *Eliz.* **Other than for the Term of One and twenty Years or Three Lives from the Time as any such Lease or Grant shall be made or granted, whereupon the accustomed yearly Rent or more shall be reserved and payable yearly during the said Term,** are void against the Successors, being restrained by this Statute and the Statute of 1 *Eliz.* And for that Reason, if the Grant of an Office by a Bishop, whether it be an Office that is exerciseable by the Bishop himself, as Chancellor, or any other Office that concerns the Bishoprick, as Steward, &c. cannot be made for Twenty-one Years or Three Lives within the Exception of 1 *Eliz.* nor by a Dean and Chapter or other Ecclesiastical Corporation within 13 *Eliz.* But a Bishop by 1 *Eliz.* or others by 13 *Eliz.* may grant an antient Office for One Life, and that upon the Account of Necessity, as being no Diminution of the Revenue; but this being a Grant at Common Law, must be confirmed. But it seems that a Commissaryship, &c. is not grantable for Life with Confirmation to bind the Successor, for so it hath been held. The Case was thus, The Deanery of *Wolverhampton* annexed to the Deanery of *Windsor* being a Peculiar, and having Ordinary Jurisdiction, the Dean makes a Commissary, which is confirmed by the Chapter: The Dean dies; the Question was, If this was good to bind the Successor? By *Dodderidge* 'tis said, that such a Jurisdiction is judicial, and that Grant is but a Commission and Authority all Times remaining in the Ordinary. True it is, that Ecclesiastical Jurisdiction in judicial Acts may be executed by Substitute, but in Law they are the Acts of them that substitute the other; by 11 *H.* 4. 64. *a.* 7 *E.* 4. 14. 20 *H.* 6. 1. A Commissary may excommunicate and prove a Testament, but that shall be in the Name of the Ordinary. 20 *E.* 3. And a Grant of that by the Bishop is not good but during his Life, and shall not bind his Successor; for the Law hath appointed who shall execute such Jurisdiction *sede vacante*, *viz.* the Archbishops in their several Provinces; by 17 *Ed.* 3. 23. The Archbishop and the Dean and Chapter cannot grant the Jurisdiction of the Warden of the Spiritualties to hold after the Death of the Archbishop, which is a more strong Case. And if the Substitute as above-said offends, the Ordinary shall be punished for it, which is unreasonable, and the Grant being void cannot be made good by the Confirmation of the Chapter. And by *Coke* Chief Justice, if that should be a good Grant to bind the Successor, then the Successor cannot remove him, and yet the Successor shall answer for the Acts and Offences of the Commissary, which would be too hard; the

What Leases and Grants generally void against Successors.

Commissaryship granted.

Warden of the Spiritualties.

Bishops Leases.

Prebend of *Hatcherly*'s Case. *Noy* 153. And it is said, that an Office judicial, or partly judicial and partly ministerial, cannot be granted in Reversion, though an Office ministerial may. 11 *Coke* 4. Auditor *Curl*'s Case, 2 *Roll's Abr.* 154. However the Dean and Chapter's Confirmation will not make valid the Bishop's Grant of an Office for Two Lives; for the same Necessity which makes the Grants of Offices good for One Life, will not extend to Grants for Two or more Lives. 1 *Car. George Bishop of Chichester* v. *Freeland*, *Bridgm.* 30. *Trin.* 8 *Car. B. R. Walker* v. Sir *John Lamb*, 1 *Cro.* 259. And if the Grant be made for Two Lives, and one of them die before the Bishop, so that there is but one Life in Being against the Successor, yet the Grant being originally void, cannot be made valid by any After-Accident; by *Harvy* and *Croke*, the said Case of *The Bishop of Chichester* v. *Freeland*, *Cro.* 50. Yet if an Office by Custom hath been used to be granted by any Bishop for Two Lives, such Grants for Two Lives by such Bishop, with Confirmation of the Dean and Chapter, are good, as seemed to be agreed concerning the Office of Official or Chancellor of the Bishop of——granted to Two Persons, and the longer Liver of them, such Grants having been usually so made by the Bishops there. *Mich.* 3 *W. & M. B. R. Jones* v. *Bean.* Neither may the Bishop grant an Office with the antient Fee to one, and after make a Grant of it in Reversion to another, because there is no Necessity for the second Grant; and if such Grants were good, by the same Reason they might be made in Tail or in Fee, which would be directly against the Meaning of the Statute; nor can any such Grant be made good by any After-Act of the Grantee, as by Surrender, Release, or the like. But if by Prescription Time out of Mind, a Bishop, or other Ecclesiastical Corporation, hath used to grant an Office in Reversion, *Habendum* after the Death of the present Grantee for Life, such Grant is good with Confirmation, (and that without the Recital of the former Estate, 2 *Roll's Abr.* 154) by *Dyer*; to which *Manwood* said, that it is the Order in the Arches, and in the Prerogative Court, and of all the Courts of *Paul*'s, to grant the Offices in Reversion, and that every Office which doth belong to the Spiritual Courts are granted in Reversion; to which *Dyer* replied, I do not care nor regard what they do, but what they ought to do; and according to his Opinion, he said it had been there lately adjudged, and that a Prescription ought to be laid. *Mich.* 15 *Eliz. C. B. Leon.* 31, and *The Bishop of Salisbury*'s Case, vouched in *The Bishop of Chichester* and *Freeland*'s Case, *Pasch.* 2 *Car.* 1 *Cro.* 49. *Mich.* 8 *Car. B. R. Young* v. *Stowel*, 1 *Cro.* 279, and *Jones* 310. *Trin.* 15 *Car. B. R. Young* v. *Fowler*, 1 *Cro.* 555, and *Marsh* 38. *Trin.* 8 *Car. B. R. Walker* v. *Lamb*, *Jones* 263. But if no Prescription be for such Grant, it is void against the Successor; by *Harvy* and *Croke*, 1 *Cro.* 49. And when the Question was, Whether an Office had been usually granted in Reversion? The Plaintiff to prove it shewed a Grant of 4 *Ed.* 6, to one in Reversion, and confirmed 1 *Eliz.* and that the 7th of *Eliz.* the Reversioner surrendred, and took a new Grant to him and another: It was held by all the Court, that this was a good Inducement to believe that the Office was antiently so granted in Reversion; but being Matter of Fact it was left to the Jury, and they found for the Plaintiff, who after exhibited a Bill in the *Chancery* to be established in Possession according to the Verdict. *Mich.* 8 *Car. B. R. Young* v. *Stowel*, 1 *Cro.* 297, and *Jones* 310. But a Bishop may grant a new Office that is necessary with a reasonable

Grant of an antient Office for Two Lives void.

Aliter, if it be by Custom.

Grant in Reversion by a Prescription.

Of a necessary new Office with Fee.

Biſhops Leaſes.

reaſonable Fee, the ſame being confirmed by the Dean and Chapter, and it ſhall bind his Succeſſor as is ſaid to be adjudged, 10 *Jac. C. B.* in the Caſe of the Biſhop of *Ely*, who granted the Office of keeping of his Houſe and Garden for Life with the Fee of 3 *l. per Ann.* 1 *Cro.* 48.

If a new Biſhoprick be founded (as divers were in the Time of *H.* 8.) the Biſhops of ſuch new Biſhopricks are reſtrained by 1 *Eliz.* as others of old Foundations, and may be even as they grant Offices of Neceſſity for Life with Confirmation of the Dean and Chapter, that is in Poſſeſſion with a reaſonable Fee; (the Reaſonableneſs of which Fee ſhall be decided by the Courts of Law in which an Action concerning it ſhall depend) as excepted out of the general Reſtraint of the ſaid Statute. *Trin.* 23 *Eliz. Boulton*'s Caſe, vouched in *The Biſhop of Chicheſter* and *Freeland*'s Caſe, 1 *Cro.* 50. *Paſch.* 27 *Car.* 2. *Ridley* v. *Founel*, 3 *Keb.* 472, 506.

If ſuch an Office may be granted to bind Succeſſor, which was not uſed before 1 *Eliz.*

And it is ſaid in the ſame Caſe of *Ridley* v. *Pownel*, by *Hale* Chief Juſtice, that before the Statute 1 *Eliz.* there was no Difference in granting Offices between the antient and the new Biſhopricks, they both made their Grants as Owners, and not by reaſon of any Preſcription; therefore, if any new or old Biſhoprick uſed to make Grants of Offices for One, Two or Three Lives before that Statute, they may do ſo after the ſaid Statute: And it was alſo ſaid by him, that the new Biſhopricks, being taken out of the old, ſhall have the ſame Preſcriptions and Appendancies to the Part ſo taken out, as were in the old Biſhopricks: And the other Juſtices inclined to be of the ſame Opinion with *Hale:* But in this Caſe, becauſe it was only found by ſpecial Verdict, that this Office had been granted *ſeparalibus Temporibus* ſince the Foundation of the Biſhoprick, which was in the Time of *H.* 8. and that might be, and yet not before, but after the Statute 1 *Eliz.* For this Incertainty, and to ſupply this Defect in the Verdict, a new *Venire Facias* was taken out to have this Matter more ſpecially found. *Lev.* 2 *Rep.* 138. So that by the Opinion of the Court in this Caſe it ſeems to be, that no Office can be granted by any Biſhop to bind his Succeſſor, which was not an Office, and uſed to be granted, before the Statute 1 *Eliz.* and the ſame Law muſt be as to Offices grantable by other Eccleſiaſtical Perſons, by the 13 *Eliz.*

Grant of an Annuity *pro Conſilio impenſo & impendendo.*

A Biſhop of a new Biſhoprick cannot grant an Annuity *pro Conſilio impenſo & impendendo* to bind the Succeſſor, though it be confirmed; for when ſuch an Annuity was granted by the Biſhop of *Cheſter*, which is a new Biſhoprick, and the Grantee brought a *Writ of Annuity* againſt the Succeſſor, and did declare that the Predeceſſors of the ſaid Biſhop had granted reaſonable Fees, but did not aver that this Fee had been granted before; the Opinion of the Court was againſt the Plaintiff. *Trin.* 30 *Eliz. Boulton*'s Caſe, vouched in *The Biſhop of Chicheſter* and *Freeland*'s Caſe, *Bridgman* 30. But *Croke* Juſtice vouching this *Bolton*'s Caſe, in *The Biſhop of Chicheſter* and *Freeland*'s Caſe, *Paſch.* 2 *Car. Ley* 75, ſaith that *Bolton* averred in this Caſe that it was the antient Fee; and the Reaſon, for which Judgment was given againſt him, was, for that this was a voluntary Thing, and not an Office, to elect one Man to be of his Council, and it was not of Neceſſity to have this Man or that Man of his Council, for peradventure the Succeſſor would not make ſuch Election. And what is ſaid of a Biſhop with reſpect to the Statute of 1 *Eliz.* is alſo true with reſpect to the Statute of 13 *Eliz.* as to Eccleſiaſtical Perſons reſtrained by that Statute, with this Difference; That though a Biſhop, or other ſole Corporation, cannot grant an Office for One Life without Confirmation, as being a Grant at Common Law, yet

a Dean and Chapter, or other Corporation aggregate, may make ſuch Grant without the Confirmation of any. *Trin.* 11 *Jac. C. B. The Biſhop of Salisbury*'s Caſe, 10 *Co.* 60. *Paſch.* 32 *Eliz. Sale* v. *Biſhop of Coventry* and *Marſh*, 1 *Anderſon* 241. And Note, That neither Biſhops by the 14th of *Eliz.* nor other Eccleſiaſtical or Collegiate Corporation by the 13th of *Eliz.* are reſtrained from making Grants of Copyholds in Fee, in Tail, or for Lives, or for any Number of Years, according to the Cuſtom of the Manor; nor is Confirmation neceſſary to make ſuch Grants good, though it be made by a ſole Corporation, as by Biſhop, Prebendary, *&c.* 4 *Co.* 23, 24. Biſhops Leaſes.

A Sixth Rule to be obſerved in the making of theſe Leaſes, is, That it muſt be of Lands or Tenements which have moſt commonly been letten to Farm, or occupied by the Farmers thereof by the Space of Twenty Years next before the making of ſuch Leaſe, for that it is ſaid in Stat. 32 *H.* 8. **(Which have moſt commonly been letten.)** And it is ſaid by my Lord *Coke*, that if the Lands of which the Leaſe is made, have been letten for Eleven Years at one or at ſeveral Times within Twenty Years next before the making of ſuch Leaſe, it is ſufficient. 1 *Inſt.* 44. *b.* But where Lands belonging to the Archbiſhop of *York* had been antiently and uſually demiſed till within Twenty Years, in which Time they had been in the Hands of the King and of the Archbiſhop, but for the Two laſt Years only had been leaſed by the late Archbiſhop; it was held by *Keeling* Chief Juſtice, and *Twiſden*, that this was a good Leaſe within the Statute of 32 *H.* 8. to bind the Succeſſor, for that the Statute did not intend to introduce a Diſability as to the Lands to be leaſed, but only of the Eſtate to be granted out of Lands, and that it would be contrary to the Intent of the Statute to make other Conſtruction; and if Lands had been leaſed for Eleven Years only, that is not ſufficient within the Statute, and that the Collection of the Lord *Coke*, 1 *Inſt.* 44, was falſe, and not warranted by the Statute; for that the firſt Part of the Statute ſeems to refer to a more antient Time of being leaſed than Eleven Years only: But *Windham* and *Moreton* Juſtices were of a contrary Opinion, That the Statute ought to be obſerved in all its Circumſtances; which was not in this Caſe, the Lands having been out of Leaſe for above Twenty Years; and if other Conſtruction ſhall be made of the Statute, a great Inconvenience might inſue, for under Colour of Land being antiently leaſed, Biſhops may leaſe all they have, and leave nothing for the Succeſſor wherewith to maintain Hoſpitality, and therefore in their Opinions the Land ought to have been both antiently and newly leaſed, otherwiſe the Succeſſor ſhall not be bound; but *Windham* dying, the Two Judges gave Judgment according to their Opinion, *contra Moreton*, *Paſch.* 21 *Car.* 2. *B. R. Pemble* v. *Stern*, 1 *Sid.* 316, 416, ſame Caſe, 2 *Keb.* 325. 1 *Lev.* 212, and *Raym.* 165. And by *Vaughan* Chief Juſtice, Lands long ſince leaſed for 500 Years, are Lands uſually demiſed, though they have not been more than that once demiſed, for that the more received Senſe of the Words **[Lands uſually demiſed]** is, the common Continuance of Lands in Leaſe, though the Words may be taken in another Senſe, *viz.* for the oftner Farming, or repeated Acts of leaſing Lands. *Vaughan's Rep.* 34, ſame Caſe, Sir *Tho. Jones's Rep.* 37. And it is ſaid, that Copyhold Lands that have been granted by Copy of Court-Roll in Fee for Life, or Years, according to the Cuſtom of the Manor, have been ſufficiently let to farm within this Statute, altho' an Eſtate granted by Copy is, in Judgment of the Common Law, but an Eſtate at Will, yet all Lands that have been

(6.) Theſe Leaſes muſt be of Lands and Tenements which have moſt commonly been letten, *&c.*

The more received Senſe of the Words [*Lands uſually demiſed.*]

Biſhops Leaſes.

accuſtomably uſed to be demiſed at Will, by thoſe who have the Inheritance of the Lands, are Lands let to Farm within this Statute; ſo if they be leaſed by Indenture, or the Reverſion of them only. *Paſch.* 3 *Jac. Heydon*'s Caſe, 3 *Co.* 7. *Trin.* 3 *Jac. B. R.* in *The Dean and Chapter of Worceſter*'s Caſe, 6 *Co.* 37. And it is ſaid to be often ſo adjudged. *Trin.* 3 *Jac. B. R. Baugh* v. *Hayns*, 2 *Cro.* 76. *Raym.* 167. So Lands that have been but twice letten, are ſaid to be Lands uſually letten; but otherwiſe it is, if they have been but once letten, or if they have been leaſed by one Contract from Year to Year for Three Years, for that this is but one Leaſe. *Paſch.* 2 *Jac. B. R.* 2 *Roll's Abr.* 261, 262. *Vaughan* 33.

Where the King's Leaſes ſhall not avail the Biſhop.

But if the Temporalties have for divers Years been in the King's Hand's, as for Fifty Years, or if it cannot be made to appear that the Lands let were let by the Biſhop, although Leaſes have been made of them out of the *Exchequer*, yet upon this Account a Leaſe by a new Biſhop of ſuch Lands will be void; for the King making Leaſes upon the Eſtate that he hath during the Vacation, ſhall not make the Biſhops Lands, *&c.* be demiſeable within the Statute, becauſe the King hath not an Eſtate of Inheritance thereof. *Paſch.* 19 *Jac. B. R. The Biſhop of Oxford*'s Caſe, *Palm.* 176.

How this Rule is to be obſerved.

And this Rule is not only to be obſerved by Perſons that make Grants or Leaſes by Virtue of the Statute of 32 *H.* 8. *viz.* without Confirmation, but alſo by Biſhops, and other ſole Corporations, although Confirmation be made of their Leaſes, and alſo by Corporations aggregate, that need no Confirmation; for though the Statute of 32 *H.* 8, which enables Perſons Eccleſiaſtical to make Leaſes for Three Lives or Twenty-one Years without Confirmation, is the only Statute that expreſly puts this Condition upon Leaſes made by Eccleſiaſticks; and ſo it may be thought that Lands not uſually let, may be well letten with Confirmation, yet both the reſtraining Statutes of 1 *Eliz.* and 13 *Eliz.* do implicitly reſtrain from making Leaſes of Lands not uſually let, becauſe they both require that the antient Rent ſhall be reſerved; by which it is clearly hinted and intended, that the Land letten ſhall be ſuch Land as hath been uſually demiſed, for otherwiſe the antient Rent cannot be reſerved for it. *Hill.* 44 *Eliz. C. B. The Biſhop of Hereford* and *Scory*, 3 *Cro.* 874.

Covenants to be obſerved.

And as theſe Leaſes muſt be of Lands and Tenements which have moſt commonly been letten to Farm, ſo no Covenants can be added in any new Leaſe to bind the Succeſſors which have not been uſed in former Leaſes; therefore where a Biſhop made a Leaſe, and covenanted that he and his Succeſſors would pay all Taxes during the Term, and in an Action of Covenant brought againſt the Succeſſor for not paying a Tax made by Parliament in ſuch a Year during the Term; Judgment was given for the Defendant, for that the Plaintiff did not ſhew that the like Covenant had been in former Leaſes; but it was ſaid, be this Covenant as it will, it would not avoid the Leaſe. *Mich.* 24 *Car.* 2. *B. R. Davenant* v. *Epiſcop. Sarum*, 2 *Lev.* 68, ſame Caſe, 1 *Vent.* 222, and 3 *Keb.* 69.

(7.) That the accuſtomed Rent or more muſt be reſerved.

A Seventh Rule to be obſerved is, that upon every ſuch Leaſe there muſt be reſerved ſo much yearly Rent, or more, as hath been moſt accuſtomably yielded and paid for the Lands within Twenty Years next before ſuch Leaſe thereof made, to be due and payable yearly to the Leſſors and their Succeſſors during the Continuance of ſuch Leaſe. This is an expreſs Condition in the Statute of 32 *H.* 8. *c.* 28, and in the Statute of 1 *Eliz. c.* 10. 13 *Eliz. c.* 20, ſo that no Leaſe can be made by any Eccleſiaſtical or Collegiate Corporation to bind Succeſſion,

sion, but with Conformity to this Rule; no not with Confirmation, in Cases when Confirmation is neceſſary; for though the Exception in the 1ſt and 13th of *Eliz.* concerning the accuſtomed Rent is more general than that of the 32d of *H.* 8. yet muſt the Pattern of the 32d of *H.* 8. be followed. 1 *Inſt.* 45. *Hardres Rep.* 326. Biſhops Leaſes.

This Rule contains ſeveral Things to be particularly noted; as Firſt, There muſt be a Rent reſerved upon every ſuch Leaſe. *Carter* and *Cleypole*'s Caſe, *Moor* 593. So that the Leaſe muſt not be of Things that lie meerly in Grant, as is before ſaid, out of which no Rent can be reſerved; and this is the Ground or Reaſon of the Fifth Rule before laid down. There muſt be a Rent.

Secondly, There muſt be ſo much Rent reſerved for the Things let, as hath been moſt accuſtomably yielded and paid within Twenty Years next before ſuch Leaſe made; and if there have been different Rents reſerved upon ſeveral Leaſes, the accuſtomed Rent mentioned in the Statute ought to be underſtood of the Rent reſerved upon the laſt Leaſe, and not upon any former Leaſe, for that the Rent having been altered ſince, cannot be called the accuſtomed Rent; by *Hale* Chief Baron, in *Moris* and *Antrobus*'s Caſe, *Paſch.* 15 *Car.* 2. in *Scaccar.* *Hardres* 326. But if One of Three Manors, formerly let together, for a certain Rent be let alone, and in the new Leaſe no certain Rent be reſerved, but it is only ſaid, rendering to the Leſſor and his Succeſſors the uſual and accuſtomed yearly Rent and Services at the Days and Times accuſtomed; in this Caſe no Rent at all is reſerved, and therefore the Leaſe is void. *Mich.* 3 *Car. C. B. Owen* v. *Thomas Aprees*, 1 *Cro.* 94. For ſo (I take it) muſt that Caſe be underſtood, comparing it as reported here by *Croke* (which is very obſcure) with the ſame Caſe as reported by *Hetly* 22. though by Chief Juſtice *Vaughan*, the Leaſe was of all the Three Manors, excepting only Parcel of one of them; but that will be the ſame Thing as if the one whole Manor had been intirely excepted: for if the whole was not demiſed, there could be no uſual and accuſtomed Rent for that which was demiſed: But 'tis agreed by the ſaid Chief Juſtice, if the three Manors had been intirely demiſed as uſual, reſerving the antient Rent, without expreſſing what it was, the Leaſe and Reſervation had been good. 3 *Keble* 380. So if a certain Parcel of Land hath been accuſtomably letten for a certain Rent, and in a new Leaſe of the ſame Lands, one Acre of Land more, not accuſtomably letten, is demiſed with the other Parcel, although that ſo much more than the old Rent be reſerved, as the Lands added, which were not uſually letten, be worth yearly according to the extended Value thereof; yet this Leaſe will not hold good by the Statutes, becauſe here is Land let not uſually let, and the Rent iſſueth out of the whole, ſo that the accuſtomable Rent for the Lands that had been accuſtomably letten is not reſerved; or if the accuſtomable Rent of Lands accuſtomably letten be reſerved in a new Leaſe thereof, and one Acre of Land be added in the Leaſe, though that Acre was of Lands alſo uſually letten, yet the Leaſe is void for the whole. So if Leaſes have been formerly and uſually made of Land wherein was an Exception of all the great Trees, as Oak, Aſh, Crab-Trees, *&c.* and after a Leaſe is made without the ſaid Exception, ſuch After-Leaſe is void. *Paſch.* 15 *Jac. B. R. Smith* v. *Bowles*, 3 *Bulſt.* 290. The Reaſon given is, becauſe there is more let by the laſt Leaſe than was anciently let by the former, *viz.* Trees, and the Profits of them, as, the Maſt and Fruit, the Boughs, and the Soil on which they ſtand; for when the Trees were formerly excepted, the Boughs, Fruit, *&c.* were alſo excepted thereby. *Hill.* 15 *Jac.* 2 *Cro.* 458. The accuſtomed Rent, what. Whether the Leaſe need to expreſs what the former Rent was. If one Acre not accuſtomably letten, be added, &c.

Bishops Leases.

458. So a Leaſe was made of a Rectory rendring Forty Pounds *per Annum*, and a Couple of Capons, or Six Shillings Eight Pence in Money over and above the ſaid Rent. And by *Hale* Chief Baron, this ſecond Leaſe was not good, by reaſon that in the former Leaſe the Capons were reſerved, and ſo Part of the Rent; in the ſecond Leaſe the Husband only covenants to pay them, which Covenant of his will not bind his Wife, if ſhe ſurvive him, therefore his Covenant will not amount to a Reſervation; otherwiſe, if both had covenanted, or if the Leaſe had been made to the Husband alone, with ſuch a Covenant. *Paſch.* 15 *Car. Saccar. Morice* v. *Antrobus*, *Hardres* 325. Yet if one ſeiſed of a Parſonage, doth let a Portion of the Tithes for One and twenty Years, rendring 8*l.* Rent, and doth reſerve the Paſturage of a Colt in the Land of the Leſſee; and the Leaſe being expired, the Succeſſor doth let the Tithes in the like Manner for One and twenty Years, omitting the Paſturage of the Colt; in this Caſe the ſecond Leaſe is good, notwithſtanding the Omiſſion of the Paſturage; for that was a Thing only reſerved to the firſt Leſſor and his Aſſigns, for that it was reſerved out of the Land of the Leſſee, and the Succeſſor could not reſerve Paſturage out of the Land of the firſt Leſſee, he not being his Tenant of the Tithes, and ſuch Reſervation is void; but otherwiſe it had been, if the Reſervation of the Paſturage had been general; *per Curiam*, *Paſch.* 17 *Jac. B. R. Euſden* v. *Denny*, *Palmer* 106. 1 *Mod. Rep.* 203. 2 *Mod. Rep.* 57. So if ſeveral Parcels of Land, *&c.* have formerly been letten together for a certain Rent, and then one Part or Parcel of the ſame Land is let alone, and a Rent *pro rata* is reſerved, this is good, becauſe in Subſtance the accuſtomable Rent is reſerved, and the Succeſſor hath no Prejudice. 1 *Inſt.* 44. *Mich.* 26 *Car.* 2. *B. R. Threadneedle* v. *Lineham*, 3 *Keb.* 380. But if a full Proportion of the Rent be not reſerved according to the Value of the Part let alone, eſtimating it with the other Part not let with it, it follows that the Leaſe of this Part alone is void.

Leaſe of Tithes, with a Reſervation of Paſturage.

Statutes extend not to Heriots and Services.

Or if Copyhold Lands demiſeable for Three Lives rendring a certain Rent, and Heriotable upon the Death of every Tenant dying in Poſſeſſion, be let by Indenture for Three Lives, rendring the antient Rent, but without the Reſervation of any Heriot, yet the Non-reſervation of the Heriot ſhall not impeach the Leaſe; for the Statutes are, that the antient Rents ſhall be reſerved, which is intended only of the very antient Rent, and doth not extend to caſual and accidental Services, as Heriots, *&c.* and an Heriot is not an annual Thing, nor depending upon the Rent. *Trin.* 3 *Jac. B. R. Baugh* v. *Haynes*, 2 *Cro.* 76. *Trin.* 3 *Jac. B. R.* Dean and Chapter of *Worceſter*'s Caſe, 6 *Co.* 37. But if the Demeſnes of a Manor have been uſually demiſed excepting the Copyhold Lands, (for Copyhold Lands are accounted as Part of the Demeſnes of a Manor, 1 *Co.* 46. *b.*) but the Services have not been demiſed, and a Leaſe be made of the whole Manor reſerving the antient Rent, this Leaſe is void, adjudged in Chief Baron *Tanfield* and *Fox*'s Caſe, vouched in the Biſhop of *Chicheſter* and *Freeland*'s Caſe, *Ley* 77. But a Biſhop ſeiſed of Two Manors, Copyhold and Free, leaſeth them to *B.* for Three Lives, reſerving the antient Rent; *B.* afterwards grants the Demeſnes of one of the Manors to *D.* for Ninety-nine Years if the Lives live ſo long; and after that grants and aſſigns all his Term and Intereſt to *N.* who ſurrenders to the Biſhop, and takes a new Leaſe for Three Lives of both the Manors (except the Lands granted to *D.*) at the old Rent, then a new Biſhop is made, and all the Lives of the firſt Leaſe die; whether the Leaſe made to *N.* upon the Surrender was a good Leaſe to bind the Succeſſor of the Biſhop that made

it or not, was the Queſtion. Adjudged that it was a good Leaſe, by reaſon there was no Prejudice, but an Advantage to the Succeſſor by the ſecond Leaſe: But *Vaughan* and *Ellis* were of a contrary Opinion, becauſe the old Rent could not be ſaid to be reſerved, when the Demeſnes of one of the Manors were excepted out of the ſecond Leaſe. *Mich.* 26 *Car.* 2. *B. R. Thredneedle* v. *Lineham*, 3 *Keb.* 372, 595, the ſame Caſe, 1 *Mod. Rep.* 203. and 2 *Mod. Rep.* 57. So if a Biſhop doth leaſe Parcel of the Demeſnes of a Manor for Life, not warranted by the Statute of 1 *Eliz.* and after doth Leaſe the Manor to another for Life, the ſaid Parcel ſo before leaſed for Life ſhall paſs with Attornment of the firſt Leſſee, for that the ſaid Leaſe did not make any Diſcontinuance, but the Reverſion thereof continued Parcel of the Manor. *Paſch.* 11 *Car. B. R. Walter* v. *Jackſon*, upon a Writ of Error; and by *Barkley* it had been formerly ſo adjudged in *C. B.* 2 *Roll's Abr.* 58.

Biſhops Leaſes.

Where the latter Leaſe is no Prejudice, but an Advantage to the Succeſſor.

Note alſo from this Rule, That to let Lands, *&c.* for more than the antient or accuſtomed Rent, makes no Avoidance of a Leaſe, for that may be done by the very Letter of the Statutes.

More than the antient Rent may be reſerved.

Alſo by the Leaſe, the Rent muſt be due and payable yearly; and therefore if the Rent hath been by the former Leaſes made due and payable at Four Days in the Year, or at Two Days in a Year, and after is made due and payable yearly, or but at one Day in each Year, it is ſufficient, and hurts not the Leaſe; for the Statutes are, that the Rent be reſerved and payable yearly, and therefore if the Rent be yearly reſerved the Statutes are ſatisfied. *Trin.* 3 *Jac.* Dean and Chapter of *Worceſter*'s Caſe, 6 *Co.* 37. *Trin.* 3 *Jac. Baugh* v. *Haynes*, 2 *Cro.* 76. So if the Rent in former Time was uſually reſerved to be paid upon the Land, and now by a new Leaſe it is reſerved to be paid at any remote Place, yet it is well enough; by *Clench*, 28 *Eliz. C. B. Grindal* Biſhop of *York*'s Caſe, 4 *Leon.* 78. But the Rent muſt be reſerved payable every Year to the Leſſor as well as to the Succeſſor, for though the reſtraining Statutes were made for the Benefit of the Succeſſor, yet it is not ſufficient to reſerve the antient Rent to the Succeſſor, and none at all or leſs Rent to the Leſſor himſelf, for that by the Letter of the Statute of 32 *H.* 8. the Rent muſt be payable yearly during the whole Term of Twenty-one Years, or Three Lives. Alſo the Leaſe muſt be ſuch which may not only reſerve a yearly Rent, but alſo ſuch as thereby the Rent muſt be payable, recoverable yearly, both by the Leſſor and the Succeſſors; and this a Ground or Reaſon of the fifth Rule, and of ſome of the Caſes relating thereunto. If a Leaſe be let for One and twenty Years from *Michaelmas*, reſerving the Rent during the Term, payable at the uſual Feaſts, or within Ten Days after; although by the Reſervation the laſt Quarter's Rent ſeems not to be payable within the Term, but Ten Days after the Term ended, yet this is a good Leaſe, and the Rent being reſerved payable during the Term, there ſhall not be allowed Ten Days to the Leſſee for the Payment of it the laſt Quarter. *Trin.* 25 *Car.* 2. *B. R. Baily* v. *Murin*, 1 *Ventris* 245.

An Eighth Rule to be obſerved in making Church or College Leaſes is, that they muſt not be made without Impeachment of Waſte; this is alſo an expreſs Condition in the Statute of 32 *H.* 8. *cap.* 28. but is not mentioned in the Statute of 1 *Eliz.* or 13 *Eliz. c.* 10. yet as to 13 *Eliz.* it has been held and reſolved, that the Perſons thereby reſtrained from making long and unreaſonable Leaſes, are by the Equity of the ſaid Statute reſtrained to make Leaſes diſpuniſhable of Waſte; for the Preamble ſpeaks, that unreaſonable Leaſes were the chiefeſt Cauſes of Dilapidations, and the Decay of all Spiritual Livings and Hoſpitality; ſo that the Statute was

(8.) Theſe Leaſes muſt not be without Impeachment of Waſte.

Biſhops Leaſes.

made to prevent ſuch unreaſonable Leaſes that had ſuch ill Effects, and by conſequence to cure ſuch ill Effects. *Trin.* 3 *Jac. B. R.* the Dean and Chapter of *Worceſter*'s Caſe, 6 *Co.* 37. But that I find not that any ſuch Conſtruction hath been made of the Statute of 1 *Eliz.* which concerneth Biſhops alone, yet that Statute being made alſo to reſtrain their making of unreaſonable Leaſes muſt be thought to bear the ſame Conſtruction. See 1 *Inſt.* 45. *a.* and by *Whitlock*, *Hill.* 22 *Jac. Evans* and *Kiffin* v. *Aſcue*, *Palmer* 468. However, Leaſes made by them without Impeachment of Waſte, and not confirmed by the Dean and Chapter, are void by *Stat.* 32 *H.* 8. *c.* 28. And if ſuch Leaſes being ſo confirmed ſhall not be thought to be made void by the Statute of 1 *Eliz.* yet I apprehend, that if ſuch Tenant go about to commit Waſte, however his Leaſe be made, he may be ſtopped by Prohibition, and after attached if he perſiſt, for ſo may the Biſhop himſelf or any other Church-man, in caſe he doth Waſte on the Church's Dower. *Mich.* 12 *Jac. Richard Liford*'s Caſe, 11 *Co.* 49. And this may be not only to prevent Waſte in cutting down Trees, but for pulling down or defacing Houſes, or the like. *Mich.* 13 *Jac. The King* v. *Zaker*, *Bulſtr.* 91. Yet a Prohibition being moved for, to hinder a Parſon from digging Lead Mines within his Glebe, the Court doubted of it, but inclined that this was not ſuch a Waſte for the which he ought to be prohibited, for it ought to be ſuch Waſte as was to the Deſtruction of the Church, for the which a Parſon ought not only to be prohibited, but may be deprived as a Dilapidator. *Mich.* 15 *Car.* 2. *The Lord Rutland* v. *Green or Gee*, 1 *Sid.* 152. and 1 *Keb.* 557. See for this Matter, 2 *H.* 4. 3. *Moor* 917. *Godb.* 259. 3 *Bulſt.* 154. 2 *Bulſtr.* 279. And if a Biſhop's Leaſe cannot bear out the Tenant in doing that which he himſelf could not lawfully do, were the Thing leaſed in his own Poſſeſſion, yet if Land hath been accuſtomably letten by a Biſhop, *&c.* without any Exception of Timber-Trees, as Oak, Aſh, *&c.* growing thereupon, ſuch Leaſe is good, for the Tenant may only by ſuch Leaſe take the Boughs and Maſt thereof, he not having an abſolute Propriety in the Trees themſelves by ſuch Leaſe, but only the Fruit and Boughs; nor hath the Biſhop, *&c.* himſelf a greater Right in them, as may be collected from *Smith* and *Bole*'s Caſe, *Hill.* 15 *Jac.* 2 *Cro.* 458. ſame Caſe, 3 *Bulſtr.* 290. Yet 'tis ſaid that a Parſon hath ſuch an Eſtate and Intereſt as he may maintain an Action of Waſte, for Waſte in cutting down Trees, *&c.* by his Termor. 10 *H.* 7. 5. *b.*

Prohibition to prevent Waſte.

Two Ways of making Leaſes without Impeachment of Waſte.

And note, That Leaſes may be made without Impeachment of Waſte, two Ways, *viz.* either expreſly by expreſs Words in the Leaſe declaring the ſame, or implicitly by Conſtruction of Law; as if a Leaſe be made for Life, the Remainder for Life, this is diſpuniſhable of Waſte, and ſo not warranted, at leaſt by the Statute of 13 *Eliz. c.* 10. *Trin.* 3 *Jac. B. R.* Dean and Chapter of *Worceſter*'s Caſe, 6 *Co.* 37. But if a Leaſe be made to one for Three Lives this Leaſe is good, becauſe 'tis not diſpuniſhable of Waſte, and the Occupant, if any happen, ſhall be puniſhed for Waſte; for the Statute of *Glouceſter*, *c.* 5. gives an Action of Waſte againſt any one that holds in any manner for Term of Life or Years, and an Occupant in this Caſe holds for Term of Life; and note, a Biſhop's Leaſe exceeding the Statute is void *in Toto.* See 1 *Salk.* 189.

Now concerning Colleges in the two Univerſities and the Colleges of *Wincheſter* and *Eaton*, there is a particular Statute, which, to the making good a Leaſe to be made by them, doth injoin one Thing more; for it is enacted by Stat. 18 *Eliz. c.* 6.

Bishops Leases.

Stat. 18 *Eliz.* c. 6. College Leases.

That no Master, Provost, President, Warden, Dean, Governor, Rector, or chief Ruler of any College, Cathedral Church, Hall, or House of Learning in any of the Universities of Cambridge or Oxford, nor any Provost, Warden, or other Head-Officer of the Colleges of Winchester or Eaton, nor the Corporation of any of the same, by what Title, Stile or Name soever they now be, shall or may be called, after the End of this present Session of Parliament, shall make any Lease for Life, Lives or Years, of any Farm, or any their Lands, Tenements or other Hereditaments to the which any Tithes, Arable Lands, Meadows or Pasture, doth or shall appertain, except that the One Third Part at the least of the old Rent be reserved in Corn for the said Colleges, Cathedral Church, Halls and Houses; that is to say, in good Wheat after the Rate of 6 s. 8 d. the Quarter, or under, or good Malt at 5 s. the Quarter, or under, to be delivered yearly upon Days prefixed, at the said Colleges, Cathedral Church, Halls or Houses; and for Default thereof, to pay to the said Colleges, Cathedral Church, Halls or Houses, in ready Money, at the Election of the said Lessees, their Executors, Administrators and Assigns, after the Rate of the best Wheat and Malt in the Market of Cambridge, for the Rents that are to be paid to the Use of the House or Houses there; and in the Market of Oxford, for the Rents that are to be paid to the Use of the House or Houses there; and in the Market of Winchester, for the Rents that are to be paid to the Use of the House or Houses there; and in the Market of Windsor, for the Rents that are to be paid to the Use of the House or Houses at Eaton, is or shall be sold the next Market Day before the said Rent shall be due, without Fraud or Deceit. And that all Leases otherwise hereafter to be made, and all collateral Bonds, or Assurance to the contrary by any of the said Corporations, shall be void in Law to all Intents and Purposes. The same Wheat, Malt or Money coming of the same, to be expended to the Use of the Relief of the Commons and Diet of the said Colleges, Cathedral Church, Halls and Houses only, and by no Fraud or Colour let or sold away from the Profit of the said Colleges, Cathedral Church, Halls and Houses, and the Fellows and Scholars in the same, and the Use aforesaid, upon Pain of Deprivation of the Governor and chief Rulers of the said Colleges, Cathedral Church, Halls and Houses, and all others thereunto consenting.

One Third Part of the Rent to be reserved in Corn.

How to be expended.

But this Act, or any thing therein contained, shall not extend, or be in any wise prejudicial to any Lease to be made of a Barn called Mouncken Barn, with a certain Portion of Tithes, rising, growing and being in the Parish of Southweek in the County of Sussex, being Parcel of the Possessions of Maudlin College in Oxford, so that the Term demised in and by the said Lease exceed not the Number of Ten Years, from and after the Feast of St. Michael the Archangel next coming.

Not to extend to *Mouncken* Barn.

Neither shall this Act extend to any Lease to be made by the President and Scholars of the College of St. John Baptist in Oxford, to any Heir Male of Sir Thomas White, late Knight and Alderman of London, Founder of the said College; which Lease shall be made according to the Meaning of the Foundation and Statutes of the said College of the Manor of Fifield, and no other Hereditaments. Stat. 18 Eliz. cap. 6.

Nor St. *John Baptist* College, *&c.* founded by Sir *Thomas White*.

This

Parſons Leaſes.

How the Word *Tithes* ſhall be intended.

This Statute enacting, That no Leaſe ſhall be made of any Farm, or any of their Lands, Tenements or Hereditaments, to the which any Tithes, arable Land, Meadow or Paſture doth or ſhall appertain, except One Third Part at the leaſt of the old Rent be reſerved in Corn, *&c.* It hath been a Queſtion, whether this Word *Tithes* be to be intended Tithes of Corn, or any Cuſtomary Tithes of Money, *&c.* as in *London*, where Money is paid as the Tithes of Houſes; and adjudged by *Manwood* Chief Baron, that it is to be intended of Tithe Corn; for that the Parliament never meant to cauſe theſe Farmers to pay Corn, who had no Corn or Land that beareth an annual Crop, as Arable, Meadow or Paſture, and not of Wood, Heath, Mariſh, *&c.* But a Writ of Error was brought of this Judgment. *Savil,* Caſe 160. *fol.* 68.

That this is a private Statute.

This is a private Statute, and muſt be pleaded, otherwiſe the Court need not take Notice of it. *Savil,* Caſe 198. *fol.* 129.

Dulwich College is by its Statutes reſtrained from making Leaſes, except for Twenty-one Years, at a Rack-Rent; it made a Leaſe for Twenty-one Years under the Rack-Rent to a Perſon who improved the Eſtate by Building, in Conſideration of which they made an Entry in their Regiſter, recommending that at the End of the Leaſe the College ſhould make him a new Leaſe at the antient Rent; this was ſigned by the Maſter-Warden and moſt of the Fellows, and afterwards an Order was made to that Effect, and ſigned in like Manner. The Chancery refuſed to carry this into Execution. *Taylor* v. *Dulwich Hoſpital,* 1 *Williams* 655, *&c.*

CHAP. XLIII.

Leaſes by Parſons, Vicars and others, of their Eccleſiaſtical Benefices.

Leaſes of Parſons, Vicars, *&c.*

IT follows next to be ſhewed particularly, what the Law is at this Day as to Leaſes made by Parſons, Vicars, or others having Benefices or Promotions with Cure of Souls. As to which, theſe Things are to be noted:

Firſt, That Parſons and Vicars are expreſly excepted out of the Statute of 32 *H.* 8. *c.* 28. ſo that they are not, as other ſole Corporations, enabled by that Statute to make any Leaſe to bind their Succeſſors without the Confirmations of their Patrons and Ordinaries.

Secondly, That they are not reſtrained by the Statute of 13 *Eliz.* or other Statute, from making Leaſes (ſuch Confirmation being had) for Twenty-one Years or Three Lives of Lands, *&c.* accuſtomably letten, reſerving the accuſtomable yearly Rent; but by the ſaid Statute of 13 *Eliz.* they are, as others, reſtrained from making Leaſes or Eſtates for longer Time, or without Regard to the Limitations therein mentioned.

Muſt be made with Conformity to the Eight foregoing Rules.

Thirdly, That all their Leaſes muſt be made with Conformity to the Eight Rules before ſet down, even as others. But it is no neceſſary Qualification in the Leſſor that he be a Prieſt; for if a meer Lay-

man be admitted, inſtituted and inducted into a Benefice uſually let, *&c.* and doth make a Leaſe thereof for Years or Lives, which is confirmed by the Patron and Ordinary, and then he is deprived, for that he is but a meer Layman; yet this Leaſe ſhall bind the Succeſſor, becauſe he was a Parſon *de Facto*, and ſuch a one whereof the Law takes Cognizance by his Induction, and the People cannot take Notice of any other: By *Gaudy*, *Popham* and *Fenner*, *Paſch.* 42 *Eliz. B. R. Coſtard* v. *Windet*, 3 *Cro.* 775, ſame Caſe, *Moor* 606. So it is not material whether the Incumbent, be he Clerk, or Layman, be of the Age of One and Twenty Years, for his Leaſe ſhall be good though he be of leſs Age. *Brooks Abr.* Tit. *Age*, *numb.* 80. But though, as hath been ſaid, it be not a neceſſary Qualification that he be a Prieſt, or of ſuch an Age, to bind the Succeſſor, yet it is neceſſary that he be an Incumbent *pro tempore* at leaſt. If he that is a legal Incumbent makes a Leaſe, *&c.* and after is deprived for not reading the Articles in Two Months, or for other Cauſe, yet the Leaſe is good. 1 *Roll's Abr.* 476, 477. But if he that makes the Leaſe be but a ſuppoſed Incumbent, or be in a Church by a Super-Inſtitution, or the like ſeeming Title, and ſo be reputed the legal Incumbent, he cannot make a Leaſe to bind after his Death, or the Death of the true Incumbent: Accordingly the Caſe was, that *A.* being made Biſhop in the Time of *Edward* the Sixth, and he living, and not deprived, *B.* was conſecrated Biſhop of the ſame Dioceſe in the Time of Queen *Mary*; *B.* makes a Leaſe of Land Parcel of the Poſſeſſions of the Biſhoprick, and then both theſe Biſhops die (though the laſt ſurvived); it was adjudged, that albeit all judicial Acts done by *B.* as Inſtitutions, Certificates, *&c.* were good, yet not ſuch voluntary Acts as tend to the Impoveriſhing of the Succeſſor; therefore the Leaſe was held to be void. *Mich.* 17 *Jac. Obrian*, *&c.* v. *Kinivan*, 2 *Cro.* 552.

Parſons Leaſes.

Though Leaſes by Parſons or Vicars be in all Reſpects well made and firm, yet they may become void before the Term limited in them be expired; for it hath been enacted as followeth; **That the Livings appointed for Eccleſiaſtical Miniſters, may not by corrupt and indirect Dealings be transferred to other Uſe; Be it enacted by the Authority of this preſent Parliament, that no Leaſe after the Fifteenth Day of** May **next following the Beginning of this Parliament, to be made of any Benefice or Eccleſiaſtical Promotion with Cure, or any Part thereof, and not being impropriated, ſhall indure any longer than while the Leſſor ſhall be ordinarily reſident, and ſerving the Cure of ſuch Benefice without Abſence above Fourſcore Days in any one Year, but that every ſuch Leaſe,** (ſo ſoon as it, or any Part thereof, ſhall come to any Poſſeſſion or Uſe above forbidden, or) **immediately upon ſuch Abſence, ſhall ceaſe and be void; and the Incumbent ſo offending ſhall for the ſame loſe one Year's Profit of his ſaid Benefice, to be diſtributed by the Ordinary among the Poor of the Pariſh: And that all Chargings of ſuch Benefices with Cure, hereafter with any Penſion, or with any Profit out of the ſame to be yielded or taken, hereafter to be made, other than Rents to be reſerved upon Leaſes hereafter to be made, according to the Meaning of this Act, ſhall be utterly void.**

How theſe Leaſes being well made may become void by 13 *Eliz. c.* 20.

Provided, That every Parſon by the Laws of this Realm allowed to have Two Benefices, may demiſe the one of them upon which he ſhall not then be moſt ordinarily reſident, to his Curate only, that ſhall there ſerve the Cure for him; but ſuch Leaſe ſhall indure no

Proviſo for demiſing one Benefice.

Parsons Leases.

Words discontinued by 14 *Eliz. c.* 11.

longer than during such Curate's Residence, without Absence above Forty Days in any one Year. Stat. 13 Eliz. cap. 20.

And by the Statute of 14 *Eliz.* 11. it is enacted, **That these Words,** [So soon as it, or any Part thereof, come to any Possession or Use above forbidden, or] **which Words are contained in the said Thirteenth Year, touching Leases or Benefices, and other Ecclesiastical Livings with Cure, shall not be revived by this Act, but remain discontinued, and shall from henceforth be omitted out of the said Act; any Thing in the said Act, or in this Act, to the contrary notwithstanding.**

If the Parson's Lease shall be void he performing his Cure, though not dwelling in the said Parish, &c.

Notwithstanding this Statute of 13 *Eliz.* if a Parson or Vicar have made a Lease of his Glebe or Tithes, and being not resident in the Parsonage or Vicarage House, as Statute of 21 *H.* 8. *cap.* 13. doth require he should, or doth not usually dwell in the same Parish, and yet doth upon all Occasions resort to his Parish, read Divine Service in his Church, and serve the Cure thereof duly, the Lease made by him is not void upon the Account of Non-residence, for then he should have been absent for Eighty Days together at one Time in the Year. *Pasch.* 9 *Jac. Sheppard* v. *Twoulsie*, 1 *Bulst.* 111. Yet before this Time it was adjudged upon special Verdict found, that a Parson being absent for several Quarters in One Year, Sixty Days in every Quarter, that this was such an Absence as would make void his Lease. 5 *Jac. B. R. Jennings* v. *Haithwaite*, *Yelverton* 106, same Case, 1 *Brownlow* 208. So it is said to be adjudged, that if the Parson be absent at several Times, *viz.* Ten Days at one Time, and at other Times in the same Year for above the Space of Eighty Days, that thereby he is non-resident within the Statute. *Sidner* and *Calvert*'s Case, *Noy* 116. And note, That this Statute of 13 *Eliz. c.* 20. is a general Law, as was adjudged in the said Case of *Jennings* and *Haithwaite*.

A Bill was by Lessee of the Parson of ———, for Tithes against the Defendant, a Parishioner; to which the Defendant pleaded the Statute 13 *El.* 20. by which it was enacted, That no Lease of any Benefice or Ecclesiastical Promotion with Cure, or any Part thereof, shall endure any longer than while the Lessor shall be ordinarily resident, and serving the Cure of such Benefice, without Absence above 80 Days in any one Year, but that such Lease immediately upon such Absence shall cease and be void, *&c.* and that the Lessor was absent above 80 Days in such Year, whereby his Lease to the Plaintiff did become void; and the Plea being admitted to be heard according to the Rules of Court, no one then appeared to defend or maintain the Title of the Plaintiff; for it was said by the Counsel for the Defendant, that such Plea was formerly allowed; that it was allowed 5 *Feb. Hill.* 12 *Geo.* between *Mills* and *Etheridge*.

That it was allowed also *Pasch.* 12 *Geo.* between *Quinter* and *Messenden*, and between *Quinter* and *Downes*, that the sole Question in those Cases was, if the Defendant should not answer to the Quantities and Values alledged by the Bill at the same Time he tenders his Plea, so as where the Defendant insists on a *Modus* as a Discharge of his Payment of Tithes *in Specie*, yet the Defendant ought to answer to the Quantity and Value of the Tithes charged in the Bill; otherwise if it were afterwards found there was no such *Modus*, the Plaintiff cannot have a Decree against the Defendant, because it does not appear how much is due by him for his Tithes to the Plaintiff. But it was then resolved by the Court, that upon such Plea of Non-residence of the Lessor the Defendant need not answer to the Quantities and Values, for such Plea goes to the Right and Title of the Plaintiff; but where a *Modus* is alledged, that admits the Title of the Plaintiff to take

take Tithes of the Defendant, but only goes to the Manner of Payment, if Tithes ſhould be paid *in Specie* or not.

Parſons Leaſes.

And upon all theſe Authorites alledged, the Plea in the preſent Caſe was allowed. *Comyns* 392, 393. *Bokenham* and *Bentfield*, in the *Exchequer*.

If after the Leaſe by Conſent, &c. the Parſon dies, this ſhall be accounted a Non-reſidence.

If a Parſon or Vicar hath, with the Conſent of his Patron and Ordinary, made a Leaſe for Twenty-one Years or Three Lives of their Benefices, or Part thereof, and then the Benefice doth become void by Death, in this Caſe the Leaſe is not made void by this Statute; by *Shute* and *Gawdy* v. *Wray* and *Clinch*, *Mich.* 30 & 31 *Eliz.* *Mote* v. *Hales*, *Moor* 270. But *Croke*, who alſo Reports this Caſe, ſaith, that it was adjudged that this Leaſe was void by the Death of the Incumbent. 3 *Croke* 123. And my Lord Chief Juſtice *Hale* ſaith, that this Caſe was adjudged according as 'tis reported by *Croke*, by the Opinion of Three Judges againſt One; but ſaith farther, that it was a hard Opinion, and that in 38 *Eliz. B. R. Moor* 448, the very Point was adjudged contrary. *Trin.* 25 *Car.* 2. *B. R. Baily* v. *Murrin*, 1 *Vent.* 245, ſame Caſe, 3 *Keb.* 107, 194, and 1 *Lev.* 61, where this very Point is ſolemnly ſettled and adjudged contrary to the Caſe reported by *Croke*, *viz.* that Death doth not make ſuch a Non-reſidence as ſhould avoid a Leaſe, for that the Intention of the Statute was to oblige the Incumbents to Reſidence: Firſt, By impoſing a Forfeiture upon them of a Year's Value of their Benefice, if they did not reſide. Secondly, By making their Leaſes void. And 'tis plain the Statute meant a wilful Negligence, becauſe it ſays, **The Party ſo offending**, &c. Beſides, the Statute 14 *Eliz.* that allows Leaſes of Houſes, *&c.* in Market-Towns for Forty Years, would be of no Effect, if Death ſhould be interpreted a Non-reſidence; and the Confirmation of Patron and Ordinary would be to no Purpoſe: Beſides, one cannot be ſaid abſent who is not in Being, for there is no ſuch Perſon; and 'tis plain, the Statute intended ſuch Non-reſidence as might be made by one that remains Incumbent, by reaſon of the Forfeitures therein contained; for immediately upon the Death of the Incumbent, all the Profits of the Living, except for the Supply of the Cure in the Vacation, do belong to the Succeſſor; How then ſhall the Statute be executed by the Biſhop after a Leaſe made, who is to ſequeſter them for the Uſe of the Poor upon a Non-reſidence againſt the ſaid Statute? And if Death be a Non-reſidence within the Meaning of that Statute, in vain are Parſons and Vicars permitted to leaſe Lands, *&c.* uſually let for One and twenty Years or Three Lives, with the Conſent or Confirmation of their Patrons and Ordinaries.

That ſuch Death ſhall not avoid the Leaſe.

But if ſuch Leaſe is not confirmed, it is void by Common Law.

But if a Parſon doth let a Leaſe for Years or Lives which is not confirmed by the Patron and Ordinary, this Leaſe is void at the Death of the Parſon, not by the Statute of 13 *Eliz. c.* 20, but by the Death, at Common Law; becauſe, as *Dodderidge* and *Haughton* ſaid, it was not intended by that Statute to make Leaſes void that were void before at Common Law; ſo that if ſuch Leaſe be made for a Term of Years abſolutely, without ſaying, [*if the Parſon ſhould ſo long live*,] and the Term is not expired at the Parſon's Death, the Leſſee may recover Damages in an Action of Covenant againſt the Executors of the Parſon for not injoying his Term; and if they plead the Statute of 14 *Eliz.* to make the Leaſe and Covenants void, it will nothing avail them. The Law is the ſame, if during ſuch Leaſe the Church doth become void by Reſignation or Deprivation. *Trin.* 14 *Jac. B. R. Rudge* v. *Thomas*, 3 *Bulſt.* 202. 1 *Roll's Rep.* 403. *Paſch.* 42 *Eliz. B. R.*

Parſons Leaſes.

B. R. Coſtard v. *Windet*, 3 *Cro.* 775, ſame Caſe, *Moor* 606. So if a Parſon doth make a Leaſe for a certain Number of Years, *if he ſo long live*, he doth thereby take upon himſelf that he will do no Act by which the Leaſe ſhall be determined, but only by his Death; therefore if he doth reſign, or otherwiſe void the Living, an Action of Covenant will lie againſt him; but if this Clauſe be added, [*And ſhall ſo long continue Parſon*] then he may reſign without Danger; by *Haughton. Trin.* 11 *Jac. Wheeler* v. *Heyden*, *Brownl.* and *Gouldſb.* 1 *Part* 125.

If a Curate demiſes over his Leaſe.

Though the Statute of 13 *Eliz. c.* 20, doth allow a Parſon or Vicar, that hath Two Benefices, to demiſe the one of them, upon which he ſhall not be ordinarily reſident, to his Curate; yet it is thought from 14 *Eliz. c.* 11, that if ſuch Curate leaſe the ſame over to another, although that he be not abſent above Forty Days in any One Year, yet the Incumbent being abſent above Eighty Days in the ſame Year, the Leaſe is thereby void: For it is enacted, **That all Leaſes, Bonds, Promiſes and Covenants, of and concerning Benefices and Eccleſiaſtical Livings with Cure, to be made by any Curate, ſhall be of no other nor better Force, Validity or Continuance, than if the ſame had been made by the beneficed Perſon himſelf, that demiſed or ſhall demiſe the ſame to the Curate.** Stat. 14 Eliz. cap. 11. Yet by *Tanfield*, when a Parſon leaſeth to his Curate, who leaſeth over, the Statute doth not make the Leaſe void by any Abſence of the Parſon, but of the Curate by Forty Days, (but of this I doubt) otherwiſe the Deſign of the Statute might be eaſily fruſtrated; which was, that he that ſerved the Cure ſhould be the Occupier of the Glebe, and Tithes belonging to the Church, and none other. And I conceive, that the Curate to whom the Parſon may make a Leaſe of his Glebe or Tithes (being abſent from his Benefice by above Eighty Days) muſt be a Curate legally admitted by the Ordinary of the Place, according to the Laws of the Land; for otherwiſe he is no Curate, although he ſerves the Cure, and is reſident: Therefore, by ſuch Leaſe made to him the Tithes or Glebe then will be forfeited upon the Incumbent's Abſence; and if they ſhould be ſequeſtred in this Caſe according to the Statute, the Parſon cannot plead that they are let to his Curate, becauſe he is no Curate in Law, and his having the Cure there is an Offence againſt the Law, of which it is not reaſonable that either the Incumbent or Curate ſhould take Advantage.

That a Parſonage may be a Manor.

Note, That a Parſonage may be a Manor, by *Mead* and *Windham* Juſtices; as if before the Statute of *Quia Emptores terrarum*, the Parſon with the Patron and Ordinary did grant Parcel of the Glebe to divers Perſons, to hold of the Parſon by divers Services, the ſame makes the Parſonage a Manor. *Paſch.* 22 *Eliz. C. B. Hughes Abr. p.* 4. And if the ſame be a Copyhold Manor, then notwithſtanding all the Statutes before rehearſed, Parſons and Vicars, as well as all other Eccleſiaſtical Perſons, may grant Copies for Life, Lives, in Tail, or in Fee, according to the Cuſtom of the Manor; for the Copyholder doth not derive his Eſtate out of the Eſtate or Intereſt of the Lord only, but from the Cuſtom, and is ſaid to be in by the Cuſtom without any Regard to the Intereſt or Perſon of the Grantor. 4 *Co.* 23, 24. And theſe Grants by Copy are good without the Confirmation of the Patron and Ordinary, and are not voided by the Non-reſidence or Death, *&c.* of the Parſon. Neither do any of the Statutes aforeſaid extend or relate to Rectories and Tithes that are impropriated and become Lay-Fee, and remain in the Hands of Lay-Men, but they may do with them as with

Rectories and Tithes impropriated, and Lay-Fee.

any

any other Inheritance whereof they are ſeiſed; but Appropriations in the Hands of Biſhops, Colleges, or other Eccleſiaſtical Perſons, are liable to the aforeſaid Statutes and Rules, even as other Inheritances whereof they are ſeiſed; and ſo are Impropriators, if by Preſentation, *&c.* the Vicarages be reſtored to the Church out of which it was indowed.

Parſons Leaſes.

If an Information be upon the Statute of 13 *Eliz. c.* 20, or if that Statute be pleaded to avoid a Leaſe, Bond or Covenant, for the Injoyment thereof, it ought to be ſaid, that the Incumbent was abſent Eighty Days *&* *ultra*; for to ſay Eighty Days, and nothing more, is not ſufficient within this Statute, which ſays **above Eighty Days,** and he may be abſent Eighty, and come again in the Night of the Eightieth Day, and if ſo, is no Offender within this Statute. *Hill.* 30 *Eliz. B. R. Goſnal* v. *Kindlemarſh*, 3 *Cro.* 88. So it muſt be ſaid, that he was abſent Eighty Days *&* *ultra* in a Year, or it will not be good. *Trin.* 14 *Jac. B. R. Rudge* v. *Thomas*, 3 *Bulſt.* 202. And it's ſafeſt alſo to ſay, (if the Caſe will bear it) that he was abſent above Eighty Days together, by reaſon of the Differences in the Caſes before ſet down. And it muſt be ſhewed that the Incumbent was voluntarily abſent; for if he be abſent, or did not ſerve the Cure by reaſon of Sickneſs, Suſpenſion, or becauſe he was inhibited by the Ordinary from ſerving the Cure, or was rejected by any out of the Parſonage Houſe, or upon the Account of other Reſtraint, he is not abſent in the Meaning of this Statute. *Trin.* 30 *Eliz. Will. Collins* v. *Edw. Vaughan*, 3 *Cro.* 100. *Hill.* 38 *Eliz. Robbins* v. *Prince*, *Moor* 438. Alſo Care muſt be taken that the Statutes be truly recited, as well as the Abſence fully alledged; for when the Statute of 13 *Eliz.* was recited with this Clauſe therein, *Tam diu* (where the Words are *tam cito*) *quam*, *&c. aut aliqua pars inde veniret ad aliquam poſſeſſionem vel uſum inhibitum vel*, *&c.* which Words by the Statute of 14 *Eliz. c.* 11, as hath been ſhewed, are repealed and appointed to be omitted. Judgment was given againſt the Party that did ſo miſrecite, *&c. Mich.* 38 *&* 39 *Eliz. B. R. Henry* Earl of *Lincoln* v. *Hoſkins*, 3 *Cro.* 490. And it is ſaid, that this Statute of 13 *Eliz. c.* 20, is a general Law. 4 *Co.* 120. *b. Dumpor*'s Caſe, *Trin.* 5 *Jac. B. R. Jenning* and *Harthwait*, 2 *Roll's Abr.* 465.

Information, *&c.* muſt ſay, abſent Eighty Days *&* *ultra* in a Year.

Note.

Statutes muſt be truly recited.

13 *Eliz.* 20. a. General Law.

But Evaſions having been found out to fruſtrate the Deſign of the aforeſaid Statute of 13 *Eliz. cap.* 20. It was afterwards enacted, **That where ſundry evil-diſpoſed Perſons have defrauded the true Meaning of the Statute made in the ſaid Thirteenth Year, by Bonds and Covenants, of ſuffering other Perſons to injoy Eccleſiaſtical Livings, and the Fruits thereof, for that ſuch Bonds and Covenants are not in Law taken to be Leaſes, altho' indeed they amount to as much: Be it therefore enacted, That all Bonds, Contracts, Promiſes, and Covenants hereafter to be made for ſuffering or permitting any Perſon to injoy any Benefice or Eccleſiaſtical Promotion with Cure, or to take Profits or Fruits thereof, other than ſuch Bonds and Covenants as ſhall be made for Aſſurance of any Leaſe heretofore made, ſhall be to all Intents and Purpoſes adjudged of ſuch Force and Validity, and not otherwiſe, as Leaſes by the ſame Perſons made of ſuch Benefices and Eccleſiaſtical Promotions with Cure.** Stat. 14 Eliz. cap. 11.

14 *Eliz. c.* 11. Againſt Evaſions made by Bonds and Covenants.

And after theſe Statutes of 3 *Eliz. c.* 20, and 14 *Eliz. c.* 11, this Clauſe following by Way of Addition thereunto was enacted by Stat. 43 *Eliz. c.* 9. (**That all Judgments hereafter to be had for the Intent to have and injoy any Leaſe contrary to the ſaid Statutes, or**

And 43 *Eliz. c.* 9. Againſt Judgments.

Parſons Leaſes.

any of them, ſhall be deemed void, in ſuch Sort, as Bonds and Covenants are appointed to be void, which are made for that Purpoſe.)

Debt upon an Obligation to reſign upon Requeſt.

Accordingly, when a Clerk did enter into an Obligation, the Condition of which was, That he being preſented, inſtituted and inducted to a Benefice then void, ſhould upon Requeſt of the Patron reſign; and afterwards did make a Leaſe to the Patron, which by the Clerk's Abſence did become void, and then upon Requeſt by the Patron to the Clerk to reſign, and he refuſing, the Patron brought an Action of Debt upon the Bond, unto which the Clerk pleaded the Statutes of 13 & 14 *Eliz.* aforeſaid, and that after his Induction he did let the Leaſe to his Patron the Plaintiff, and then was abſent above Eighty Days in one Year; and averred, that the Obligation was made for the injoying of the Benefice let by the ſaid Leaſe, and to the Intent to compel him not to avoid the Leaſe by Abſence, for fear of being required to reſign, and demanded Judgment, *&c.* And by the whole Court (the Plaintiff demurring) the Plea was held good, and the Averment to be very apt, becauſe the Obligation being made generally to reſign upon Requeſt, might be averred to be for this particular Purpoſe, and ſo void. *Mich.* 43 & 44 *Eliz. Web* v. *Hargrave*, *Moor* 641.

Plea by Parſon's Leſſee aſſigning over.

If the Parſon's Leſſee doth aſſign over to another what the Parſon hath let to him, and the Parſon be abſent above Eighty Days in the ſame Year, the Leſſee alſo may plead the Statutes of 13 & 14 *Eliz.* for the avoiding of his Aſſignment of what the Parſon had granted to him. *Paſch.* 7 *Jac. B. R. Shepherd* v. *Twoulſey*, 1 *Bulſt.* 111.

Rule upon Stat. 14 *El. c.* 11, & 43 *Eliz. c.* 9, *&c.*

As to the Statutes of 14 *Eliz. c.* 11, and 43 *Eliz. c.* 9, this is a certain Rule, That where Leaſes are made void by the Statute of 13 *Eliz.* there all Bonds, Covenants, and Judgments for the injoying ſuch Leaſes are made void by theſe Statutes; but if the Leaſes be void at Common Law, and not by the Statute of 13 *Eliz.* there Bonds and Covenants for the injoying of ſuch Leaſes are not made void by the Statute of 14 *Eliz.* nor Judgments by 43 *Eliz.* Therefore if the Parſon covenants that another ſhall injoy his Benefice, or Part thereof, not uſually let, for Seven Years abſolutely, not ſaying, [*if he ſo long live and continue Incumbent*;] and before the Expiration of the Term doth reſign his Benefice, and ſo becomes abſent above Eighty Days, and doth not ſerve the Cure; in this Caſe, although the Leaſe be void, yet an Action of Covenant well lies for the Leſſee upon the Covenants in the Leaſe; and the Reaſon is, that though the Incumbent becomes abſent, and ceaſeth to ſerve the Cure, the Leaſe is not voided thereby, but by his Reſignation, and conſequently the Leaſe became void by the Common Law at the ſame Inſtant that the Benefice was void by the Reſignation, and before his Abſence had commenced; and by *Dodderidge* and *Haughton*, the Statute of 13 & 14 *Eliz.* do not meddle with Aſſurances at the Common Law, nor were intended to make any Leaſes void, which were void at Common Law; to which *Coke* agreed. *Trin.* 14 *Jac. B. R. Rudge* v. *Thomas*, 1 *Roll's Rep.* 403, ſame Caſe, 3 *Bulſt.* 202. But if a Parſon doth let his Rectory for Three Years, and covenants that the Leſſee ſhall have and injoy it during the ſaid Term without Expulſion, or any Thing done, or to be done, by the Leſſor, and is alſo bound in an Obligation to the Leſſee to perform the ſaid Covenants, and afterwards for not reading the Articles is deprived *ipſo facto* by the Statute of 13 *Eliz.* ſo that the Leaſe becomes void thereby, yet the Obligation is not forfeited, for that the Leſſee was not ouſted by any Act done by the Leſſor, but rather for *Non-feaſance*, and

Where the Leaſe becomes void at Common Law by Reſignation.

and ſo out of the Compaſs of the Covenant aforeſaid; *per Curiam. Paſch.* 19 *Eliz. C. B.* 4 *Leon.* Caſe 104. But otherwiſe it would have been, If the Leſſor had covenanted not to omit the doing of any Thing whereby the Leaſe ſhall become void. So by *Coke*, if he be bound by his Obligation to make ſuch a Leaſe, this is good, as it was adjudged in the Dean and Chapter of *Norwich*'s Caſe, to which *Dodderidge* and *Haughton* agreed. *Trin.* 14 *Jac. B. R. Rudge* v. *Thomas*, 3 *Bulſtr.* 202. Parſons Leaſes.

When Leaſes, Bonds, *&c.* are voided by reaſon of the aforeſaid Statutes upon the Account of Abſence, and not ſerving the Cure of the Benefice let, for above Eighty Days, we muſt not underſtand ſuch Leaſes and Bonds, *&c.* to be void *ab initio*, but only from the Time that ſuch Abſence of Eighty Days ſhall be compleated; for the Words of the Statute of 13 *Eliz. cap.* 20. are, **Shall not endure any longer, but while the Leſſor ſhall be ordinarily Reſident** (ſo that ſo long it ſhall endure) **as he ſerves the Cure of ſuch Benefice without Abſence above Fourſcore Days in One Year, but that every ſuch Leaſe immediately upon ſuch Abſence ſhall ceaſe and be void**; therefore, till ſuch Abſence of above Eighty Days be accompliſhed, the Leaſe is good and in Being; accordingly it hath been adjudged, that if ſuch Leaſe by Indenture be made, containing Covenants on the Leſſor and Leſſee's Part, and after, by Abſence for above Eighty Days, both the Leaſe and Covenants do become void; yet an Action of Covenant doth well lie for the Leſſor or Leſſee, for any Covenant broke before the End of the Eighty Days Abſence. 26 *Eliz. Wallis* v. *Cox*, 3 *Cro.* 78. Therefore, if in ſuch Caſe an Action of Covenant be brought, the Defendant muſt not only plead the Statutes which make the Leaſe and Covenants void, but muſt alſo plead the Performance of Covenants to the Time of the Eighty Days Abſence expired. *Mich.* 22 and 23 *Eliz. Dyer* 372, 373. From what Time ſuch Leaſes and Bonds are void. Action for Covenant broken before the End of 80 Days Abſence.

To a Bill in the Exchequer for a Diſcovery of Tithes by Leſſee of a Parſon, the Defendant pleaded *Stat.* 13 *Eliz. cap.* 20. againſt Non-reſidence, in Bar. The Plea need not ſhew, 1. That he was not juſtifiably abſent. 2. The Abſence need not be a continual Abſence of 80 Days at one Time; for, this Conſtruction would defeat the Statute. And the Caſe in 1 *Bulſt.* 111. is not Law. 3. The Plea is good as to the Diſcovery, as well as to the Relief. 4. The Year is to be 365 Days without beginning at the 25th of *March. Gilb.* 228, *&c. Quilter* v. *Muſſendine.*

CHAP.

Confirmation of Leaſes.

CHAP. XLIV.

Leaſes by Eccleſiaſtical Perſons by whom to be confirmed, and what Confirmations are good. Of Variances in Leaſes, &c. *and miſnaming Corporations.*

What Rules are to be obſerved with reſpect to the Common Law.

IT hath hitherto been ſhewed what Rules Eccleſiaſtical Perſons are to obſerve in making of Leaſes, eſpecially to bind their Succeſſors, *viz.* with reſpect to the aforeſaid Statutes: It follows to be ſhewed, what Rules before the making of the ſaid Statutes, and notwithſtanding the ſaid Statutes, are at this Day to be obſerved by them with reſpect to the Common Law. Firſt then, In many Caſes the Conſent and Confirmation of others muſt be obtained to make a Leaſe good againſt the Succeſſor. But when

Corporations. we ſpeak of the Neceſſity of Confirmation, we ſpeak only in the Caſe of ſole Corporations, for Corporations aggregate of many, as Deans and Chapters, Maſters and Fellows of a College, may by the Common Law make any Grant of, or out of their Poſſeſſions which they hold in common, although the Dean, *&c.* were preſentable; but no ſole Corporation had ever that Liberty allowed them by the Common Law. The Prudence of the Law thinking it not convenient to truſt any ſingle Perſon alone with the ſole Diſpoſition of his Eſtate which he held in the Right of his Church, and therefore ſubſtituted ſome whoſe Aſſent and Confirmation is of Neceſſity to the making good of all Grants to be made by them. 3 *Co.*

Corporations of Two Sorts. 75. And theſe Corporations as to this Purpoſe are of Two Sorts: Firſt, Such who have the whole Eſtate and Right of the Land in them, as Biſhops, who might at the Common Law, before the reſtraining Statute of 1 *Eliz.* was made, have granted any manner of Eſtate with the Confirmation of the Dean and Chapter, which Confirmation was to be made, Firſt, by Deed in the Life-time of the Biſhop; and the Confirmation in this Caſe is but a Confirmation of the Deed, or as an Aſſent given to the Biſhop to make ſuch Deed, and not of the Eſtate, for there is a Diverſity as to that; for if a Diſſeiſor doth make a Charter of Feoffment to *A.* with a Letter of Attorney to give Seiſin, and before Seiſin given the Diſſeiſee doth confirm the Eſtate of *A.* or the Deed made to *A.* this is clearly void, though Livery be made after; for this muſt enure as a Confirmation of the Eſtate, which cannot be good before the Eſtate paſſed, which it did not before Livery made. But if a Biſhop makes a Charter of Feoffment with a Letter of Attorney, and the Dean and Chapter before Livery do confirm the Deed, this is a good Confirmation, and the Livery made after is good. The ſame Law is of a Confirmation of a Deed of Grant of a Reverſion before Attornment. 1 *Inſtit.* 300, 301. See more fully of this Matter afterwards in this Chapter.

Exceptions at the Common Law. But out of this Law of Confirmations at the Common Law was excepted, That a Biſhop might grant Copyhold Eſtates in Fee, in Tail, or for Life or Lives, according to the Cuſtom of the Manor, without

any Confirmation by the Dean and Chapter; and the ſame Law was of Parſons, Prebends, Vicars, *&c.* without the Conſent of their Patron, *&c.* and the Ordinary. 4 *Co.* 22. Confirmation of Leaſes.

The Second Sort of ſole Corporations are ſuch which have not the abſolute Fee in them, as Parſons, Prebends, Vicars, and the like, and to their Grants, Leaſes, *&c.* at the Common Law, the Patron and Ordinary both muſt give their Conſent; wherein is to be noted (as is ſaid of the Biſhop) that the Confirmation is but a meer Aſſent to the Grant: And therefore if the Patron and Ordinary give Licence by Deed to the Parſon to grant a Rent-Charge out of the Glebe, and the Parſon doth it, this is good and binding to the Succeſſor, and yet is not a Confirmation ſubſequent, but a Licence precedent. *Broke's Novel Caſes* 201. 7 *H.* 4. 15. Secondly, The Ordinary alone without the Dean and Chapter may agree thereunto, either by Licence precedent, or Confirmation ſubſequent; for the Dean and Chapter have nothing to do with that which the Biſhop doth as Ordinary in the Life-time of the Biſhop. 1 *Inſt. fol.* 300. *b.* Though before the Statute of 32 *H.* 8. *c.* 28, was made, no ſole Corporation could have made any Leaſe or Grant which ſhould have bound the Succeſſor without Confirmation of thoſe *Quorum Intereſt*; yet by that Statute, Biſhops, Deans, Archdeacons, Prebends, Chancellors of Churches, Treaſurers, Precentors, and all other ſuch like ſole Corporations, (Parſons and Vicars only excepted) are enabled to leaſe their Poſſeſſions for Twenty-one Years or Three Lives without the Confirmation of any; but then their Leaſes muſt be made purſuant to the Eight Rules before remembred in *Chap.* 42, or Confirmation is neceſſary notwithſtanding the ſaid Statute. *Trin.* 11 *Jac. C. B. The Biſhop of Salisbury*'s Caſe, 10 *Co.* 60. Yet it is to be noted, That if a Biſhop, or other Eccleſiaſtical Perſon, enabled to grant without Confirmation by the Statute of 32 *H.* 8. *c.* 28, doth make a Leaſe for longer Term than Twenty-one Years or Three Lives; or Two Leaſes, the one for Twenty-one Years, the other for Three Lives of the ſame Eſtate; or if the Leaſe be not made to hold from the Time of the making, but from the Day of the making thereof; or that the old accuſtomed yearly Rent or more be not reſerved, and made payable yearly during the Term of the ſaid Leaſe; and by conſequence be not made of Things uſually let; or of Things out of which a yearly Rent may be reſerved, Confirmation will not make ſuch Leaſe good to bind the Succeſſor, by reaſon of the reſtraining Statutes of 1 *Eliz. c.* 19. 13 *Eliz. c.* 10. And therefore, as to ſuch who are within the Statute of 32 *H.* 8, the Uſe of Confirmation ſeems to be chiefly, if not only this, That if the Thing demiſed be not all in Poſſeſſion, or that the old Leaſe be not expired, or ſurrendred within One Year after the making of the new Leaſe, ſuch new Leaſe muſt be confirmed, or the Succeſſor will not be bound thereby. *Trin.* 11 *Jac. C. B. The Biſhop of Saliſbury*'s Caſe, 10 *Co.* 60. And that in ſuch Caſes Confirmation is ſtill of Uſe, and Neceſſity appears, becauſe Biſhops before the 1ſt of *Eliz.* and other Eccleſiaſtical Perſons before 13th and 18th of *Eliz.* might have made concurrent Leaſes with Confirmation; and by the Statute of 1 *Eliz.* Biſhops are not reſtrained from granting Leaſes in Reverſion, or concurrent Leaſes at any Time after the firſt Leaſe made; nor are other Eccleſiaſtical Perſons reſtrained from granting like Leaſes, by the Statute of 13 *Eliz. c.* 10, or by the Statute of 18 *Eliz. c.* 11. if a former Leaſe for Years be ſurrendred, or ended within Three Years next after the making of ſuch new Leaſe; and therefore though the Statute of 32 *H.* 8, doth not enable them to leaſe without Confirmation, unleſs the old

Where if a Perſon enabled to grant without Confirmation doth not obſerve Rules, Confirmation will not bind the Succeſſor.

Confirmation of Leases.

Biſhops, *&c.* with Confirmation may make concurrent Leaſes.

Leaſe be expired, ſurrendred, avoided, or ended within One Year next after the making of a new Leaſe; yet with Confirmation a Biſhop or other Eccleſiaſtical ſole Corporation may make concurrent Leaſes, Reſpect being had to the aforeſaid Statutes, even as Corporations aggregate may do without Confirmation. *Trin.* 21 *Eliz. Fox* v. *Collier*, *Moor* 107. But if an antient Office be by a Biſhop granted to one, although with no more than the antient Fee, it ſhall not bind his Succeſſor, if it be not confirmed by the Dean and Chapter; for ſuch Grants remain as they were at the Common Law, as was adjudged in *The Biſhop of Salisbury*'s Caſe, *Trin.* 11 *Jac. C. B.* 10 *Coke* 60.

Confirmation muſt be of the Leaſes or Grants of Parſons and Vicars, *&c.*

But as for Parſons and Vicars, they being excepted out of the Statute of 32 *H.* 8. Confirmation is neceſſary in all Caſes, if any Leaſe or Grant be made by them to bind their Succeſſors. And that the Confirmation may be ſuch as may ſerve its End, it muſt be made by proper Perſons, and all muſt concur who have Intereſt in the Thing of which the Grant is made: Accordingly the Grant of an Archbiſhop or Biſhop is to be confirmed (when Confirmation is neceſſary) by the reſpective Dean and Chapter; and if there be Two Deans and Chapters, both of them are to confirm all Grants, or they will be void againſt the Succeſſors, for both are but one in reſpect of the Biſhop, if the Biſhop is choſen by both. *The Biſhop of Coventry* and *Litchfield*'s Caſe, *Statham Abr.* Tit. *Aſſiſe. Co.* 1 *Inſt.* 301. *a. Trin.* 8 *Jac.* 12 *Co.* 71. But if Two Biſhopricks that were originally diſtinct be by lawful Authority united, and the Uſage hath been Time whereof, *&c.* ſince the Union, that the ſeveral Deans and Chapters have made Confirmations ſeverally, that is, each Dean and Chapter of Grants made of the Things belonging to their Biſhoprick before the Union, the Union not being extant, it ſhall be intended that the Union was made eſpecially, and in ſuch Manner, that notwithſtanding the ſame, Eſtates made ſhall be ſeverally confirmed as before that Union, and ſuch Confirmations ſhall then be good. *Trin.* 8 *Jac.* 12 *Co. p.* 71. So if there have been Two Deans and Chapters belonging to One Biſhoprick, who have both uſed to confirm the Grants of their Biſhop, and One Dean and Chapter hath ſurrendred their Church and Poſſeſſions to the King, and then the Biſhop doth grant Lands with the Confirmation only of the remaining Dean and Chapter, this Grant binds his Succeſſors; yea, and although after ſuch Confirmation, the Dean and Chapter that had ſurrendred, and was thereby diſcharged, be again erected, as was held by the greater Part of the Juſtices in *Ireland*, and by Five Juſtices in *England*, who certified their Opinion to be ſo into *Ireland*. *Paſch.* 11 *Eliz. Dyer* 282. *b.* 1 *Inſt.* 301. *a.* But if the Biſhop hath no Dean and Chapter, his Grants are to be confirmed by the Clergy of his Dioceſe. *Trin.* 2 *Jac.* in the Exchequer, *The King* v. Sir *Ambroſe Forth*, *Davis*, *f.* 1.

How the Dean muſt join with the Chapter.

Whenever a Dean and Chapter doth confirm, that the Confirmation may be good, the Dean muſt join with the Chapter, and not one who is Deputy or Sub-Dean only, who is a Stranger, and not one of the Chapter, for ſuch Perſon is uncapable of being a Dean Subſtitute, or Proctor; and alſo it's generally ſaid, that the Common Law will not ſuffer that the Members of a Corporation ſhould give their Aſſents by Proctors or Subſtitutes, for which is cited 11 *H.* 4. *fol.* 64, where upon a Compoſition for Tithes a Parſon granted an Annuity to the Abbey of *Battel*, which Grant was confirmed by the Biſhop and Dean and Chapter being Patrons; but it appears by the Deed of Confirmation, that the Dean was abſent, and did not put his Seal thereto, but that the Chantor

who was his Commiſſary did it for him; and there it was held, that though the Dean might have a Deputy to exerciſe his Spiritual Juriſdiction, yet that ſuch Deputy cannot charge the Poſſeſſion of the Church. *Paſch.* 5 *Jac. B. R.* in *Pemerton* and *Allen*'s Caſe, *Davis, fol.* 47. 11 *H.* 4. 84. *Latch* 251. And when the Caſe was, that a Leaſe was made by the Free Chapel and College of *Windſor* under the Common Seal, yet the Dean or Warden himſelf was not Party to the Leaſe, but one that was his Deputy in his Abſence; and upon Suit to avoid the Leaſe, a Statute of the College was ſhewed for the Authority of the Deputy to exerciſe and perform the Office of the Dean in all Things *in Perſon' & Collegium, &c.* yet the Judges did hold, that the Confirmation was not good by the Deputy, for that he had no Authority to confirm this Leaſe by the College Statute ſhewed; and this was chiefly upon the Expoſition of the Word *Collegium*, for thereby all the Poſſeſſions of the College are not to be underſtood, but only the Site and Circuit of the College or Place of its Situation. *Mich.* 6 & 7 *Eliz. Dyer* 233. *b.* From which Caſe it ſeems to follow, that if by the Statutes of a Church the Deputy Dean may confirm Grants, and join in the making of Leaſes, as if the Dean himſelf was preſent and did the ſame, that ſuch Confirmation and Grants ſhall be good.

Confirmation of Leaſes.

Q. If by the Statutes of a Church a Deputy Dean may confirm Grants.

Collegium.

As a Deputy Dean generally ſpeaking cannot confirm, ſo neither can he that is but a meer Commendatory Dean, *viz.* a Dean by *Recipere in Commendam*, although that he may with the Chapter chooſe a Biſhop, becauſe that he is but *Depoſitarius*, yet ſuch Commendatory Dean may be ſued by that Name, and may take the Profits, and exerciſe the Juriſdiction, and yet is not a Dean compleat. See 27 *H.* 8. 15. *Hill.* 22 *Jac. B. R. Evans* and *Kiffin* v. *Alſmith, Noy* 93, and *Palmer* 460, 480. *Latch* 237, 250, 251. But if a Dean be elected Biſhop, and before his Conſecration doth obtain Diſpenſation to hold his Deanery in *Commendam*, ſuch Dean may well confirm, *&c.* And if he be tranſlated to another Biſhoprick, and after his Election, and before Confirmation, doth obtain Diſpenſation to hold the ſame Deanery in *Commendam* with his ſecond Biſhoprick, his old Title remains, and Confirmations and other Acts done by him as Dean are as good in Law, as if he had never been made Biſhop. *Trin.* 3 *Jac. B. R. Evans* and *Kiffin* v. *Alſmith, Palmer* 460. *Jones* 158. *Trin.* 2 *Car. Thornborough*'s Caſe, *Bendlows* 187. The Law I ſuppoſe to be the ſame as to Commendatory Biſhops in both Caſes; and when there is a meer Commendatory Biſhop of a Dioceſe, the Archbiſhop confirms. But *Quære*, Who confirms the Biſhop's Grants and Leaſes when there is a meer Commendatory Dean, if not the Clergy of the Dioceſe, as in the Caſe when there is no Dean and Chapter?

Generally a Deputy or Commendatory Dean cannot confirm.

Though one that is Dean, be Dean *de jure* as well as *de facto*, yet neither he, nor any other of the Corporation, hath a negative Voice; but Confirmations and other Grants are good, if made by the major Part of the whole Corporation, for the Dean and major Part of the Corporation make the Corporation, though the reſt diſſent. 14 *H.* 8. 29. 21 *E.* 4. 27. 15 *E.* 4. 2. *a.* 9 *H.* 6. 32. And for this Purpoſe it hath been enacted as followeth: **Albeit that by the Common Laws of this Realm of** England, **all Aſſents, Elections, Grants and Leaſes had, made and granted by the Dean, Warden, Provoſt, Maſter, Preſident, or other Governor of any Cathedral Church, Hoſpital, College, or other Corporation, by whatſoever Name they be incorporate or founded, with the Aſſent and Conſent of the more or greater Part of their Chapter, Fellows or Brethren of ſuch Corporation,**

Where neither Dean or other hath a negative Voice. Stat. 33 *H.* 8. *c.* 27.

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ration, having Voices of Assent thereunto, be as good and effectual in the Law to the Grantees and Lessees of the same, as if the Residue of the whole Number of such Chapter, Fellows and Brethren of such Corporation, having Voices of Assent had thereunto consented and agreed; yet the said Common Laws notwithstanding, divers Founders of such Deaneries, Hospitals, Colleges and Corporations within the said Realm, have upon the Foundation and Establishment of the same Deaneries, Hospitals, Colleges, and other Corporations, established and made amongst other their peculiar Acts, local Statutes and Ordinances, that if any one of such Corporation, having Power or Authority to assent or dissent, should and would deny any such Grant or Grants, that then no such Lease, Election or Grants, should be had, granted or leased; and for the Performance of the same, every Person having Power of Assent to the same, have been and be daily thereunto sworn, and so the Residue may not proceed to the Perfection of such Elections, Grants and Leases, according to the Course of the Common Laws of this Realm, unless they should incur the Danger of Perjury: For the avoiding whereof, and for the due Execution of the Common Law universally within this Realm, and every Place in one Conformity of Reason to be used; Be it ordained, established and enacted by the Authority of this present Parliament, That all and every peculiar Act, Order, Rule and Statute heretofore made, or hereafter to be made, by any Founder or Founders of any Hospital, College, Deanery or other Corporation, at or upon the Foundation of any such Hospital, College, Deanery or Corporation, whereby the Grant, Lease, Gift, or Election of the Governor or Ruler of such Hospital, College, Deanery, or other Corporation, with the Assent of the more Part of such of the same Hospital, College, Deanery or Corporation, as have or shall have Voice or Assent to the same, at the Time of such Grant, Lease, Gift, or Election hereafter to be made, should be in any wise hindred or let by any one or more, being the lesser Number of such Corporation, contrary to the Form, Order and Course of the Common Law of this Realm of England, shall be from henceforth clearly frustrate, void, and of none Effect; And that all Oaths heretofore taken by any Person or Persons of such Hospital, College, Deanery, and other Corporation, shall be, for and concerning the Observance of any such Order, Statute or Rule, deemed void and of none Effect; And that from henceforth no Manner of Person or Persons of any such Hospital, College, Deanery, or other Corporation, shall be in any wise compelled to take an Oath for the observing of any such Order, Statute or Rule, upon the Pain of every Person giving such Oath, to forfeit for every Time so offending Five Pound; the one Moiety thereof to be to the Use of our Sovereign Lord the King, and the other Moiety thereof to any of the King's Subjects which will sue for the same in any of the King's Courts of Record, by Action of Debt, Bill, Plaint, Information, or otherwise, wherein the Defendant shall not be admitted to wage his Law, nor any Protection nor Essoin, or any other dilatory Plea admitted or allowed. Stat. 33 H. 8. cap. 27.

That other Persons consenting must be present with the Dean.

Though it be said before, that Confirmations and other Grants are good if they be made by the major Part of the Dean and Chapter, yet as well the other Members consenting as the Dean, must be personally present to give their Consents; for it is generally said, that when

when a Corporation ſhall paſs any Intereſt, the Common Law will not ſuffer that the Members of the Corporation ſhall give their Aſſent by Proctors or Subſtitutes, but that they ought to be *Capitulariter Congregati* in one certain Place; otherwiſe if they be ſcattered in ſeveral Places, that which they ſhall do, ſhall not be ſaid to be the Act of the Corporation, but the Deed of them in their ſingular and private Capacity, and ſhall not bind: Yet it was agreed, that the Dean and Chapter are not confined to the Chapter-Houſe, but may aſſemble and make their Acts in any other Place, ſo it be a Place certain. See 21 *E.* 4. 26. 27 *Aſſ.* 23. *The Caſe of the Dean and Chapter of Fernes, Paſch.* 5 *Jac. Davis* 48.

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As the major Part of the Corporation muſt give their Conſents to Confirmations and other Acts in one Place, ſo at one Time *ſimul & ſemel*, and not ſcatteringly, or on ſeveral Days; for the Conſent of the Corporation being expreſſed by the putting their Seal to the Deed of Confirmation, or other Writing, if the major Part be not preſent to conſent when the Conſent is ſo expreſſed, what is then done is void for Want of the Conſent of the major Part of the Chapter; and in ſuch Caſe the particular Conſents of their Members given after, ſhall not make it good. Alſo the major Part of the Members being aſſembled, ought to give their Voices and Conſents ſingly and diſtinctly, and not in a confuſed and uncertain Manner, as may be done in the Choice of Knights of the Shire, *&c.* and when the major Part doth ſo conſent, their Conſent ought to be expreſſed by the fixing of their Seal to the Deed of Confirmation or other Grant. 4 *H.* 6. 17. See for theſe Points *Davis* 48.

Conſent by the major Part in one Place *ſimul & ſemel.*

If a Grant or Leaſe is made by a Corporation aggregate; as for Inſtance, If a Leaſe be made by a Maſter, Brothers and Siſters of an Hoſpital, and the Words of the Indenture be, *Hæc Indentura inter Magiſtrum, Fratres & Sorores, &c. teſtatur*, that the Maſter with the Aſſent of the Brothers and Siſters aforeſaid, have leaſed to *A. In cujus rei Teſtimonium*, the ſaid Maſter, with the Aſſent of the Brothers and Siſters aforeſaid, have put to their Common Seal: Such Leaſe is void; for here the Brothers and Siſters being one intire Body with the Maſter, are not Parties to ſuch Indenture, but give their Conſent only, and a Corporation aggregate is but one Perſon in Law, (*viz.* one Body, 30 *Eliz. The Provoſt of Queen's College* in *Oxford* his Caſe, 4 *Leon.* 85.) and a Body cannot be diſtinct, ſo as one Part can conſent to the Acts of the other; for this is not like the Caſe of Jointenant, nor like the Caſe of a Parſon, Patron and Ordinary, where the Parſon, with the Aſſent of the Patron and Ordinary, doth grant, *&c.* for there the Parſon is the principal Grantor, and the others have not any real Intereſt in the Land; by *Ayliff* and *Clench* v. *Gawdy*, *Trin.* 26 *Eliz. C. B. Clerk*'s Caſe, 4 *Leon.* 11.

How the Indenture of a Corporation aggregate ought to be made.

When a Dean of a Cathedral doth make a Grant or Leaſe of any of his Poſſeſſions of which he is ſolely ſeiſed, to bind his Succeſſors, which doth want Confirmation; this, as is ſaid, regularly muſt be confirmed by the Biſhop and Chapter of the ſame Church, and not by the King, although that he be Patron of ſuch Deanery. But there is ſome Doubt, whether the Biſhop's Confirmation be neceſſary to ſuch Grants; I find it laid down as a Rule, That the Biſhop's Confirmation, as well as the Confirmation of the Chapter, is neceſſary in all Leaſes or Grants made by the Dean. *Parſon's Counſellor*, *fol.* 124. *cap.* 10. And what is ſaid by *Fitzherbert* in his *Natura Brevium*, Tit. *Sine aſſenſu Capituli*, that the Biſhop and Chapter are but in Law looked upon as one Body, ſeems alſo to favour this Opinion; for 'tis reaſonable, that the whole

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Body ought to conſent to the granting their Poſſeſſions, and not that the Biſhop, who is the Head of the Body, ſhould be unconcerned therein; alſo the Poſſeſſions of the Dean are ſaid to be derived from, and carved out of the Biſhoprick, and the Biſhop *de Jure* is ſaid to be the Patron of the Deanery, 17 *Eliz.* 3. 40. *b.* which are all ſtrong Arguments for the Biſhop's Confirmation; yet I have not met with any Book Caſe expreſly to warrant the Opinion laid down by *Parſon's Counſellor*; but rather the contrary, that the Confirmation of the Chapter without the Biſhop, is ſufficient to make good the Dean's Leaſes or Grants that need Confirmation, as *Dyer* 40, 273, 349. *Pl.* 18. *Plowd.* 538. 1 *Roll's Abr.* 478, 481, therefore, *Quære*; and ſee *Regiſt. Orig.* 230. *b.* But if ſuch Deanery be merely Donative, then the King's Conſent and Confirmation is to be obtained; but whether the King's Confirmation without the Chapter in ſuch Caſe be ſufficient, *Quære.* However, I conceive that the Biſhop's Confirmation is not neceſſary in ſuch Caſe, nor to the Grants of any Incumbent of a Parſonage or Vicarage that is merely Donative, but only the Patrons thereof.

An old Deanery diſſolved, and a new one erected to be of the ſame Nature.

The Dean of *Wells* might antiently have paſſed his Poſſeſſions belonging to his Deanery with the Aſſent of the Chapter without the Biſhop's Confirmation, and after this Deanery of *Wells* was ſurrendred by the Dean thereof with all Poſſeſſions thereunto belonging, and ſo diſſolved; and by Act of Parliament this Diſſolution was confirmed, and a new Deanery erected, and the Nomination (by Letters Patent) of a new Dean and his Succeſſors, given to the King, and his Succeſſors, and thereby alſo enacted, that the new Dean and his Succeſſors might grant, demiſe and part with their Poſſeſſions in the ſame Manner and Form as the antient Deans might and uſed to do; in this Caſe it is not needful to have the Biſhop's Confirmation of a Grant made by the new Dean, but of the Chapter only; for that his Confirmation of the Grants of the old Dean was not neceſſary, neither is the Confirmation of the King of the new Dean's Grants neceſſary, becauſe this Deanery it ſeems was not a meer Donative before the Diſſolution thereof, and by the Statute the new Deanery is made to be of the ſame Nature as the old Deanery was. *Paſch.* 10 *Eliz. C. B. Walround* v. *Pollard*, *Dyer* 273. 1 *Roll's Abr.* 478.

Of Grants by an Archdeacon or Prebendary.

If an Archdeacon, or Prebendary do make Grants to bind their Succeſſors which do want Confirmation, they are to be confirmed by the Biſhop, Dean and Chapter. *Paſch. & Trin.* 15 *Jac. B. R. Smith* v. *Bowles*, 1 *Roll's Abr.* 479, & 481. *Trin.* 7 *Eliz. C. B. Hodſkins* v. *Tucker*, *Dyer* 239.

Where the Corporation hath not a Fee ſimple.

If a Parſon, Vicar, Prebendary, *&c.* that have not the Fee-ſimple in them, doth make a Grant to bind his Succeſſor, it is to be confirmed by the Patron; but if a Corporation aggregate of many, as Dean and Chapter, *&c.* or any ſole Corporation that hath the abſolute Fee, as a Biſhop, *&c.* doth make a Grant; this is good without their Founder or Patron, although the Dean, *&c.* were preſentable. 1 *Inſt.* 300. *b.* And if the Parſonage or Vicarage be a Donative, then the Confirmation is to be by the Patron only. *Paſch.* 16 *Eliz. Dyer* 273. *b.* But if not, and the Biſhop be not Patron, by the Patron and Ordinary; but the Confirmation of the Dean and Chapter in ſuch Caſe is not neceſſary.

It is ſaid, though the Guardian of the Spiritualties may inſtitute, yet he cannot confirm. 7 *H.* 4. 97.

Appropriation to a Patron by King and Biſhop.

If an Appropriation be made to the Patron of the Church by the Aſſent of the King and Biſhop, this is ſufficient without the Confirmation of the

Dean and Chapter, and ſhall bind the Biſhop's Succeſſor; for the Biſhop gave nothing by his Aſſent, not having any Right as Patron, but only as Ordinary. 1 *Roll's Abr.* 481, *contra* 46 *Aſſ.* 4. *Brook, Dean and Chapter* 18. However, if the Biſhop be Patron of any Deanery, Archdeaconry, Prebend, Parſonage or Vicarage, *&c.* and the Incumbent's Grant be to be confirmed, the Biſhop himſelf muſt confirm (as I conceive,) and his Confirmation alone without the Confirmation of the Dean and Chapter, ſhall make the ſame good to bind the Succeſſor, as it is ſaid to be agreed *Paſch.* 13 *Jac. B. R. Smith* v. *Bowles*, 3 *Bulſt.* 290. for which is cited 33 *H.* 8. *Brook*'s Caſe 46. But this Confirmation, it ſeems to me, ſhall only ſtand good during the Life of the Biſhop that did make it, and of the Succeſſor Incumbent that found the Church charged, becauſe the Advowſon is Part of the Poſſeſſions of the Biſhoprick. 11 *H.* 6. 9. 33 *H.* 8. *Broke Leaſe* 64. *Paſch.* 9 *Eliz. Dyer, f.* 357. *a.* See 1 *Roll's Abr.* 481. 1 *Inſt.* 300. *b.* And it is ſaid, that if a Biſhop be Patron and Ordinary, and doth confirm a Leaſe made by the Parſon without the Dean and Chapter, and after the Parſon dieth, and the Biſhop collateth another, and then is tranſlated, yet this Confirmation remaineth good, for that the Revenues that are to maintain the Succeſſor are not thereby diminiſhed; and ſo it is, if the Biſhop doth reſign, yet ſuch Leaſe will be void by the Biſhop's Death; but when by the Biſhop's Grant the Revenues of the Biſhoprick be impaired that ſhould maintain the Succeſſor, there the Privation or Tranſlation of the Biſhop is all one with his Death. 1 *Inſt.* 329. *a.*

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Leaſe void by the Biſhop's Death, *&c.*

If the Biſhop of *A.* be Patron of the Church Preſentative of *B.* which lies within his Dioceſe, and this is the Corps of a Prebend in the Church of *A.* and the Biſhop of *A.* is alſo Patron of the Church of *C.* which is alſo Preſentative and lies in the Dioceſe of the Biſhop of *D.* and afterwards the Church of *C.* is lawfully annexed and united by the Aſſent of the Biſhops, Deans and Chapters of both Dioceſes to the ſaid Prebend of *B.* and afterwards the Biſhop of *A.* doth collate *J. S.* to the ſaid Prebend, which now by the Union doth conſiſt of both Churches, and doth inſtall him in the Cathedral Church of *A.* and then the Prebendary doth make a Leaſe for Years, which is confirmed by the Biſhop, Dean and Chapter of *A.* and not by the Biſhop of *D.* yet this is a good Confirmation; for by the Union, the Biſhop of *D.* hath annexed the Church of *C.* to the Prebend of *B.* and ſo hath deprived himſelf of the Power of Confirmation as Ordinary; for after the Union the Prebendary is inveſted in both Churches by his Inſtalment without any other Preſentment, Admiſſion, Inſtitution or Induction to the Church of *B.* or *C. Paſch.* 10 *Jac. B. R. Leigh* v. *Hellyer*, 1 *Roll's Abr.* 479. *Mich.* 39 & 40 *Eliz. B. R.* Dr. *Herbert* v. *Munday*, 3 *Cro.* 587, and *Paſch.* 14 *Car.* 2. *B. R. Gie* v. *Rider*, 1 *Sid.* 75. 1 *Keb.* 280.

That the Patron's Confirmation may be ſufficient, no other Perſon ought to have any Intereſt in the Patronage, but the Patron or Patrons that do confirm; for thoſe Grants that are confirmed, being to bind Succeſſors, are in the Nature of a Charge upon the Advowſon, and therefore ought to be directed by the Eſtate which the Confirmer hath, and being derived out of the Eſtate of the Advowſon, can indure no longer than the Eſtate of the Patron confirming doth abide. 1 *Inſt.* 300. *b. Maund* and *French*'s Caſe, *Hill.* 13 *Jac.* 1 *Roll's Rep.* 361. 1 *Roll's Abr.* 480. Accordingly if there be a Patron Paramount, as well as an immediate Patron, Confirmation of the immediate Patron without the others Confirmation is not good; for Inſtance, if a Parſon be

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be Patron of the Vicarage of the ſame Church, and the Vicar doth make a Leaſe confirmed by the Parſon and Ordinary only, this is not good without the Confirmation of the Patron of the Rectory alſo. So if the Patron's Eſtate in the Advowſon that confirms be Conditional, and after the Condition is broken, thereby the Confirmation is void, as determining with the Eſtate of the Confirmer. 1 *Inſt.* 300. *b.* Or if the Patron that confirms be but Tenant in Tail, or Tenant for Life, his Confirmation ſhall only bind ſuch Incumbents as come into his Church during his own Life, 31 *Ed.* 3. Tit. *Grants* 61. and accordingly it was agreed by *Coke* and *Dodderidge*, that if a Parſon doth make a Leaſe for Years, which is confirmed by Patron and Ordinary, the Patron being Tenant in Tail, the Patron and Parſon both die, and the Iſſue in Tail doth preſent another, his Preſentee ſhall hold the Rectory diſcharged of ſuch Leaſe. And alſo they agreed, that although the Iſſue in Tail after a Preſentation doth levy a Fine, yet the Preſentee of the Conuſee, when the Church becomes void again, ſhall hold it diſcharged alſo; for that the Confirmation was defeated by the Preſentation of the Iſſue in Tail. *Paſch.* 14 *Jac. B. R. Maund* v. *French*, 1 *Roll's Rep.* 361, the ſame Caſe, *Hill.* 13 *Jac. Bridgman* 95. But if the Patron that is Tenant in Tail doth diſcontinue the Eſtate in Tail, the Leaſe ſhall ſtand good during the Diſcontinuance; or if the Eſtate Tail be barred, it ſhall ſtand good for the whole Term. 1 *Inſt.* 300. *b.*

If he be Tenant for Life, *&c.* or in Tail.

If the Iſſue in Tail levy a Fine.

Leaſe by Chaplain of a Chantry, *&c.*

If the Chaplain of a Chantry or Free Chapel, that was a Donative, had made a Leaſe for Years before 32 *H.* 8, and the Patron of the Chapel being ſeiſed of the Patronage in Tail, had confirmed it, this ſhould not have bound the Chaplain of the Iſſue in Tail. *Dyer*, 8 *Eliz.* 252. And if in ſuch Caſe the Patronage of the Donative came to the King by the Statute of Chantries, neither the King, nor his Clerk, ſhould be bound by the ſaid Leaſe; but if the Donor levied a Fine after the Confirmation, by which the Iſſue in Tail was bound from avoiding the Leaſe, the King alſo ſhould be barred. 1 *Roll's Abr.* 480. If Tenant in Tail of an Advowſon and his Son and Heir apparent do join in a Grant of the next Avoidance, and after the Tenant in Tail dies, the Son ſhall avoid the Grant, becauſe he had nothing in the Advowſon at the Time of the Grant made. *Mich.* 12 *Jac. Wyvil* and *Scroop* v. *Ewbank* and *Topſhal*, 1 *Roll's Abr.* 482.

Confirmation by Coparceners.

If there be three Coparceners or Tenants in Common of an Advowſon, the Confirmation muſt be made by all of them, elſe it will not bind the next Incumbent, becauſe they are all but one Patron (by *Coke.*) But if there be a Compoſition to preſent by Turns, *Quære*, If a Leaſe confirmed by him that hath the next Turn, when the Church voids, ſhall not be good to bind his Preſentee? But if of the Three Coparceners or Tenants in Common, one be a Feme Covert, and ſhe confirms, her Act is void, and ſhall not bind her, her Heirs or Clerk, but only during the Coverture. 1 *Roll's Abr.* 479.

If ſucceſſor be collated upon a Lapſe by Succeſſor of the Confirmor.

Quære, if the Succeſſor of the Incumbent that made the Leaſe, be collated upon the Title of Lapſe by the Succeſſor of the Biſhop that confirmed it, whether ſuch Clerk be bound? (it ſeems not;) for that the Ordinary hath no Intereſt, but preſents in Right of the Patron, and ſo his Clerk ſhall be ſo far bound, and no farther than the Clerk of him that ſuffered the Lapſe ſhould have been. *Mich.* 32 & 33 *Eliz. B. R. Lancaſter* v. *Lucas*, 1 *Leon.* 233.

Where the Patron's Grantee muſt alſo confirm.

Though he that confirms as Patron hath the Fee-Simple of the Advowſon in him, yet if before he confirms he hath granted away the

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next Avoidance, his Confirmation of the Preſentee's Leaſe will not be good to bind the Preſentee of the Grantee of the next Avoidance, unleſs ſuch Grantee doth alſo confirm. By *Brown*, *Trin.* 6 *Eliz.* *Moor* 67. *Mich.* 3 & 4 *Ph. & Mar.* *Dyer* 133. *a.* And if the Preſentee of him that hath the next Turn doth enter and void ſuch Leaſe (as he well may) and then dying, the Patron of the Fee doth preſent a new Incumbent; this new Incumbent ſhall hold the Benefice diſcharged of the Leaſe which was confirmed by his Patron, as his Predeceſſor ſhould have done, for the Leaſe was fully avoided by the Entry of his Predeceſſor, and not for his Time only, becauſe the Predeceſſor that avoided it had the intire Fee, (as much as any Parſon may have of a Rectory Preſentative) and when he was in and had evicted the Leſſee, it was an abſolute Eviction of the intire Term without Expectation of Revivor, and was an Eviction not only for himſelf and his own Time, but alſo for all his Succeſſors; *per Curiam*, upon a Writ of Error. *Paſch.* 16 *Car. B. R.* *Plowden* v. *Oldford*, 1 *Cro.* 582, the ſame Caſe, *Jones*, *p.* 454. See the Earl of *Bedford*'s Caſe, 7 *Co. f.* 8. *Trin.* 11 *Jac.* *Spendlow* v. *Burket*, *Hob.* 7. 1 *Inſt.* 46. *a.* So if the Incumbent of an Uſurper doth make a Grant, which is confirmed by the Uſurper and the Ordinary, and in a *Quare Impedit* the true Patron doth recover, and remove the Incumbent, the Grant thereby is defeated, becauſe it was not made and confirmed by thoſe that were Parſon and Patron in Right, 1 *Roll's Abr.* 480, where he cites 9 *H.* 6. 33, (which warrants not what he ſays, but the contrary.)

Upon a Grant by the Incumbent of an Uſurper.

Patron may confirm by conſequence of Law, if abſolutely ſeiſed.

But note, That a Patron may not only confirm explicitly by his Deed or Writing, but alſo by Conſequence of Law; for if a Parſon doth make a Leaſe for Years to the Patron, who doth grant over or aſſign it to another, this is a Confirmation in Law by the Patron; but without ſuch Aſſignment the Ordinary's Confirmation ſhall not make the Leaſe good to the Patron to bind the Succeſſor according to *Newcomb*'s Caſe, cited in the Caſe of the Eccleſiaſtical Perſons. 5 *Co.* 15. *a.* 1 *Cro.* 38. *Paſch.* 14 *Jac. B. R.* *Maund* v. *French*, 1 *Roll's Rep.* 361, 171. 1 *Inſt.* 301. *b.* 302. *a.* But then the Patron ought to be abſolutely ſeiſed of the Advowſon, otherwiſe it ſhall bind but according to the Eſtate that he hath therein.

How by Conſtruction of Law a Confirmation may be for a Longer Term than expreſſed.

As by Conſequence of Law Confirmation may be without Writing, ſo if it be by Writing, by Conſtruction of Law it may be for longer Term than is thereby expreſſed; as if a Patron doth at this Day make Leaſe for Twenty-one Years, and the Patron and Ordinary do confirm his Eſtate for Seven Years, this by the Conſent of all is a Leaſe well confirmed for the Seven Years, *Mich.* 16 & 17 *Eliz. C. B.* *Dyer* 338, and by ſome ſhall amount to a Confirmation of the whole Term of Twenty-one Years, as by *Richardſon*, who took a Difference where the Eſtate is confirmed, and where they confirm the Land for Seven Years; in the firſt Caſe, the Confirmation confirms all the Eſtate; but where they confirm the Land for Seven Years, that Confirmation ſhall not inure but according to the Term limited, and that Difference was agreed by *Croke* and all the Serjeants at the Bar; but *Hutton* doubted. *Hill.* 3 *Car. C. B.* *Tomlinſon*'s Caſe, *Hetley* 75. And accordingly when a Prebend demiſed a Rectory, Parcel of his Prebend, for Seventy Years, and after the Biſhop confirmed the ſame Demiſe for Fifty-one Years, and the Dean and Chapter likewiſe confirmed the ſame for Fifty-one Years, and no more; it was held by all the Juſtices, that they might confirm ſeverally, and that their Confirmations were available for the reſt of the Term after

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Fifty-one Years, *viz.* for the whole Seventy Years; for when the Biſhop, Dean and Chapter, reciting the Demiſe of Seventy Years, do confirm *Dimiſſionem prædictam in forma prædicta*, theſe Words, *pro termino* Fifty-one Years *& non ultra*, come too late; and the Leaſe being for Seventy Years it is repugnant to confirm *Dimiſſionem prædictam* for Fifty-one Years. But if the Biſhop, Dean and Chapter, had recited the Leaſe, and had confirmed the Land to the Leſſee for Fifty-one Years, the ſame had been good for that Term only, for then there ſhall not be any ſuch Repugnancy in the Confirmation. And a Difference is in this ſame Caſe made between a bare Aſſent without any Right or Intereſt, and an Aſſent coupled with a Right or Intereſt; for the Termor who is to perfect a Grant by his Attornment cannot aſſent for a Time, nor upon Condition, nor for Part of the Thing granted, but it ſhall abſolutely enure to all, becauſe he hath but a bare Aſſent which cannot be qualified or apportioned; but the Biſhop who is Patron, and the Dean and Chapter, have an Intereſt in the Prebend, and every Part of it. 3 *Cro.* 79. For the Patron hath *Jus conferendi*, and a Releaſe unto the Patron of an Annuity in the Time of Vacation is good, as it is holden in 21 *H.* 7. 41. 8 *E.* 3. 28. *Percy*'s Caſe, 33 *E.* 3. *Aid de Roy* 103. 8 *H.* 6. 24. And alſo it is holden in 31 *E.* 3. *Grants* 90. 16 *E.* 3. *Annuity* 23. 8 *R.* 2. *Annuity* 53, that the Patron and Ordinary may charge the Glebe in Time of Vacation; and *F. N. B.* 49, ſaith, that the Right is in the Patron and Ordinary. *Litt. cap. Diſcontinuance, ſect.* 144, 145. So if a Leaſe be made of Twenty Acres, they may make a Confirmation as to Part of the Land, *viz.* to one or more Acres, ſo they may confirm Part or all upon Condition; by which it appeareth, that they have not a bare Aſſent as in caſe of Attornment, but an Aſſent clothed with an Intereſt. Another Difference was taken between a Leaſe for Years and a Leaſe for Life; a Gift in Tail, or a Feoffment in Fee; for if a Prebendary make a Leaſe for Years, Confirmation may be made of the Land, as hath been ſaid before, for a leſs Number of Years; for the Years are ſeveral, although the Leaſe or Term be one. As if a Man make a Leaſe of Lands for Five Years, rendring Rent every Year Twenty Pounds, the Years are ſeveral, ſo that an Action of Debt will lie for the Rent every Year, as it is adjudged in 45 *E.* 3. 8. But if a Prebendary make a Leaſe for Life, or a Gift in Tail, or a Feoffment in Fee, and Confirmation is made of the Land to the Leſſee, Donee or Feoffee, for one Hour, it is good for ever, for an Eſtate of Freehold or Inheritance is intire; therefore it is, that if he who hath a Freehold or Inheritance be diſſeiſed, and confirmeth the Land to the Diſſeiſor for one Hour, it is good for ever. See for all theſe Differences, *Paſch.* 37 *Eliz. C. B. Foord*'s Caſe, 5 *Co.* 81. *Paſch.* 38 *Eliz.* 1 *Anderſon* 47. and 1 *Inſt.* 297.

Where Patron and Ordinary may charge the Glebe.

Confirmation may be as well before the Leaſe as after.

The Time when a Confirmation is made is not generally to be regarded, for it is ſaid, that if a Biſhop doth make a Leaſe for Years on the 2d of *May*, and the Dean and Chapter confirm it on the 1ſt of *May*, this is a good Leaſe after the Biſhop's Death; by *Catlin* and *Southcot:* But *Wray* objected, that a Leaſe cannot be confirmed before it be made. *Catlin* and *Southcot* replied, that the Aſſent before is a good Confirmation of a Leaſe made after, *Hill.* 18 *Eliz. Owen, p.* 33, and 14 *Eliz. The Biſhop of Rocheſter*'s Caſe, 4 *Leonard* 23. So when a Biſhop made a Leaſe the 2d of *May*, which was confirmed the 3d of *May*, and ſealed the 4th of *May*, it was held that the Leaſe was well confirmed. Juſtice *Harper's Rep. Mich.* 14 & 15 *Eliz.* So when the Deed of Confirmation bore Date before the Deed confirmed, but by

Confirmation of Leaſes.

Agreement the Deed confirmed was firſt delivered, the Confirmation was held good. 1 *H.* 6. 8. For a Confirmation is but a meer Aſſent by Deed to the Grant; and therefore, if the Patron and Ordinary give Licence by Deed unto the Parſon to grant a Rent-Charge out of the Glebe, and the Parſon doth ſo accordingly, this is good and binding to the Succeſſor, and yet it is not a Confirmation ſubſequent, but a Licence precedent. 1 *Inſt. f.* 300. *b.* So if a Leaſe be made by a Biſhop to the King, and a Commiſſion doth iſſue out of the *Exchequer* to take this Leaſe, and after the taking thereof, and before the Inrolment, the Dean and Chapter do confirm the Leaſe, the Confirmation is good, though it be before the Inrolment; becauſe Confirmation is but an Aſſent which may be as well before the Leaſe as after. *Evans* and *Aſcough*'s Caſe, *Hill.* 22 *Jac. Latch* 240. *Trin.* 8 *Jac.* Sir *Edward Dimock*'s Caſe, 1 *Roll's Abr.* 471. 1 *Inſt.* 301. *a.* But on the contrary it hath been held, that if a Confirmation be made and delivered before the Grant be confirmed, this is not a good Confirmation; and in this Caſe it was ſaid, that if after the Grant the Confirmation be delivered again, yet that will not make it good, for that it was a Deed by the firſt Delivery, and the ſecond Delivery will not make it good as an Aſſent, becauſe the Aſſent ought to be by Deed, and the firſt Delivery was void. 8 *H.* 6. 6. cited 1 *Roll's Abr.* 480.

Confirmation is but a meer Aſſent by Deed.

Confirmation of Biſhop's Grant after his Death.

If a Confirmation of a Biſhop's Grant be made by the Dean and Chapter after the Death of the Biſhop, this Confirmation comes too late. *Harper*'s *Rep.* 14 & 15 *Eliz.* But by *Clench*, if the Confirmation be made in the Vacation after the Biſhop's Death, it's good. 28 *Eliz. Grindal*'s Caſe, 4 *Leonard* 78. But of this I much doubt, for the Death muſt void the Leaſe, which Confirmation cannot revive. And accordingly, when a Parſon did grant an Annuity, and then reſigned, and after the Patron and Ordinary did confirm the Grant, the Confirmation was of none Effect, for that it was made after the Reſignation, and ſo not till after the Grant of the Annuity was determined. 21 *H.* 7. 1. And all Confirmations are to be made in the Life, and during the Incumbency of the Parſon, who makes the Grant; and ſo in like Manner in the Life of the Biſhop, and every other ſole Corporation. 1 *Inſt.* 301. *a.*

Confirmation by a ſucceeding Biſhop and Patron.

But if a Parſon doth make a Leaſe, which is not confirmed by the Biſhop, or Patron then in Being, but by the ſucceeding Biſhop, and ſucceeding Patron, this is a good Leaſe againſt the Succeſſor according to *Newcomb*'s Caſe, 5 *Co. f.* 15. *Trin.* 2 *Car. B. R.* Sir *Robert Banniſter*'s Caſe, 1 *Cro.* 38. But if a Biſhop doth make a Leaſe for One and twenty Years according to the Statutes, and after doth make a concurrent Leaſe, for Years of the ſame Land to another, and after and before any Confirmation of the ſecond Leaſe the Biſhop doth make another concurrent Leaſe to a third Perſon, which is immediately confirmed, and after the ſecond Leaſe is confirmed alſo; in this Caſe the ſecond Leaſe ſhall be good and effectual by the Confirmation, although that the laſt Leaſe was confirmed before it, for the Confirmation doth not convey any Intereſt, but is only to make the Leaſe durable and effectual; by *Dyer*, *Weſton* and *Carus*, *Trin.* 6 *Eliz. Moor* 69. And upon this Reaſon it hath been adjudged, that Leaſes made before the Statute of 13 *Eliz.* for more Years than allowed thereby, being confirmed after the ſaid Statute, are good for the whole Term. And ſo, becauſe the Statute of 13 *Eliz. c.* 10. doth only reſtrain from alienating, not confirming. *Mich.* 38 & 39 *Eliz. Arkingſal* v. *Denny*, *Moor* 459. *Paſch.* 25 *Eliz. C. B. Higgins* v. *Grant*, 3 *Cro.* 18 *Mich.* 23 & 24 *Eliz.* in the High Court of Parliament, the Caſe of *Eccleſiaſtical Perſons*, 5 *Co.* 14. And ſo it hath been held *per Curiam*,

Miſnomer in Leaſes.

Curiam, that the Statute of 1 *Eliz.* did not reſtrain Biſhops from confirming the Incumbent's Leaſes made for above One and twenty Years, although the Biſhop was as well Patron as Ordinary of the Church to which the Thing leaſed did belong. *Mich.* 37 & 38 *Eliz.* Sir *Edward Denny* v. *Egkenſtal*, 3 *Cro.* 430.

The Corporations to be truly named.

A ſecond Rule at Common Law to be obſerved by Eccleſiaſtical Perſons, or Corporations, in making Grants and Leaſes, is truly to name the Corporations according to the Name by which they are incorporated; and this not only in making of Leaſes, but alſo Preſentations, Confirmations, &c. *Hill. Jac.* Dr. *Array*'s Caſe, 11 *Co.* 19. So of Obligations, &c. *L.* 5. *E.* 4. 201. *Paſch.* 4 & 5 *P. & M. Bendlow* 2. In like Manner in all Grants made by others to them, the Corporation muſt be truly named. And yet in Preſentations it ſeems not to be altogether neceſſary to name the Corporation by its true Name; for when the King preſented to the Deanery of *Norwich*, and did miſtake and miſrecite the Name of the Foundation of the Deanery, the Preſentation was held good, becauſe it was but a Commendation of a Perſon to the Dignity, and touched not the Inheritance. *Trin.* 8 *Jac. C. B. The King* v.——— 2 *Cro.* 248.

Name of Baptiſm miſtaken.

If Land be given to *George* Biſhop of *Norwich*, where his Name is *John*, for that in this and the like Caſes there can be but one of that Dignity or Name, ſuch Grant is good, albeit the Name of Baptiſm be miſtaken: So if by Licence Lands be given to the Dean and Chapter of *Norwich*, this is good, although that the Dean be not named by his proper Name, if there were a Dean at the Time of the Grant; but in Pleading his proper Name muſt be ſhewed; ſo on the other Side, if the Dean and Chapter make a Leaſe without naming the Dean by his proper Name, the Leaſe is good, if there was a Dean at the Time of the Leaſe made; but 11 *E.* 4. 8. *Br. Corporations*, *f.* 95. is contrary. Yet a Leaſe being made by a Dean and Chapter in theſe Words, *Nos Decanus & Capitulum*, without naming the Dean by his proper Name, the Leaſe for that Reaſon was held to be void. *Mich.* 32 & 33 *Eliz.* 1 *Leon.* 307. See *Dyer* 106. 11 *Co.* 21. *Perkins* 8. 27 *H.* 6. 3. *Hobart* 32 *Litt. Rep.* 201. 11 *Co.* 20. *Owen* 35. *Dalliſon* 78. Note, That any Man that alters his Name at Confirmation, may purchaſe by his new Name. 1 *Inſt. fol.* 3. *a.* 1 *Brownlow* 147. *Lit. Rep.* 182. And it is ſaid, that the Name of a Corporation is as the Name of Baptiſm which cannot be changed. *Bendlow* 2.

Variation as to Circumſtances hurts not.

But in theſe Caſes it is not neceſſary that the Corporation be named according to the very Words, ſo that it be named according to the Senſe and Subſtance of the very Name, although there be a Variation as to Circumſtances. *Mich.* 10 *Jac. C. B.* the Caſe of the Mayor and Burgeſſes of *Lyn Regis*, 10 *Co.* 120. and by *Gaudy*, *Trin.* 39 *Eliz. Sherborn* v. *Lewis*, *Gouldsborough* 120. *Hill.* 29. *Fanſhaw*'s Caſe, *Moor* 228. *Mich.* 10 & 11 *Eliz. Dyer* 278. *Trin.* 30 *Eliz. Fiſher* v. *Boys*, *Moor* 266. *Mich.* 36 & 37 *Eliz. Lord North*'s Caſe, *Moor* 361. But the great Queſtion or Difference is, when the Name of a Corporation in any Grant or Deed ſhall be ſaid to vary from the true Name in Subſtance, and when in Circumſtance only.

Great Queſtion of Variance.

We muſt note, that there are, according to *Manwood*, Chief Baron, ſome Things of Subſtance to be obſerved in every Corporation founded to pious Uſes. Firſt, It is needful that there be Perſons for the Support of the Corporation in which the Freehold and Government of it may remain, and they ought to have and be known by ſome Name,

as

as *Preſident and Scholars*, or *Maſter and Scholars*, *&c.* and a Variance in this Name is a Variance in Subſtance. Miſnomer in Leaſes.

Secondly, That the Perſons ſhall be appointed to one Houſe certain, in which they ſhall be reſident, which Houſe alſo ought to have a Name known, as College, Hoſpital, or the like; and Variance in the Name of the Houſe is a Variance in Subſtance. Variance in the Name of the Houſe.

Thirdly, it ought to have the Name of a Saint to whom it is dedicated, or of the Perſon by whom it is founded, as *Collegium Petri*, or *Pauli*, or *Gonvel-Hall*, or *Chriſt-Church*, *&c.* and Variance in this Name of Dedication or Foundation is Variance in Subſtance. In the Name of Dedication, *&c.*

Fourthly, It ought to have a Place known in which the Houſe ſhall ſtand, known by ſome Name before the Foundation, as *Oxford*, *Cambridge*, *London*, *&c.* and Variance as to this Place is an eſſential Variance. *Hill.* 29 *Eliz.* *Fanſhaw*'s Caſe, *Moor* 228. But it ſufficeth that there be a ſufficient Demonſtration of the Place where the Corporation is, though it be not by preciſe Words comprized in the Charter, as in naming, to ſay *Academia Oxon pro Villa Oxon*; ſo if a Town was incorporated by the Name of Mayor and Commonalty of ſuch a Town, as *Briſtol*, *Exeter*, *&c.* which afterwards are made Cities; it is good to ſay, Mayor and Commonalty of the City of *Exeter*, *&c.* after they became Cities; but more Preciſeneſs is uſed in the Body of the Name of the Corporation before the Place to which they are annexed; yet in them that which is but an Ornament to the Name comprehended in the Charter ſhall not hurt, as the Grant of St. *George* of *Windſor*, if it be of St. *George* the Martyr, *&c.* is good, becauſe the Martyr is but an Addition of Ornament to the Name comprized in the Charter, and ſo in Reality is the ſame Name. *Burton* and *Wrightman*'s Caſe, *Mich.* 36 & 37 *Eliz.* *B. R.* *Popham* 56. Variance as to Place where the Houſe ſtands.

Though Leaſes, *&c.* are void when there is Variance in the Subſtance of the Name of the Corporation; yet not when the Variance is only as to any of theſe four Circumſtances, *viz.* in Addition, Interpoſition, Omiſſion, or Commutation, or altering the Order of the Words, ſo that they retain the four aforeſaid Principles of Subſtance; by *Manwood*, Chief Baron, in *Fanſhaw*'s Caſe, *Hill.* 29 *Eliz.* *Moor* 231, and *Trin.* 6 *Eliz.* *Moor* 71. And generally albeit the Words in the Grant do not agree with the Words of Incorporation, yet if they agree in common Underſtanding it is good; but if in common Underſtanding the Grant may not be taken according to the Foundation, there it is not good; by *Popham* in *Sherburn* and *Lewis*'s Caſe, *Trin.* 39 *Eliz.* *Gouldſb.* 123. Variance, as Addition, Interpoſition, Omiſſion, or Commutation, will not void the Leaſes.

But if the Name of a Deed doth not import of itſelf the true Name of the Corporation, yet if in Pleading, or by a ſpecial and expreſs Averment, or by the finding of the Jury, it ſhall be made apparent to the Court that the true Name of the Corporation, and the Name in the Leaſe, Grant, *&c.* are all one in Effect, it will much inforce the Matter, although that in Words there be ſome Appearance of Difference; by *Coke*, in *The Caſe of the Mayor and Burgeſſes of Lyn Regis*, *Mich.* 10 *Jac.* *C. B.* 10 *Co.* 125. If the true Name, *&c.* appear by Pleading, or Averment, or the Jury's finding.

And indeed, the Judges ought in theſe Caſes (as generally they do) to make ſuch Conſtructions, if they may, that Grants do ſtand good. *Sherborn* v. *Lewis*, *Gouldſb.* 122, and it is great Reaſon that Favour and Equity ſhould be mixt with Juſtice, for that Suits to avoid Grants upon the account of the Miſnoſmer are odious Suits; and a ſhameful Thing it is that when Grantees or Leſſees, who for the moſt part are illiterate Perſons, have paid great Fines, Corporations, that are preſumed Conſtructions of the Judges.

Leaſes void, &c.

beſt to know their Name of Foundation, ſhould go about to avoid their own Grants under their Common Seal upon ſuch a ſlight Miſtake: The Reader may ſee divers Caſes relating to this Subject, cited in *The Caſe of the Mayor and Burgeſſes of Lyn Regis, Mich.* 10 *Jac.* 10 *Co.* 120. *Hayward* and *Fulcher*'s Caſe, *Palmer* 491, and in *Fanſhaw*'s Caſe, *Moor* 228. See in the ſame Book 71, 539, and 6 *Co.* 24. 1 *Leon.* 159. *Gouldſb.* 121. *Plowden* 537. 1 *And.* 196, 201. However, it ſeems that in ſuch Caſe Remedy may be had in the Court of *Chancery*; for the Lord Chancellor ſaid it was fit to help ſuch Leaſes there, if for reaſonable Time, and made upon good Conſideration; otherwiſe not. 1 *Jac. Cary* 44. 32 & 33 *Eliz.* Lord *Audley* v. *Sidenham*, *Tothil* 136.

Relief in Chancery.

Many more Things at the Common Law are to be regarded in making Grants by Spiritual Corporations, which are here omitted, for that they are Common with them to all other Perſons making Grants in their natural Capacity.

CHAP. XLV.

Leaſes void and voidable. Voidable Leaſes, how made good or actually void. Entries, how to be made. Diſcontinuance and Aid Prayer. Judgments in Real Actions, to whom binding.

HAVING ſhewed what Eſtates Eccleſiaſtical Perſons or Corporations may at this Day make, and what Rules are to be obſerved by them in the making thereof, that they may not be void; It remains to be ſhewed, againſt whom ſuch Grants or Leaſes are void? by what Means, and in what Caſes they may be affirmed or made good by the Succeſſors? and by what Means they may be made actually void that were but voidable?

Biſhop's Grant of a next Avoidance good againſt himſelf.

Firſt then, although that by the Words of the Statute of 1 *Eliz. cap.* 19, Leaſes or other Grants made by any Archbiſhop or Biſhop, that be not warranted by the ſame, ſhall be utterly void; yet it hath been adjudged, that if a Biſhop grant a next Avoidance which is not warranted by this Statute, becauſe it is a Thing lies meerly in Grant, out of which no Rent can be reſerved, it is not void againſt the Biſhop himſelf that makes the Grant, but only againſt the Succeſſor, *Paſch.* 32 *Eliz. Sale* v. *Biſhop of Coventry* and *Marſh*, 1 *Anderſon* 241. *Mich.* 37 & 38 *Eliz. Dean and Chapter of Hereford* v. *The Biſhop of Hereford* and *Ballard*, 3 *Cro.* 440. *Mich.* 32 & 33 *Eliz. Smallwood and others* v. *The Biſhop of Coventry* and *Marſh*, 3 *Cro.* 207. *Trin.* 41 *Eliz. Armiger* v. *Biſhop of Norwich* and *Holland*, 3 *Cro.* 690. *Singleton*'s Caſe, cited in *Lincoln College*'s Caſe, 3 *Co. f.* 59. *b.* And ſo it is if a Biſhop doth make a Leaſe of the Advowſon of a Church, *Smallwood* v. *The Biſhop of Coventry* and *Litchfield*, and *Marſh*, *Savil*'s Caſe

188. *Paſch.* 15 *Car.* 2. *Scaccar'*, *Morrice* v. *Antrobus*, *Hardres* 366. *Scudamore* v. *Belliſon*, 1 *Keb.* 182. So if an Annuity be granted by a Biſhop out of the Poſſeſſion of the Biſhoprick, this is not void againſt the Biſhop that makes the Grant thereof. *The Biſhop of Saliſbury*'s Caſe, *Trin.* 11 *Jac. C. B.* 10 *Co.* 60. Or if a Biſhop makes a Leaſe for above One and twenty Years, this ſhall bind the Biſhop during his Time, as was ſaid in Sir *Moyl Finche*'s Caſe, 33 *Eliz.* 2 *Leon.* 134. Or if a Biſhop doth let Tithes for three Lives, which is a void Leaſe againſt the Succeſſor, becauſe there is not any Remedy for the Rent; or if the antient Rent is not reſerved, and Annually due and payable, yet it was adjudged this Leaſe was not void againſt the Biſhop himſelf that made it. *Trin.* 5 *Jac. B. R. Rickman* v. *Garth*, 2 *Cro.* 173. And when a Biſhop did by Deed inrolled grant to the Queen without the Conſent of the Dean and Chapter, it was held that this was not void againſt the Biſhop himſelf. *Warren*'s Caſe v. *Smith*, or *Magdalen College*'s Caſe, *Paſch.* 13 *Jac. B. R.* 1 *Roll's Rep.* 151. So though the Statute of 13 *Eliz. cap.* 10, doth ſay, That all Leaſes, Gifts, Grants, *&c.* made by any Perſons or Corporations therein mentioned, contrary to the Tenor of that Act, ſhall be utterly void and of none Effect to all Intents, Conſtructions and Purpoſes; yet it hath been adjudged, that a Leaſe made againſt the ſaid Statute by a Dean and Chapter ſhall not be void, or avoided by them, nor any Covenants therein contained, during the Life and Continuance of the Dean that made the Leaſe; and if they have made a Leaſe for Years of any of their Poſſeſſions, and before the Expiration thereof do make a concurrent Leaſe alſo for Years of the ſame Lands, and then make a Third Leaſe for Lives, with an expreſs Covenant, that the Grantee of the Leaſe for Lives ſhall injoy the Land againſt the ſecond or concurrent Leaſe; and the Grantee of the Leaſe for Lives being in Poſſeſſion is evicted, and brings Covenant againſt the Dean and Chapter; in this Caſe, although the laſt Leaſe for Lives be void by the Statute of 13 *Eliz.* yet it was agreed by the Juſtices, that becauſe the Dean that made the Leaſe for Three Lives was living, and continued Dean at the Time of the Eviction, the Leaſe and Covenants were not void. *Paſch.* 10 *Jac. Walter* v. *The Dean and Chapter of Norwich*, *Moor* 875, the ſame Caſe, *Brownl.* and *Goldſb.* 2 *Part* 158.

Leaſes void, &c.

Leaſes above 21 Years.

Biſhop's Grant to the Queen.

So when the Caſe was, that a Maſter and Fellows of a College did by Deed inrolled make a Leaſe not warranted by the Statute, and did ſuffer a Fine and Five Years to paſs without Claim; though this was void againſt the ſucceeding Maſter, yet by Conſtruction the Leaſe and Fine ſhall be good againſt the College (though it be a Corporation that never dies) during the Life of the Maſter that was Party to the Leaſe and made no Claim, becauſe he is the Head and principal Part of the Corporation. *Paſch.* 17 *Jac. The Caſe of the Maſter and Fellows of Magdalen College* in *Cambridge*; 11 *Co.* 67, the ſame Caſe, 1 *Roll's Rep.* 151. *Mich.* 32 & 33 *Eliz. C. B. Carter* and *Claycole*'s Caſe, 1 *Leon.* 306.

Leaſe by Maſter and Fellows of a College, *&c.*

And the Law I ſuppoſe to be the ſame, if an Archdeacon, Dean or Prebend, *&c.* make Leaſes or other Grants of any of their ſole Poſſeſſions, nor warranted by the ſaid Statute, *viz.* That they ſhall be bound by their own Grants for their Time; for ſo was it held in the Caſe of a Parſon, by *Popham*, *Clinch* and *Gawdy*; that is, if a Rent be reſerved by ſuch Leaſes, otherwiſe not, as was ſaid by *Popham*. *Hill.* 43 *Eliz. Revil* v. *Hart*, *Gouldsb.* 138. And the Reaſon of all theſe Caſes is, becauſe that the Intent of the Statutes of the 1ſt and 13th of *Eliz.* was only to provide for the Succeſſor, and not relieve the very Perſons

Archdeacon, Dean or Prebend, bound by their Leaſes.

Leaſes void, &c.

Perſons themſelves who make ſuch Leaſes or Grants not warranted by the Statutes. *Hetley* 24. But where there is a Chapter that hath no Dean, as the Chapter of the Collegiate Church of *Southwel*, there Grants or Leaſes made by them contrary to the Statute of 13 *Eliz.* are void *ab initio*, for they muſt be either ſo, or good for ever. *Trin.* 27 *Car.* 2. *C. B. The Chapter of the Collegiate Church of Southwel* v. *The Biſhop of Lincoln* and *J. S.* 1 *Mod. Rep.* 204. And in all Caſes where a Corporation aggregate makes a Leaſe not warranted by the Statute of 13 *Eliz.* ſuch Leaſe is void *ab initio* againſt themſelves, as hath often been adjudged; but where a ſole Corporation makes ſuch Leaſe, it ſhall bind him that makes it, but ſhall be void againſt his Succeſſor. *Paſch.* 15 *Car.* 2. *Scaccar. Morrice* v. *Antrobus*, *Hardres Rep.* 326. *Carter* v. *Claycoles*, 1 *Leon.* 308. As Leaſes and Grants not warranted by the Statutes are not void againſt the Leſſors and Grantors themſelves, ſo neither are Grants made without due Confirmation, where Confirmation is neceſſary, but only by the Grantee's Death, *&c. Trin.* 7 *Eliz. C. B. Hoſkins* v. *Tucker*, *Dyer* 239. But Grants made by Corporations, in which the Corporation is miſnamed, are void immediately againſt the ſame Grantors.

Aliter by ſole Corporation.

Advantage to ſucceeding Biſhop.

Alſo a Biſhop having made a defective and voidable Leaſe or Grant, not only the Succeſſor, but alſo the King, when the Temporalties come into his Hands, may take Advantage thereof by avoiding them during the Vacancy of the Biſhoprick, in Privity and Right of the Biſhop. But though the King in Privity and Right of the Biſhoprick hath avoided the Leaſe during the Time that the Temporalties were in his Hands, yet the Leaſe is not thereby ſo abſolutely avoided, but that the ſucceeding Biſhop may make the ſame either good or void at his Election as to himſelf. *Mich.* 28 *&* 29 *Eliz. The Earl of Bedford*'s Caſe, 7 *Co.* 8. And this may be done either expreſly, as when the Succeſſor doth actually agree to the Leaſe or Grant of his Predeceſſor, 5 *E.* 4. 105, or implicitly by ſome Act which amounts to an Agreement in Law. And in this, as in all Caſes of Conditions broken, whatſoever Act amounts to the affirming the Leaſe to have Continuance, is in Law an Agreement to the former Demiſe; and a Leaſe may be affirmed firſt, by Acceptance of Rent incurred after the Death of the Predeceſſor. *Paſch.* 13 *Jac. B. R. Brook Abr.* Tit. *Abbe & Prior* 26. *Magdalen College*'s Caſe, 1 *Roll's Rep.* 15. *Mich.* 3 *Car. C. B. Owen* v. *Thomas app Rees*, 1 *Cro.* 95. But here we muſt regard the Difference betwixt Leaſes that are only voidable, and Leaſes that are actually void: For when Leaſes are abſolutely void, that is, without Entry or any other Ceremony, the Succeſſor's Acceptance of Rent incurred will not affirm ſuch Leaſe; otherwiſe it is of Leaſes that are but voidable. *Brook Abr.* Tit. *Acceptance* 7. Accordingly, if a Biſhop doth let a Portion of Tithes for Lives, reſerving the antient Rent, and the Succeſſor doth accept the Rent, this Acceptance of the Rent ſhall not bind the Succeſſor, becauſe the Leaſe was abſolutely void by the Biſhop's Death, *&c.* that made it, without Entry or other Ceremony: the Reaſon is, becauſe Tithes let alone are Things that lie in *prender*, out of which a Rent cannot be reſerved, recoverable by the Succeſſors or next Incumbent when the Leaſe is for Lives. *Trin.* 5 *Jac. B. R. Rickman* v. *Garth*, 2 *Cro.* 173. And therefore being that the Succeſſor's Acceptance of the Rent due at one Day will not enable him to ſue for it, if afterwards denied, he ſhall not be bound by ſuch Acceptance; and the Law is the ſame alſo to all other Things not manurable. But if the Tithes had been let for Years, the Succeſſor's Acceptance of the Rent would have bound him during his Time, becauſe then he may have an Action of Debt for the

Leaſe affirmed, how.

How void.

As of Tithes by a Biſhop for Lives.

Tithes let for Years.

Rent. See the Fifth Rule before, in *Chap.* 42. And as to this Matter, there is a Difference alſo betwixt thoſe that have the Fee-ſimple abſolutely in themſelves, as Biſhops, Deans and Chapters, Maſters and Fellows of Colleges, *&c.* and thoſe that have but a qualified Fee-ſimple, as Parſons, Vicars, Prebends, and others that be Preſentative or Collative, not Elective; for if any of the former Sort make voidable Leaſes for Lives or Years not warranted by the Statutes, if the Succeſſor doth accept the Rent before Entry to make ſuch Leaſes void, be the Leaſe for Lives or Years, he affirms it for his Time. But if a Parſon, Vicar, Prebend, *&c.* doth make a Leaſe for One and twenty Years, rendring Rent, not warranted by the Statutes, and dies, the Leaſe is abſolutely void by the Death, 1 *Inſt.* 45. *b.* and no Acceptance of the Rent by the Succeſſor will affirm it, becauſe the ſame is void without Entry or other Ceremony. 32 *H.* 8. *Bro.* Tit. *Dean* 20. *Bro.* Tit. *Acceptance* 9 & 11. *Paſch.* 4 *Car. C. B. Johnſon*'s Caſe, *Hetley* 88. 24 *H.* 8. *Brook's Novel Caſes, fol.* 10. *Placito* 54. But if a Parſon, *&c.* doth make a Leaſe not warranted by the Statutes for Life or Lives, it is only voidable, not void by Death, 1 *Inſt.* 45. *b.* and if the Succeſſor before Entry to avoid it doth accept the Rent, this Acceptance ſhall bind him for his Time, becauſe this being an Eſtate of Freehold, which is very much regarded in Law, the Law allows it this Privilege, amongſt ſeveral others, not to be void before an Entry when the Eſtate is out of Lands, or the like, into which an Entry may be made. 32 *H.* 8. *Bro. Dean and Chapter* 20. *Hill.* 13 *Jac. Maund* v. *French, Bridgman* 94, and by *Dodderidge, Paſch.* 14 *Jac.* in *Maund* and *French*'s Caſe, 1 *Roll's Rep.* 362. *Trin.* 7 *Eliz. Dyer* 239. *Paſch.* 39 *Eliz. Overton* v. *Sydal, Popham* 120. And this Difference concerning thoſe that have an abſolute Fee, as Biſhops, *&c.* and Parſons, *&c.* who have but a qualified Fee, was obſerved at the Common Law before the Statutes were made. *Mich.* 33 *H.* 8. *Dyer* 46. *Plowd.* 264. *a. Vide L.* 5 *E.* 4. 105.

Leaſes void, &c.

And it is here to be obſerved, that ſo far as the Leſſor is bound by ſuch void or voidable Leaſe, ſo far alſo the Leſſee, his Executors or Aſſigns, which of them have the Intereſt, are bound thereby, and no farther; therefore when the Leaſe is not void without Entry, if Rent be in arrear after the Death of the Predeceſſor, the Succeſſor hath Remedy to recover ſuch Arrears, if he doth chuſe to affirm the Leaſe; but if the Leaſe be abſolutely void, the Succeſſor hath no Remedy at Law for any Rent incurred after the Death of his Predeceſſor. *Paſch.* 39 *Eliz. Overton* v. *Sydal, Popham* 121, and by *Anderſon, Mich.* 32 & 33 *Eliz. C. B. Carter* and *Claycole*'s Caſe, 1 *Leon.* 309. So in like Manner the Leſſee of a voidable Leaſe, after the Death of the Leſſor, may maintain an Action of Treſpaſs againſt the Stranger who ſhall enter or do any other Treſpaſs upon the Land before the Leaſe be actually avoided; by *Periam* in the ſaid Caſe of *Carter* and *Claycole*, 1 *Leon.* 309. And what is ſaid with reſpect to Leaſes defective upon Account of the Statutes, holds good as to Leaſes defective for want of due Confirmation. *Trin.* 7 *Eliz. Dyer* 239, and by *Dodderidge, Paſch.* 14 *Jac. B. R. Maund* v. *French*, 1 *Roll's Rep.* 361.

Leſſor and Leſſee, *&c.* bound alike.

Though, as hath been ſaid, a Leaſe may be affirmed by the Acceptance of Rent, yet this is to be underſtood to hold true only when the Rent is duly accepted; therefore, if a Biſhop doth accept of Rent before Reſtitution of the Temporalties, this Acceptance ſhall not conclude him or bar him of Entry. *Paſch.* 19 *Jac. B. R. The Biſhop of Oxford*'s Caſe, *Palmer* 175. So when a Maſter of a College, or any Head of a Corporation aggregate, doth accept a Rent payable by a voidable Leaſe, this ſhall not

Affirmance by Rent duly accepted.

Leaſes void, &c.

affirm the Leaſe during ſuch Maſter or Head's Life or Continuance, that is, unleſs ſuch Maſter, *&c.* had an Authority from the Corporation to accept the ſame; for inaſmuch as ſuch Bodies Politick do conſiſt of many, the Maſter alone cannot deveſt any Right, which is as much in the Fellows or other Members of the College, *&c.* as in himſelf, or conclude them of their Entry upon any voidable Leaſe. *Paſch.* 13 *Jac. The Caſe of the Maſter and Fellows of Magdalen College,* 11 *Co.* 79, the ſame Caſe, 1 *Roll's Rep. p.* 100.

Acceptance by Biſhop's Bailiff, where binding or not.

If a Biſhop's Bailiff of his own Head, and without any Order from the Biſhop, doth receive Rent, (the Leaſe being voidable) this ſhall not bind the Biſhop. *Dorothy Owen* and *Owen Price*'s Caſe, *Trin.* 3 *Car. C. B. Hetley* 24. But if a Biſhop doth leaſe for Life certain Lands, Parcel of the Manor of *H.* reſerving Rent, (which Leaſe for ſome Reaſon is voidable, and ſhall not bind the Succeſſor) and dies, and another Biſhop is made, and the Bailiff of the ſaid Manor doth come to him, and ſhew him in general Manner, that there be certain Rents in arrear of the ſaid Manor; upon which the Biſhop doth command him to receive the ſaid Rents, and he receives them accordingly, and entreth the Rent reſerved upon the voidable Leaſe to be received, and after doth pay all the Rents to the Biſhop without giving him Notice of the ſaid voidable Leaſe, this is a good Confirmation thereof; for the Biſhop ought of himſelf to take Notice what Leaſes were made by his Predeceſſor; *per Curiam.* 5 *Jac. Wheeler* and *Danby*'s Caſe, 1 *Roll's Abr. p.* 476 *D. Hetley* 26.

Affirmance by a Diſtreſs, *&c.*

As by the Acceptance of Rent a voidable Leaſe may be affirmed, ſo may it be by diſtraining for Rent due at a Day after the Death of the Predeceſſor, or by bringing an Action of Waſte againſt the Leſſee. And in caſe the Leaſe be for Life, by bringing an Aſſize for the Rent due after the Death of the Predeceſſor, but no Aſſize can be brought of a Rent reſerved upon a Leaſe for Years: For an Aſſize cannot be brought of ſuch Things whereof a Man hath a Freehold, that is an Eſtate for Life at the leaſt, except an *Aſſize of Darrein Preſentment*, which, as hath been ſaid *Chap.* 22, may be brought by Tenant for Years, or at Will. Alſo if a Parſon doth accept of Fealty from the Leſſee for Life of his Predeceſſor, he thereby affirms his voidable Leaſe for his own Time. *Trin.* 7 *Eliz. Dyer* 239. 42. 11 *E.* 3. *Fitz. Abbot* 9. *Bro.* Tit. *Acceptance, n.* 15.

Leaſe voided by Entry, *&c.*

But on the other Hand, if a Succeſſor will make a voidable Leaſe actually void, this he may do either by Entry, *viz.* where the Leaſe is of Things corporeal and manurable, and till then the Leaſe remains good. *Paſch.* 5 *Eliz. Ayer* v. *Ome, Dyer* 222. Or by Claim, when the Leaſe is of Things incorporeal: But where a Leaſe for Years is made, rendring Rent, upon Condition to be void for Non-payment, this Leaſe ſhall not be void without Demand made of the Rent, for if it ſhould be otherwiſe, then were it in the Power of the Leſſee to make the Leaſe void at any Rent-Day he pleaſeth, and by that Means to add the Wrong making the Leaſe void to that of Non-payment of the Rent. *Mich.* 31 *&* 32 *Car.* 2. *C. B. Young* v. *Wright*, 1 *Sid.* 7. But when by theſe Means a Leaſe is once made void, it can never be revived again, but remains void againſt all After-Succeſſors. *Paſch.* 16 *Car. Oldfield* v. *Plowden, Jones* 454.

How an Entry may be made.

As to making an Entry, this may be done either by the Party's Bailiff that would enter, or by other Perſons deputed for that Purpoſe; but a Bailiff, by Virtue of his Office, cannot make an Entry for his Maſter without ſpecial Warrant, becauſe his Office is to manage his Maſter's Lands, and to make the Profits thereof to his Maſter's Uſe; but to gain new Land which his Maſter had not, belongs not to the Office of a Bailiff.

Beſides, an Entry is a Thing which the Maſter may or may not make, and his Bailiff ſhall not determine his Election; in *Eire's* Caſe, *Moor* 52. *Paſch.* 5 *Eliz. C. B. Ayer* v. *Ome*, *Dyer* 222. Neither can a Corporation aggregate command their Bailiff to enter for a Condition broken, unleſs it be by Deed, for ſuch Command and Entry without Deed is void. *Paſch.* 43 *Eliz. B. R. Dumper* and *Syms's* Caſe, 1 *Roll's Abr.* 514. *k.* 18 *E.* 4. 8. *Br. Corporation* 59. Yet *per Curiam*, he that diſtrains as Bailiff of a Corporation, and is not Bailiff, may make Conuſance, *&c.* and if the Corporation agree thereto it is good without Deed, for that the Command he had to diſtrain is not in ſuch Caſe traverſable, as was reſolved in a Caſe where one of the Members of the Corporation did diſtrain in the Name and Right of the Corporation without any Warrant in Writing. 26 *H.* 8. 8. *Br. Corporations*, &c. 2. But a Biſhop by Word may command his Servant to demand a Rent, or to make an Entry. *Mich.* 15 *Eliz. B. R. Wood* v. *Chiver*, 4 *Leon.* 179.

Leaſes void, &c.

And as to Corporations aggregate in the Caſe of Leaſes becoming void, it hath been held, that where a Dean and Chapter made a Leaſe for Years rendring Rent, and for Default of Payment the Leaſe to be void, the Rent was arrear and not paid, they make a new Leaſe to another Perſon, ſealed in their Chapter-Houſe before any Entry made upon the firſt Leſſee, and make a Letter of Attorney to one to enter, and make Delivery of this Leaſe upon the Land; this was a good Leaſe, although it was in this Caſe objected that the Dean and Chapter being out of Poſſeſſion, and the firſt Leſſee in Poſſeſſion, and they ſetting their Seal to the new Leaſe in their Chapter-Houſe did perfect it as the Deed of the Corporation; ſo that there can be no other Delivery of it; and therefore the Leaſe was void for want of an Entry before the Leaſe made, and the After-Delivery by the Attorney was void, by reaſon it was perfect before; but it was anſwered, that there was no other Means for a Corporation to make a Leaſe but this: And *Gawdy* ſaid, that it is not the Leaſe or Deed of the Corporation until Delivery as of another Perſon. *Hill.* 31 *Eliz. Willis* v. *Jermin*, 3 *Cro.* 167, the ſame Caſe, 2 *Leon.* 97. Yet it's ſaid to be agreed, that if a Dean and Chapter put their Chapter-Seal to a Deed, this is a perfect Deed thereby, without Delivery. *Davis Rep.* 44. *b. The Dean and Chapter of Fernes*, *Hill.* 32 *Eliz. B. R. Jermin* v. *Willis*, 2 *Roll's Abr.* 23. But this is to be underſtood when the Dean and Chapter are in Poſſeſſion, as in the Caſe laſt put. *Mich.* 13 *Car. B. R. Flud* v. *Gregory*, 2 *Roll's Abr.* 24.

New Leaſe by a Corporation aggregate before any Entry made, *&c.*

And note, That in the Caſe of a Corporation aggregate, if they make a Charter of Feoffment, and a Letter of Attorney to deliver Seiſin, the Livery of Seiſin is good after the Death of him that is the Head of ſuch Corporation, but otherwiſe it is in the Caſe of the ſole Corporations; for albeit the Warrant of Attorney be indefinite, yet the Law preſcribeth that it muſt be executed in the Life-time of him that made it, and the Death not only of the Feoffor, but alſo of the Feoffee, is a Countermand in Law of the Letter of Attorney, and the Deed itſelf is thereby become of none Effect. 1 *Inſt.* 52. *b.*

Livery and Seiſin by Letter of Attorney of a Congregation ſole or aggregate.

And note, That if a Leaſe be made to Two for their Lives *& diutius eorum viventi*, and the Leſſees do make Partition, and then one of them doth die, the Leſſor may enter into his Part ſo dying, for there ſhall be no other Occupancy of his Eſtate, the Words *& diutius eorum viventi* not being more than the Law doth ſay, and by the Partition the Jointenancy is ſevered. 30 *Aſſ.* 8. 2 *Roll's Abr.* 150. So Entry may be made for Condition broken in the Life of the Predeceſſor, or in the Time of the Vacation,

Leaſe to Two, and the longer Liver of them.

Leaſes void, &c.

Vacation, as the Heir may do for Condition broken in the Life of his Father; for otherwiſe it is of Conditions in Law, as Waſte, Forfeiture, and the like. *Eire*'s Caſe, *Moor* 52.

Void upon Non-payment.

If a Leaſe be made with a Clauſe, that it ſhall be void upon Non-payment of the Rent, yet before it ſhall be void, the Leſſor ought to make Demand of the Rent at the Place where the Rent was made payable. *Trin.* 37 *Eliz. Tuſkin* v. *Edmund*, *Moor* 408. And as to a Demand to be made of any Rent whereby to make a Re-entry, or take Advantage of the Breach of a Condition in a Leaſe, theſe Things are to be obſerved: Firſt, That the Demand muſt be made upon the Land, and at the moſt notorious Place of it; if there be a Houſe upon the Land, the Demand muſt be made at the Houſe, and at the Fore-door of the Houſe. Secondly, If the Rent be made payable at any Place from the Land, it muſt be demanded at the Place where by Agreement of the Parties it is to be paid, obſerving that which hath been ſaid before of the moſt notorious Place. Thirdly, The Demand is to be made ſuch a convenient Time before the Sun-ſetting of the laſt Day on which the Rent is payable, as the Money may be numbred and received. 1 *Inſt.* 101, 202. Fourthly, The Demand muſt be certain in the Sum demanded, for if one Penny more or leſs Rent be demanded than is due, or if a Certainty of the Rent be not ſhewed, and the Day when it was due, it is not a good Demand. *Moor* 207, *Mich.* 31 & 32 *Eliz. C. B. Fabian* v. *Windſor*, 1 *Leon.* 305. *Dalliſon* 35. So if there be ſeveral half Years Rent in arrear, the Demand muſt not be of the whole Sum ſo behind as of one intire Rent, but the half Year's Rent then due muſt be demanded, and ſo much in arrear before; for where a Leaſe for Years was made rendring Seven Pounds Rent *per Annum*, and there being Three Pounds behind, and at the next Day of Payment the Leſſor demands Ten Pounds, this was held to be no good Demand, becauſe the Rent and Arrear were demanded as an intire Sum; by *Roll's*, *Mich.* 24 *Car. B. R. Allen* 95. And if the Leſſor doth come upon the Land at any Time of the Day when the Rent is due and payable, and demands the Rent, and doth continue upon the Land till the Sun be ſet without making any other Demand, yet the Demand is good enough, for his Preſence there is a Continuance of the Demand, (*per Curiam.*) Or if the Leſſor after his Demand in the Morning doth depart off the Land, and before the Sun-ſet returneth, and ſtays upon the Land till Sun-ſetting, this is a Continuance of the Demand, and a further Demand is not neceſſary; by *Wray* and *Catlin*. But if the Leſſor doth come to the Land before the laſt Hour and demands the Rent, and afterwards goes off the Land, and is not there at the laſt Inſtant of the Day, the ſame is not a ſufficient Demand, although that he return preſently after the Sun is ſet: So if the Leſſor's Attorney, *viz.* he whom he gives Authority to demand the Rent, doth before Sun-ſetting demand the Rent at the capital Meſſuage, and then goeth his Way, but leaves his Servant in the Houſe with Order, that if any Perſon did come to pay the Rent he ſhould ſignify it to him, and returneth not again till after the Sun was ſet; this Continuance of the Servant is no Continuance of the Demand, for that the Attorney was but as a Servant himſelf in this Buſineſs, and therefore could not appoint another in his Stead. *Mich.* 15 *Eliz. B. R. Wood* v. *Chiver*, 4 *Leon.* 179.

Nota, Of a Demand of a Rent, &c.

Upon a Covenant in a concurrent Leaſe.

If a concurrent Leaſe be made, and there be a Covenant therein, that if the Leſſee without the Licence of the Leſſor and his Succeſſors ſhall grant over his Eſtate, it ſhall be lawful for the Leſſor and his Succeſſors to re-enter; in this Caſe, although the Leſſee doth grant over his Eſtate without

without Licence, yet the Leſſor cannot enter during the firſt Leaſe. *Mich.* 1 & 2 *Ph. & Mar. Earnly* v. *Walron, Dyer.*

Leaſes void, &c.

Tho' Entry is the Means of making a voidable Leaſe void, as alſo of regaining an Eſtate that was aliened by the Predeceſſor, *&c.* yet at the Common Law, in the Caſe of Alienation, Entry was not always lawful, or of any Effect, that is, where there was a Diſcontinuance; for the Effect of Diſcontinuance is commonly thus, that it prevents a Man from entring upon the Land or Tenements alienated by his own Authority, but he muſt bring his Action, and ſeek to recover his Poſſeſſion by Law. But at Common Law every Eccleſiaſtical Perſon was not capable of making a Diſcontinuance, but only thoſe that had an abſolute Right or Fee in their Poſſeſſions, as Biſhops, *&c.* but not Parſons, Vicars, Prebends, nor any others that are preſentative, and have but a qualified Right; for the Succeſſors of ſuch might ever have entred, and were not driven to their real Action by any Act of their Predeceſſors. *Paſch.* 4 *Car. C. B. Johnſon*'s Caſe, *Hetley* 88. But at this Day, neither a Biſhop, Dean, Maſter of an Hoſpital, *&c.* that have the Fee and Right in them, can diſcontinue any of their Poſſeſſions, or bar their Succeſſors of Entry, *&c.* by reaſon of the Statutes of 1 and 13 *Eliz.* 1 *Inſt.* 342. *a. Paſch.* 2 *Car. C. B. Water* v. *Jackſon*, 1 *Roll's Abr.* 633. And it is to be obſerved, that the Remedy is ever agreeable to the Right; therefore a Biſhop, Dean, Maſter of an Hoſpital, or the like, that hath a College and Common Seal, ſhall have a *Writ of Right*, which is the higheſt Remedy the Law gives; for that they have the higheſt Eſtate, and they ſhall not have Aid in reſpect of their high and large Eſtate, albeit any of them be preſentable; but a Dean that is collative ſhall have Aid of the King, but a Parſon or Vicar cannot have a *Writ of Right*; the higheſt Writ that they can have is the *Writ of Juris Utrum*, 1 *Inſt. f.* 431. *b.* 342. *a.* and this lies for the Succeſſor of every Parſon or Vicar who have not the abſolute Right in them, and cannot maintain a *Writ of Right*, but not for the Succeſſor of a Prebend or Provoſt in a Cathedral Church without the Conſent of the Chapter; eſpecially where the Body of the Prebend or Provoſtry is a Parſonage, and not a Lay-Fee. And many Books prove that they ſhall have Aid of the Biſhop, as Patron and Ordinary, in any Action in which they ſhall be charged, and ſo all Clerks preſentative ſhall have Aid of their Patrons and Ordinaries. 1 *Roll's Abr.* 175. *Trin.* 7 *Eliz. C. B. Hodgſkins* v. *Tucker*, *Dyer* 239, though the Patron be within Age. 1 *Roll's Abr.* 145. And if there be many Patrons, as Coparceners, though they make Compoſition to preſent by Turns, they ſhall have Aid of them all. *Lancaſter* v. *Lucas*, *Mich.* 32 & 33 *Eliz. B. R.* 1 *Leon.* 234. *Harris*'s Caſe, *Noy* 11, and ſo it is if a *Writ of Annuity* be brought againſt the Parſon, *ibid.* In theſe Caſes, and the like, he muſt pray Aid of the Ordinary when he prays Aid of his Patron; for when an Annuity was brought againſt a Parſon, who prayed Aid only of the King, it was agreed by the Court to be ill, becauſe he did not pray Aid alſo of the Ordinary, for it is all one in the Caſe of the King as of a common Patron. *Harris*'s Caſe, *Noy* 11. But the Parſon who prays in Aid muſt be as well inducted as inſtituted, for when he prays in Aid of the Patron and Ordinary he ought to ſay, that he is a Parſon *imparſonee* of his Church, and found his Church diſcharged of this Annuity, *&c.* which he cannot ſay without Induction. *Hare* v. *Bickley*, *Trin.* 20 *Eliz. C. B. Plowden* 529.

The Effect of a Diſcontinuance.

Nota.

Remedy agreeable to the Right.

Juris utrum where no Writ of Right.

Such Parſon muſt be inducted, *&c.*

If a Writ of Annuity be brought againſt a Parſon that prays in Aid of the Patron and Ordinary, who being ſummoned make Default, and Judgment is given againſt the Defendant by Action tried, or Confeſſion,

No Aid after a Default, *&c.*

Leaſes void, &c.

or Default of the Parſon after Appearance; he himſelf in a *Scire Facias* after ſhall not have Aid, neither ſhall the Succeſſor have it if the *Scire Facias* be afterwards brought againſt him upon this Judgment. *Br.* Tit. *Aid* 29 & 76. *Jenk. Cent.* 1. *Caſe* 98. *p.* 51. *Cent.* 2. *Caſe* 15. *p.* 61. 29 *E.* 3. Tit. *Scire Facias in Fitz.* 152. *contra Br.* Tit. *Aid* 24, & 72. After Judgment in Annuity once had, a *Scire Facias* upon this Judgment ſhall be only brought for the Recovery of Arrearages incurred before, and the Arrearages incurred pendant the Writ ſhall be recovered by the *Scire Facias*; and if the Annuity be determined, a *Scire Facias* doth not lie for the Arrears, but an Action of Debt, for a *Scire Facias* is in the Place of a Writ of Annuity. *Jenk. Cent.* 1. *Caſe* 98. *p.* 51. If the Parſon in a Writ of Annuity hath Aid of the Metropolitan Guardian of the Spiritualties as Ordinary, he ſhall not have a new Aid of a new Biſhop when created; ſo if he hath Aid of the Ordinary, who dies, he ſhall not thereupon have Aid of the Metropolitan, Warden of the Spiritualties, nor of the ſucceeding Biſhop. 1 *Roll's Abr.* 188. A Defendant in a Writ of Annuity pleaded, that the Biſhop was Patron of the Benefice charged, and that his Temporalties were in the Hands of the King, therefore prayed Aid of the King, and of the Biſhop as Patron and Ordinary, and of the Dean and Chapter, for that the Parſonage appertained to the Chauntor as one of the Chapter, and Aid was granted of them all. *Bro.* Tit. *Aid. n.* 18.

Judgment againſt having a qualified Right, &c.

And note, That ſuch Perſons as have not the meer Right in them, but a qualified Right, as Parſons, Prebends, &c. if they be barred in a real Action without making them Parties who have Intereſt, yet this ſhall not bind the Succeſſor, but that he in a new Action of the ſame Nature brought ſhall falſify the Recovery; neither is a Judgment given in ſuch Caſe any Diſcontinuance, but the Succeſſor may enter; otherwiſe it is of an Abbot, Biſhop, or the like, who have the intire Fee-ſimple in them; for their Succeſſor at the Common Law ſhall not falſify in a *Scire Facias* or new Action of the ſame Nature. The ſame Law when Recovery is had againſt them, for it hath been adjudged, that in a *Writ of Right* againſt a Parſon who after the Miſe joined made Default, whereupon Judgment was given againſt him; yet the Succeſſor might have *Juris utrum*, becauſe he had not the meer Right, nor had prayed in Aid of the Patron and Ordinary. And if a Parſon, Vicar or Prebend, &c. loſe by Default in a real Action, he himſelf may have a *Juris utrum*, for that is his *Writ of Right*, as is ſaid, *Regiſt.* 32. *b.* And it would be againſt Reaſon that he ſhould have no Remedy in ſuch Caſe, the ſame being the Right of the Church, which is favoured in Law. *Mich.* 40 & 41 *Eliz. C. B. Ferrer's* Caſe. But ſee more concerning this Matter, 1 *Roll's Abr.* Tit. *Aid*, & *Br.* Tit. *Aid*, & *del Roy.*

CHAP.

CHAP. XLVI.

Tithes.

Tithes, of what due. Tithes in London, *how payable. Tithes of Houſes.*

Concerning Tithes, and other Church Duties.

HAving ſhewed what are the Effects of a legal Poſſeſſion of an Eccleſiaſtical Benefice or Promotion, and what Eſtates, Grants, and Leaſes, may be made thereof; I am further to ſpeak of the Profits themſelves, and to ſhew what the Profits be that may belong to any Eccleſiaſtical Benefice or Promotion. Theſe (not to ſpeak of Lands, of which nothing need to be ſaid in this Place) do principally conſiſt of Tithes: As to which, Two Things in general are only needful to be ſhewed: *Firſt*, For what, and of what Things, Tithes ought, or ought not to be paid. *Secondly*, What Remedy the Law hath given the Owner for the Recovery of them, and other Church Duties, being detained.

Tithes ought not to be paid of Quarries.

As to the Firſt, it muſt be noted, that *de Jure communi* Tithes are to be paid for ſuch Things only which do yield a yearly Increaſe by the Act of God, and therefore of common Right no Tithes are to be paid of Quarries of Stone or Slate, for that they are Parcel of the Freehold, and the Parſon hath Tithes of the Graſs or Corn which grow upon the Surface of the Land in which the Quarry is. *Paſch.* 34 *Eliz. C. B. Lyſs* v. *Wats*, 3 *Cro.* 277, ſame Caſe, *Moor* 908. *Hil.* 11 *Jac. B. R. Per Curiam.* 1 *Roll's Abr.* 637. 26 *Eliz. B. R. Daws* v. *Mollins*, 2 *Leon.* 79. Nor for Coal. *Hill.* 14 *Jac. B. R.* by *Haughton.* 1 *Roll's Abr.* 637. *Paſch.* 34 *Eliz. Lib* v. *Watts*, *Moor* 908. Nor of Turf which is to burn. *Hill.* 14 *Jac. B. R.* by *Haughton*, and *Hill.* 11 *Jac. B. R. Per Curiam.* 1 *Roll's Abr.* 637. *Mich.* 28 & 29 *Eliz. B. R. Godbolt*, *p.* 44. Nor for Lime. *Mich.* 13 *Jac. C. B. Thomas* and *Perrie*'s Caſes, *Per Curiam.* 1 *Roll's Abr.* 637. 2 *Inſt.* 651. *Hill.* 21 & 22 *Car.* 2. *Amiers* v. *Chambers*, 2 *Keb.* 596, and *Raym.* 425. Yet of a Lime-Kiln by Cuſtom Tithes ſhall be paid. 1 *Roll's Abr.* 642, and ſo by Cuſtom Tithes ſhall be paid of white Salt. *Trin.* 16 *Jac. B. R. Jones* and *Goward*'s Caſe, 1 *Roll's Abr.* 642. So a *Modus* may be of the Tithes of Iron Oar. *Mich.* 27 *Car.* 2. *Andrews* v. *Sympſon*, 3 *Keb.* 527. Tithe-Oar not due, but by particular Cuſtom. 2 *Vern.* 46. *Buxton* v. *Hutchinſon.*

The Plaintiff being Vicar of the Pariſh of *Wirkſworth* in *Derbyſhire*, brought a *Subpœna* in the Nature of a *Scire Facias* againſt the Defendants to inforce the Performance of a Decree made 5 *Car.* 1. by which (amongſt other Things) it was decreed, that all the Miners within the ſaid Pariſh, as well for the Time being, as to come, ſhould pay the Tenth Diſh of Lead-Oar cleanſed, *&c.* to the Vicar of the ſaid Pariſh for the Time being for Tithes, *&c.* The Defendants appeared to the *Scire Facias*, and ſet forth they claimed not in Privity under any of the Parties to that Decree, and that ſome of them were ſeiſed of Mines not then found out or opened, and that there had not been any Performance or Execution of the Decree, and other Matters in Avoidance.

Per Cur': The Decree extends to all Miners within the Pariſh for the Time being, or to come, ſo the Defendants are within the Letter, and expreſly

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expreſly bound by the Decree, and as long as the Decree ſtands in Force, muſt obey. 2 *Vern.* 184. *Browne* v. *Booth.*

No Tithes ſhall be paid for Brick, becauſe 'tis Part of the Soil, and 'tis ſaid to have been often adjudged. *Paſch.* 28 *Car.* 2. *C. B. Stoutfil*'s Caſe, 2 *Mod. Rep.* 77. Nor for Houſes which be for Habitation, nor for other Buildings; nor for any Rent reſerved upon a Demiſe of any ſuch Houſe or Building, being created meerly by the Act of the Party. *Mich.* 11 *Jac. C. B.* Doctor *Grant*'s Caſe, 11 *Co.* 16. Doctor *Leyfield* v. *Tiſdal*, *Hobart*, *p.* 11. If a Man purchaſe an Houſe for 300 *l.* and doth ſell it again within a ſhort Time after for 500 *l.* yet no Tithes ſhall be paid of the Gain thereof made, for this is againſt the Common Law: Reſolved *Mich.* 11 *Jac. B. R. Daires* and *Tollin*'s Caſe, 1 *Roll's Abr.* 657. But though not of Common Right, yet by Cuſtom, Tithes may be paid for Houſes by the Rent reſerved upon a Demiſe thereof; to which Purpoſe is the Caſe of Doctor *Grant*, which is as followeth. *Gabriel Grant* Doctor in Divinity, Parſon of the Pariſh of St. *Leonard* in *Foſter-Lane*, *infra Præcinctum Sancti Martini le Grand*, did libel in the Spiritual Court before Dr. *Maſters*, Official of *The Dean and Chapter of Weſtminſter*, againſt *Edward Taylor*, Farmer of a great and antient Houſe called *The Dean's Houſe*, within the Precinct of St. *Martin le Grand*, late Parcel of the Poſſeſſions of the Abbot of *Weſtminſter*, and alledged, that every Pariſhioner or Inhabitant having or occupying a Manſion-Houſe, Shops, Ware-Houſes, Cellars or Stables, within the ſaid Pariſh of St. *Leonard* within St. *Martin's le Grand*, hath paid yearly every Quarter of the Year at the Feaſts of *Eaſter*, the Birth of Chriſt, St. *John* the Baptiſt, and St. *Michael*, Time out of Mind, *&c.* or at leaſt from the Foundation, Donation and Erection of the ſaid Rectory of St. *Leonard*, by equal Portions to the Parſons of the ſaid Rectory for the Time being, *Nomine & loco decimarum ſuarum juxta ratam cujuſlibet viginti ſolidor' redditus per annum ex qualibet hujuſmodi Domo, Shopa, Sollar', Sellar', ſive Stabulo ſic tent' ſive occupat' in prædicta Parochia, duos ſolidos legalis Monetæ Angliæ, &c.* And that the ſaid *Edward Taylor*, and his Family, did dwell in the ſaid Houſe Three Years, and had poſſeſſed the ſame for the ſame Time *ſub annuali redditu ſexdecim librarum, ſeu ſaltem duodecim librarum, &c.* and ſo demanded Two Shillings in the Pound, *&c.* The ſaid *Edward Taylor* did exhibit an Information and Suggeſtion to the Court, that the late Abbot of *Weſtminſter*, and all his Predeceſſors till the Diſſolution of the ſaid Monaſtery, which was *Anno* 30 *H.* 8, had held the ſaid Houſe diſcharged of Tithes, and alledged the Statute of 31 *H.* 8, concerning the Diſcharge of the Payment of Tithes, and conveyed to himſelf a Leaſe for Years, and thereupon had a Prohibition, to which the ſaid Doctor *Grant* appeared, and *Taylor* declared againſt him to the Effect aforeſaid, and Doctor *Grant* traverſed the ſaid Preſcription of Diſcharge of Tithes; whereupon Iſſue was joined, and tried in *London* for Doctor *Grant*: But it was moved by *Taylor*'s Counſel, that upon the ſaid Libel no Conſultation ought to be granted, for of common Right no Tithes ought to be paid for Houſes of Habitation, nor for any Rent reſerved upon any Leaſe of them; for Tithes ought to be paid of Things which grow and renew Year by Year by the Act of God. *Regiſt.* 53. *b.* *F. N. B.* 54. Tit. *Diſmes* 16, and not for Dwelling-houſes, or Rents iſſuing out of Lands reſerved, and created only and meerly by the Act of the Party; and therefore in the City of *London* the Parſons have Two Shillings Nine Pence in the Pound, *&c.*

Cuſtoms for Houſes by the Rent.

Traverſe of Preſcription.

in the Name of Tithes; but the ſame is by Decree made *Anno* 1535, which is enacted and confirmed by Authority of Parliament, *Anno* 37 *H.* 8. *cap.* 12. But St. *Martin's le Grand* is not included within the ſaid Decree and Act; for tho' the ſame is within *London*, yet 'tis not of it, and therefore it remaineth at the Common Law. And in 30 *E.* 3. *fol.* 1. *a.* & 38 *E.* 3. *fol.* 13. by *Finchden* it is ſaid, that the Profits of the Churches in *London* are the Oblations and Obventions. But it was reſolved by the whole Court, that a Conſultation ſhould be granted, for it may have a lawful Beginning; for it may be, that for all the Tithes of Land upon which the Houſes are built, this *Modus Decimandi* hath Time out of Mind been paid, and although the ſame be after built, that ſhall not take away the Right of the Parſon in ſuch Caſe; and becauſe it might have a lawful Beginning, and the ſame hath been uſed Time out of Mind, &c. for this Cauſe it was reſolved that a Conſultation ſhould be granted. It was alſo reſolved that for this Cuſtomary Payment of Monies he might ſue in the Eccleſiaſtical Court, becauſe it is in the Name of Tithes, *viz. Modus Decimandi*, and every antient City and Borough hath for the moſt part ſuch Cuſtom *de modo Decimandi* for their Houſes for the Maintenance of their Parſons. And as to the Opinions of 30 *E.* 3. and 38 *E.* 3. it was ſaid, that *Obventio dicitur ab obveniendo*, and includeth Oblations, Rents, and other Revenues, which may well agree with the Reſolution before, and a Conſultation was granted, *Mich.* 11 *Jac. C. B.* Dr. *Grant*'s Caſe, 11 *Co.* 16.

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St. *Martin's le Grand* not within the Decree for *London*.

And afterwards Doctor *Lyefield*, Parſon of St. *Clements* without *Temple-Bar*, which is alſo out of *London* and the Liberty thereof, ſued for Tithes of certain Stables; and libelled, that by common Right, and by Preſcription Time out of Mind, the Parſons there uſed to have a *Modus Decimandi* for the Houſes, Stables, and Buildings, that is to ſay, after the Rate of the Tenth Part of the yearly Rent, or the Value of the ſame, and upon this Surmiſe a Prohibition was granted; but the Caſe being after moved for the Defendant, and upon urging Dr. *Grant*'s Caſe, it was ordered by the Court, that they ſhould declare upon the Prohibition, and ſo bring the Matter to be determined judicially by the Court. Dr. *Leyfield* v. *Tiſdal*, *Hobart p.* 11. Alſo the Proviſo in the Statute of 2 & 3 *E.* 6. *cap.* 13. doth ſuppoſe that ſuch *Modus* may be, which is this: **Provided always, and be it enacted by the Authority aforeſaid, That this Act, or any Thing therein contained, ſhall not extend in any wiſe to the Inhabitants of the City of** London **and** Canterbury, **and the Suburbs of the ſame, nor to any other Town or Place that hath uſed to pay their Tithes by their Houſes, otherwiſe than they ought or ſhould have done before the making of this Act; any Thing contained in this Act to the contrary in any wiſe notwithſtanding.** But it is ſaid to be ruled, *Trin.* 31 *Eliz.* in the Lady *Greſham*'s Caſe, where one preſcribed to pay yearly by the Hands of Two Perſons inhabiting in ſuch Houſes, Four Pence to the Vicar, in Satisfaction of all Tithes, that the Preſcription was not good, for the Houſes may decay, or none may live in them, ſo nothing ſhould be paid. *Trin.* 3 *Eliz. B. R. Perry* v. *Sean*, 3 *Cro.* 139. Yet if a Cuſtom be, that the Inhabitants of a Pariſh ſhall pay in full Satisfaction of all Tithes, after the Rate of the Tenth Part of the yearly Rent or Value of their Land and Houſes, whilſt any ſhall remain there, it is good; for in ſuch Caſe, the Rent of the Houſe with the Land is but the Meaſure of the Rate to be paid in Money. But a Suggeſtion that all the Occupiers of Land within ſuch a Vill have uſed to pay 2 *s.* 6 *d.* in full of all the

Dr. *Lyefield*'s Caſe for Tithes of Stables.

Preſcriptions for Houſes and Lands.

Tithes in London.

Tithes of the ſaid Vill, was held by the Court not to be good, there being no Remedy to compel any that refuſe to contribute; but if it had been that *quilibet Occupator* had uſed to pay, it had been good. *Mich.* 19 *Car.* 2. *Keb.* 280. So a Cuſtom, that all Occupiers and Tenants that are Inhabitants in any Place out of the Pariſh, ſhall pay to the Vicar 4 *d.* for every Acre, was held an unreaſonable Cuſtom, not being fixed to the Land, nor to any Perſon certain. *Mich.* 15 *Car.* 2. 1 *Keb.* 602.

Cuſtom in Diſcharge of Tithes.

But a Cuſtom to pay for Tenants and Occupiers of Land ſo much in Diſcharge of Tithes, was held good, it being in Diſcharge only, and not claiming any Intereſt. *Hill.* 5 *W. & M. C. B. Stopp.* v. *Peacocke*, 3 *Levinz.* 386.

Tithes of Houſes in *London*.

But the Tithes of Houſes in *London* are ſettled by Statute-Law, for it hath been enacted by Stat. 37 *H.* 8. *cap.* 12. as follows: **Where of late Time Contention, Strife and Variance hath riſen and grown within the City of** London, **and the Liberties of the ſame, between the Parſons, Vicars and Curates of the ſaid City and the Citizens and Inhabitants of the ſame, for and concerning the Payment of Tythes, Oblations, and other Duties within the ſaid City and Liberties; for appeaſing whereof, a certain Order and Decree was made thereof by the moſt Reverend Father in God,** Thomas **Archbiſhop of** Canterbury, **Metropolitan, Chief Primate of all** England, Thomas Audley **Knight, Lord** Audley **of** Walden, **and then Lord Chancellor of** England, **now deceaſed, and other of the King's Majeſty's moſt honourable Privy Council, and alſo the King's Letters Patent, and Proclamation was made thereof, and directed to the ſaid Citizens concerning the ſame; whereupon it was after enacted in the Parliament holden at** Weſtminſter **by Prorogation the Fourth Day of** February **in the Twenty-ſeventh Year of the King's Majeſty's moſt Noble Reign, by Authority of the ſame Parliament, That the Citizens and the Inhabitants of the ſame City ſhould, at** Eaſter **then next coming, pay unto the Curates of the ſaid City and Suburbs all ſuch and like Sums of Money for Tythes, Oblations, and other Duties, as the ſaid Citizens and the Inhabitants by the Order of the ſaid late Lord Chancellor, and other the King's moſt honourable Council, and the King's ſaid Proclamation, paid or ought to have paid by Force and Virtue of the ſaid Order at** Eaſter, **which was in the Year of our Lord God** MDXXXV. **and the ſame Payments ſo to continue from Time to Time, until ſuch Time as any other Order or Law ſhould be made, publiſhed, ratified and confirmed by the King's Highneſs, and the Two and thirty Perſons by his Grace to be named, as well for the full Eſtabliſhment concerning the Payment of all Tythes, Oblations, and other Duties of the Inhabitants within the ſaid City, Suburbs and Liberties of the ſame, as for the making of the other Eccleſiaſtical Laws of this Realm of** England; **and that every Perſon denying to pay, as is aforeſaid, ſhould by the Commandment of the Mayor of** London **for the Time being be committed to Priſon, there to remain until ſuch Time as he or they ſhould have agreed with the Curate or Curates for their ſaid Tythes, Oblations, and other Duties, as is aforeſaid, as in the ſaid Act more plainly appeareth: Sithen which Act divers Variances, Contentions and Strifes are newly riſen and grown between the ſaid Parſons, Vicars and Curates, and the ſaid Citizens and Inhabitants touching the Payment of the Tythes, Oblations, and other Duties, by reaſon of certain Words and Terms ſpecified in the ſaid Order, which are not ſo plainly and fully ſet forth as is thought convenient and meet to be: For appeaſing**

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Remedy by further Reference.

peasing whereof, as well the said Parsons, Vicars and Curates, as the said Citizens and Inhabitants, have compromitted and put themselves to stand to such Order and Decree touching the Premisses as shall be made by the said Right Reverend Father in God, Thomas Archbishop of Canterbury, Metropolitan and Primate of England, the Right Honourable Sir Thomas Wryothesly Knight, Lord Wryothesly and Lord Chancellor of England, the Right Honourable Thomas Duke of Norfolk, Lord Treasurer of England, the Right Honourable Sir William Pawlet Knight, Lord St. John, Lord President of the Council, and Lord Great Master of the King's most honourable Houshold, the Right Honourable Sir John Russel Knight, Lord Russel, and Lord Privy Seal, the Right Honourable Edward Earl of Hertford, Lord Great Chamberlain of England, the Right Honourable John Viscount Lisle, High Admiral of England, Sir Richard Lister Knight, Chief Justice of England, Sir Edward Montague Knight, Chief Justice of the Common Bench at Westminster, and Sir Roger Cholmley Knight, Chief Baron of the Exchequer, for a final End and Conclusion to be had and made touching the Premisses for ever. And to the Intent to have a full Peace and perfect End between the said Parties, their Heirs and Successors, touching the said Tythes, Oblations, and other Duties for ever, Be it enacted by Authority of this present Parliament, that such End, Order and Direction as shall be made, decreed and concluded by the fore-named Archbishop, Lords and Knights, or any Six of them, before the first Day of March next ensuing, of, for and concerning the Payments of the Tythes, Oblations, and other Duties within the said City, and the Liberties of the same, and enrolled in the King's high Court of Chancery of Record, shall stand, remain and be as an Act of Parliament, and shall bind as well all Citizens and Inhabitants of the said City and Liberties for the Time being, as the said Parsons, Vicars, Curates, and their Successors for ever, according to the Effect, Purport and Intent of the said Order and Decree so to be made and enrolled; and that every Person denying to pay any of his or their Tythes, Oblations, or other Duties contrary to the said Decree to be made, shall by the Commandment of the Mayor of London for the Time being, and in his Default or Negligence, by the Lord Chancellor of England for the Time being, be committed to Prison, there to remain till such Time as he or they have agreed with the Curate and Curates for his or their said Tythes, Oblations, and other Duties, as is aforesaid.

Enacted by this Act, 37 *H.* 8. *c.* 12. that the Decree to be made shall be inrolled, *&c.*

The Decree.

As touching the Payment of Tithes in the City of London, *and the Liberties of the same, It is fully ordered and decreed by the most Reverend Father in God,* Thomas *Archbishop of* Canterbury, *Primate and Metropolitan of* England, Thomas *Lord* Wryothesley, *Lord Chancellor of* England, William *Lord* St. John, *President of the King's Majesty's Council, and Lord Great Master of his Highness's Houshold,* John *Lord* Russel *Lord Privy Seal,* Edward *Earl of* Hertford, *Lord Great Chamberlain of* England, John *Viscount* Lisle, *High Admiral of* England, Richard Lister *Knight, Chief Justice of* England, *and* Roger Cholmley *Knight, Chief Baron of his Grace's Exchequer, this present 24th Day of* February, Anno Domini, secundum cursum & computationem Ecclesiæ Anglicanæ, Millesimo

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simo quingentesimo quadragesimo quinto, *according to the Statute in such Case lately provided, That the Citizens and Inhabitants of the said City of* London, *and Liberties of the same, for the Time being shall yearly, without Fraud or Covin, for ever pay their Tithes to the Parsons, Vicars and Curates of the said City, and their Successors for the Time being, after the Rate hereafter following; that is to wit, Of every Ten Shillings Rent by the Year of all and every House or Houses, Shops, Ware-houses, Cellars, Stables, and every of them within the said City and Liberty of the same, Sixteen Pence* ob. *And of every Twenty Shillings Rent by the Year of all and every such House and Houses, Shops, Ware-houses, Cellars, and Stables, and every of them within the said City and Liberties, Two Shillings and Nine-pence. And so above the Rent of Twenty Shillings by the Year, ascending from Ten Shillings to Ten Shillings, according to the Rate aforesaid.*

Upon Fraudulent Leases.

Item, *That where any Lease is, or shall be made of any Dwelling-house or Houses, Shops, Ware-houses, Cellars, or Stables, or any of them, by Fraud or Covin reserving less Rent than hath been accustomed, or is, or that any such Lease shall be made without any Rent reserved upon the same, by reason of any Fine or Income paid beforehand, or by any other Fraud or Covin; that then in every such Case the Tenant or Farmor, Tenants or Farmors thereof shall pay for his or their Tithes of the same after the Rate aforesaid, according to the Quality of such Rent or Rents as the same House or Houses, Shops, Warehouses, Cellars or Stables, or any of them, were last letten for, without Fraud or Covin, before the making of such Lease.*

Item, *That every Owner or Owners, Inheritor or Inheritors, of any Dwelling-house or Houses, Shops, Ware-houses, Cellars or Stables, or any of them, within the said City and Liberties, inhabiting or occupying the same himself, or themselves, shall pay after such Rate or Tithes as is abovesaid, after the Quantity of such yearly Rent as the same was last letten for, without Fraud or Covin.*

Lessees dwelling in Part of the House, &c.

Item, *If any Person or Persons have taken, or hereafter shall take, any Mease or Mansion-place by Lease, and the Taker or Takers thereof, his or their Executors or Assigns, doth or shall inhabit in any Part thereof, and have or hath within Eight Years last past before this Order, or hereafter will or shall let out the Residue of the same; that then in such Case the principal Farmor or Farmors, or first Taker or Takers thereof, his or their Executors or Assigns, shall pay his or their Tithes after the Rate aforesaid, according to his or their Quantity therein, and that his or their Executors, Assignee or Assignees, shall pay his or their Tithes after the Rate abovesaid, according to the Quantity of their Rent by Year.*

If divers Houses, &c. be taken by one Lease.

And if that any Person or Persons have, or shall take divers Mansion-houses, Shops, Ware-houses, Cellars or Stables, in one Lease, and letteth or shall let out one or more of the said Houses, and keepeth or shall keep one or more in his or their own Hands, and inhabiteth or inhabit in the same; that then the said Taker or Takers, and his or their Executors or Assignees, shall pay his or their Tithes after the Rate abovesaid, according to the Quantity of the yearly Rent of such Mansion-house or Houses retained in his or their Hands: And that his Assignee or Assignees of the Residue of the said Mansion-house or Houses shall pay his or their Tithes after the Rate abovesaid, according to the Quantity of their yearly Rents.

Item, *If ſuch Farmor or Farmors, or his or their Aſſigns of any Manſion-houſe or Houſes, Ware-houſes, Shops, Cellars or Stables, hath at any Time within Eight Years laſt paſt, or ſhall hereafter let over all the ſaid Manſion-houſe or Houſes contained in his or their Leaſe to one Perſon, or to divers Perſons; that then the Inhabitants, Leſſees or Occupiers of them, and every of them, ſhall pay their Tithes after the Rate of ſuch Rents as the Inhabitants, Leſſees, or Occupiers, and their Aſſignee or Aſſignees have been or ſhall be charged withal, without Fraud or Covin.* Tithes in London.

Item, *If any Dwelling-houſe within Eight Years laſt paſt was, or hereafter ſhall be converted into a Ware-houſe, Store-houſe, or ſuch like, or if a Ware-houſe, Store-houſe, or ſuch like, within the ſaid Eight Years, was or thereafter ſhall be converted into a Dwelling-houſe; that then the Occupiers thereof ſhall pay Tithes for the ſame after the Rate above declared of Manſion-houſe Rents.* Of Houſes converted, &c.

Item, *That where any Perſon ſhall demiſe any Dye-houſe or Brew-houſe with Implements convenient and neceſſary for Dying or Brewing, reſerving a Rent upon the ſame, as well in reſpect of ſuch Implements as in reſpect of ſuch Dye-houſe or Brew-houſe; that then the Tenant ſhall pay his Tithes after ſuch Rate as is aboveſaid, the Third Penny abated: And that every principal Houſe or Houſes with Key or Wharf, having any Crane or Gibit belonging to the ſame, ſhall pay after the like Rate of their Rents as is aforeſaid, the Third Penny abated; and that other Wharfs belonging to Houſes, having no Crane or Gibit, ſhall pay for his Tithes as ſhall be payed for Manſion-houſes in Form aforeſaid.*

Item, *That where any Manſion-houſe with a Shop, Stable, Ware-houſe, Wharf with Crane, Timber-yard, Teinter-yard, or Garden, belonging to the ſame, or as Parcel of the ſame, is or ſhall be occupied together, that if the ſame be hereafter ſevered or divided, or at any Time within Eight Years laſt paſt were ſevered or divided; that then the Farmor or Farmors, Occupier or Occupiers thereof, ſhall pay ſuch Tithes as is aboveſaid for ſuch Shops, Stables, Whare-houſes, Wharf with Crane, Timber-yard, Teinter-yard, or Garden aforeſaid, ſo ſevered or divided, after the Rate of their ſeveral Rents thereupon reſerved.*

Item, *That the ſaid Citizens and Inhabitants ſhall pay their Tithes quarterly, that is to ſay, at the Feaſt of* Eaſter, *the Nativity of St.* John Baptiſt, *the Feaſt of St.* Michael *the Archangel, and the Nativity of our Lord, by even Portions.*

Item, *That every Houſholder paying Ten Shillings Rent, or above, ſhall for him or herſelf be diſcharged of their Four Offering-Days: But his Wife, Children, Servant, or others of their Family, taking their Rights of the Church at* Eaſter, *ſhall pay Two Pence for their Four Offering-Days yearly.* Offerings diſcharged.

Provided always, and it is decreed, That if any Houſe or Houſes which hath been, or hereafter ſhall be letten for Ten Shillings Rent by Year or more, be or hath at any Time within Eight Years laſt paſſed, or hereafter ſhall be divided and leaſed into ſmall Parcels or Members yielding leſs yearly Rents than Ten Shillings by Year; that then the Owner or Owners, if he or they dwell in any Part of ſuch Houſe, or elſe the principal Leſſee and Leſſees, if the Owner or Owners do not dwell in ſome Part of the ſame, ſhall from henceforth pay for his or their Tithes after ſuch Rate of Rent as the ſame Houſe was accuſtomed to be letten for before ſuch Diviſion or Dividing into Parts or Members: And the Under-Farmor or Farmors, Leſſee and Leſſees, to be diſcharged of all Tithes for ſuch ſmall Parcels, Parts or Members rented at leſs yearly Rent than Ten Shillings by Year, without Houſes divided into ſmall Parcels.

Tithes in London.

without Fraud or Covin, paying Two-pence apiece yearly for Four Offering-Days.

Gardens for Pleaſure.

Provided alway, and it is decreed, That for ſuch Gardens as appertain not to any Manſion-houſe, and which any Perſon or Perſons holdeth or ſhall hold in his or their Hands for Pleaſure, or to his own Uſe; that the then Perſon ſo holding the ſame, ſhall pay no Tithes for the ſame: But if any Perſon or Perſons which holdeth or ſhall hold any ſuch Garden, containing half an Acre or more, doth or ſhall make any yearly Profit thereof by Way of Sale; that then he or they ſhall pay Tithes for the ſame after ſuch Rate of his Rent, as is herein firſt above ſpecified.

Gardens divided.

Provided alſo, That if any ſuch Gardens now being of the Quantity of half an Acre or more, be hereafter by Fraud or Covin divided into leſs Quantity or Quantities, then to pay Tithe according to the Rate aboveſaid.

Noblemens Houſes.

Provided alway, That this Decree ſhall not extend to the Houſes of great Men, or Noble-men, or Noble-women, kept in their own Hands, and not letten for any Rent, which in Times paſt hath paid no Tithes, ſo long as they ſhall ſo continue unletten: Nor to any Halls of Crafts or Companies, ſo long as they be kept unletten, ſo that the ſame Halls in Times paſt have not uſed to pay any Tithes.

Sheds, &c. exempted.

Provided always, and it is decreed, That this preſent Order and Decree ſhall not in any wiſe extend to bind or charge any Sheds, Stables, Cellars, Timber-yards, ne Tinter-yards, which were never Parcel of any Dwelling-houſe, ne appertaining or belonging to any Dwelling-houſe, ne have accuſtomed to pay any Tithes; but that the ſaid Citizens and Inhabitants ſhall thereof be quit of Payment of any Tithes, as it hath been uſed and accuſtomed.

Accuſtomable Rates. See this Clauſe expounded, Gilb. 191.

Provided alſo, and it is decreed, That where leſs Sum than after Sixteen pence half-penny in the Ten Shillings Rent, or leſs Sum than Two Shillings nine-pence in the Twenty Shillings Rent, hath been accuſtomed to be paid for Tithes; that then in ſuch Places the ſaid Citizens and Inhabitants ſhall pay but only after ſuch Rate as hath been accuſtomed.

Controverſies referred to the Mayor.

Item, *It is alſo decreed, That if any Variance, Controverſy or Strife, do or ſhall hereafter ariſe in the ſaid City for Non-payment of any Tithes; or if any Variance or Doubt ariſe upon the true Knowledge or Diviſion of any Rent or Tithes, within the Liberties of the ſaid City, or of any Extent or Aſſeſſment thereof, or if any Doubt ariſe upon any other Thing contained within this Decree; that then upon Complaint made by the Party grieved to the Mayor of the City of* London *for the Time being, the ſaid Mayor, by the Advice of Council, ſhall call the ſaid Parties before him, and make a final End in the ſame, with Coſts to be awarded by the Diſcretion of the ſaid Mayor and his Aſſiſtants, according to the Intent and Purport of this preſent Decree.*

Appeal to the Lord Chancellor.

And if the ſaid Mayor make not an End thereof within two Months after Complaint to him made, or if any of the ſaid Parties find themſelves aggrieved; that then the Lord Chancellor of England *for the Time being, upon Complaint to him made within three Months then next following, ſhall make an End in the ſame, with ſuch Coſts to be awarded as ſhall be thought convenient, according to the Intent and Purport of the ſaid Decree.*

Rent leſſened by reaſon of Ruins, &c.

Provided always, That if any Perſon or Perſons take any Tenement for a leſs Rent than it was accuſtomed to be letten for, by reaſon of great Ruine or Decay, Brenning or ſuch like Occaſions or Misfortunes, that then ſuch Perſon or Perſons, his Executors or Aſſigns, ſhall pay Tithes only after the Rate of the Rent reſerved in his or their Leaſe, and none otherwiſe, as long as the ſame Leaſe ſhall indure. Stat. 37 H. 8. cap. 12.

Upon Motion for a Prohibition, the Caſe upon this Statute was this; That the yearly Rent of an Houſe in *London*, at the Time of the Decree made, and after, was Five Pounds, and a new Leaſe was made of the ſaid Houſe, rendring the Rent of Five Pounds *per Annum*; and over that a great Income or Fine, which was covenanted and agreed to be paid yearly the ſame Day that the Rent was paid, as a Sum in groſs; but ſo much Rent might have been reſerved for the ſaid Houſe, as both the ſaid Five Pounds Rent reſerved, and the Sum in groſs amounted unto; which Reſervation and Covenant, *&c.* were made to defraud the Parſon of the true Rent of the ſaid Houſe, which he ought to have had according to the true Intent of the ſaid Decree. In this Caſe it was reſolved by the whole Court of *C. B.* If ſo much Rent be reſerved as was accuſtomed to be paid at the making of the Decree in 37 *H.* 8. (whatſoever Fine or Income be paid) that the Parſon can aver no Fraud in the Reſervation of that Rent, for the Words of the Decree are, *Where any Leaſe is or ſhall be made of any Dwelling-houſe*, &c. *by Fraud or Covin, in reſerving leſs Rent than hath been accuſtomed or is paid*, &c. So as if the accuſtomed Rent be reſerved, no Fraud can be alledged; for the Fraud by the Decree is, when leſſer Rent than uſual is reſerved; or if no Rent at all be reſerved, that then Tithe ſhall be paid according to the Rent that then was laſt before reſerved, for ſo are the Words of the Decree; which Decree conſiſteth of four Parts, *viz. Firſt*, Where the accuſtomed Rent, *&c.* was reſerved; *Secondly*, Where the Rent was increaſed, there the Tithes ſhall be paid according to the whole Rent; *Thirdly*, Where leſs Rent was reſerved; *Fourthly*, Where no Rent was reſerved, but had been formerly reſerved; but in this Caſe the Parſon confeſſeth that the accuſtomed Rent was reſerved, and therefore had no Cauſe of Suit.

Tithes in London.

The ſame Rent, with a great Fine or Income reſerved.

Accuſtomed Rent reſerved.

The Decree conſiſts of four Parts.

Secondly, It was reſolved, That ſuch Houſes as were never letten to Farm, but inhabited by the Owner, is *Caſus Omiſſus*, and ſhall pay no Tithes by Force of the Decree.

Caſus Omiſſus.

Thirdly, It was reſolved, That where the Decree ſaith, *Where no Rent is reſerved by reaſon of any Fine or Income paid before-hand*; albeit no Fine or Income be paid, yet if no Rent be reſerved, the Parſon ſhall have his Tithes according to the Decree; for that is put but for an Example or Cauſe, why no Rent is reſerved, and whether any Fine or Income were paid or no, is not material as to the Parſon; and a Prohibition was awarded to the Court of the Chancellor of the Biſhop of *London* to ſtay the Plaintiff's Suit there. *Mich.* 5 *Jac. Skidmore* and *Eire* v. *Bell*, Parſon of *St. Michael Queenhith*, 2 *Inſt.* 659.

If no Rent be reſerved.

And Note, That it hath been held by the Juſtices, that a Houſe in *London*, which was Part of the Poſſeſſions of a Priory, that was diſcharged of paying Tithes of their Poſſeſſions, was by the aforeſaid Statute charged with Tithes, according to the Ordinance there; for before that Statute, no Dwelling-houſe was chargeable with Tithes, becauſe no Profit ariſeth of it, and only Noblemens Houſes are excepted. *Paſch.* 34 *Eliz. B. R. Green* v. *Piper*, 3 *Cro.* 276, and *Moor* 912.

Part of a Priory.

Alſo it hath been reſolved, that a Rent for half a Year, and afterwards for another half Year, is a yearly Rent within the Meaning of the Decree; and that as the ſame was laſt let, is not intended laſt before the Decree, but before the Demand of the Tithes; yet if the Leſſee for Life leaſeth for Years to *A.* reſerving Rent, that Rent reſerved by the Leſſee ſhall not conclude and bind him in the Reverſion to pay Tithes according

Half-yearly Rent.

Tithes in London.

ding to that Rule. *Hil.* 5 *Jac. B. R.* Doctor *Mendhouſe* v. Doctor *Taylor*, *Noy* 130.

Prohibition how.

If a Suit be brought in the Spiritual Court for the Tithes of the Rent of Houſes in *London*, a Prohibition lies, for by the Statute 37 *H.* 8. *cap.* 12, the Suit ought to be before the Mayor of *London*, by Complaint in Writing, and not by Word of Mouth only, in nature of a *Monſtrans de Droit*, declaring all the Title; and if the Suit be in the Spiritual Court for Tithes in *London*, the Court of *King's Bench* may grant a Prohibition, and yet that Court hath not Power to meddle with Tithes in *London*. *Hill.* 5 *Jac. B. R.* Doctor *Mendhouſe* v. Doctor *Taylor*, *Noy* 130. *Skidmore* and *Eire* v. *Bell*, 2 *Inſt.* 650.

Preſcriptions.

Notwithſtanding this Settlement, divers Preſcriptions for the Payment of leſſer Rates than the Parſons might require by the ſaid Settlement (as to pay Ten Shillings for the Tithe of an Houſe, although that the Rent thereof was Forty Pounds *per Annum* or more) have been gained and allowed. But upon the Occaſion of the late dreadful Fire, as to the Churches thereby conſumed, another Statute was made, to make the Maintenance of the Miniſters thereof more certain, which is as followeth.

Statute 22 & 23 *Car.* 2. *c.* 15. for ſettling the Tithes in *London*, &c.

Whereas the Tithes in the City of London **were levied and paid with great Inequality, and are ſince the late dreadful Fire there, in the rebuilding of the ſame, by taking away of ſome Houſes, altering the Foundations of many, and the new Erecting of others, ſo diſordered, that in caſe they ſhould not for the Time to come be reduced to a Certainty, many Controverſies and Suits of Law might thence ariſe: Be it enacted by the King's moſt excellent Majeſty, by and with the Advice and Conſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, that the Annual certain Tithes of all and every Pariſh and Pariſhes within the ſaid City of** London **and the Liberties thereof, whoſe Churches have been demoliſhed, or in Part conſumed by the late Fire, and which ſaid Pariſhes by Virtue of an Act of this preſent Parliament, Intitled,** An Additional Act for the Rebuilding of the City of *London*, Uniting of Pariſhes, and Rebuilding of the Cathedral and Parochial Churches within the City, **remain and continue ſingle, as heretofore they were, or are by the ſaid Act annexed or united into one Pariſh reſpectively, ſhall be as followeth; that is to ſay, the Annual certain Tithes, or Sum of Money in lieu of Tithes.**

	l.	s.	d.
Of the Pariſh of Alhallows Lumbard-Street —— ——	110	00	00
Of St. Bartholomew-Exchange —— —— ——	100	00	00
Of St. Bridget *alias* Bridges —— —— ——	120	00	00
Of St. Bennet Finck —— —— ——	100	00	00
Of St. Michaels Crooked-Lane —— —— ——	100	00	00
Of St. Chriſtopher —— —— ——	120	00	00
Of St. Dyonis Back-Church —— —— ——	120	00	00
Of St. Dunſtan in the Eaſt —— —— ——	200	00	00
Of St. James Garlick-hith —— —— ——	100	00	00
Of St. Michael Cornhil —— —— ——	140	00	00
Of St. Michael Baſſiſhaw —— —— ——	132	11	00
Of St. Margaret Lothbury —— —— —— ——	100	00	00
Of St. Mary Aldermanbury —— —— ——	150	00	00

Of

	l.	s.	d.	Tithes in London.
Of St. Martin Ludgate	160	00	00	
Of St. Peter Cornhil	110	00	00	
Of St. Stephen Coleman-ſtreet	110	00	00	
Of St. Sepulchre	200	00	00	
Of Alhallows Bread-ſtreet, and St. John Evangeliſt	140	00	00	
Of Alhallows the Great, and Alhallows the Leſs	200	00	00	
Of St. Alban Wood-ſtreet, and St. Olaves Silver-ſtreet	170	00	00	
Of St. Anne and Agnes, and St. John Zachary	140	00	00	
Of St. Auguſtine and St. Faith	172	00	00	
Of St. Andrew Wardrobe, and St. Anne Black-Fryars	140	00	00	
Of St. Antholin, and St. John Baptiſt	120	00	00	
Of St. Bennet Grace-Church, and St. Leonard Eaſt-cheap	140	00	00	
Of St. Bennet Paul's-Wharf, and St. Peters Paul's-Wharf	100	00	00	
Of Chriſt-Church, and St. Leonard Foſter-Lane	200	00	00	
Of St. Edmund the King, and St. Nicholas Acons	180	00	00	
Of St. George Buttolph Lane, and St. Buttolph Billinſgate	180	00	00	
Of St. Lawrence Jury, and St. Magdalen Milk-ſtreet	120	00	00	
Of St. Magnus, and St. Margaret New Fiſh-ſtreet	170	00	00	
Of St. Michael Royal, and St. Martin Vintry	140	00	00	
Of St. Matthew Friday-ſtreet, and St. Peter Cheap	150	00	00	
Of St. Margaret Pattons, and St. Gabriel Fenchurch	120	00	00	
Of St. Mary at Hill, and St. Andrew Hubbard	200	00	00	
Of St. Mary Woolnoth, and St. Mary Woolchurch	160	00	00	
Of St. Clement Eaſtcheap, and St. Martin Orgars	140	00	00	
Of St. Mary Abchurch, and St. Lawrence Pountney	120	00	00	
Of St. Mary Aldermary, and St. Thomas Apoſtles	150	00	00	
Of St. Mary-le-Bow, St. Pancraſs Soper-Lane, and Alhallows Honey-Lane	200	00	00	
Of St. Mildred Poultry, and St. Mary Cole-Church	170	00	00	
Of St. Michael Wood-ſtreet, and St. Mary Staining	100	00	00	
Of St. Mildred Bred-ſtreet, and St. Margaret Moſes	130	00	00	
Of St. Michael Queenhith, and Trinity	160	00	00	
Of St. Magdalen Old Fiſh-ſtreet, and St. Gregory	120	00	00	
Of St. Mary Sommerſet, and St. Mary Mounthaw	110	00	00	
Of St. Nicholas Coleabby, and St. Nicholas Olives	130	00	00	
Of St. Olive Jury, and St. Martin Ironmonger-Lane	120	00	00	
Of St. Stephen Walbrook, and St. Bennet Sherehogg	100	00	00	
Of St. Swithin, and St. Mary Bothaw	140	00	00	
Of St. Vedaſt *alias* Foſters, and St. Michael Quern	160	00	00	

Over and above Glebes, &c.

Which reſpective Sums of Money to be paid in lieu of Tithes within the ſaid reſpective Pariſhes, and aſſeſſed as herein after is directed, ſhall be and continue to be eſteemed, deemed and taken, to all Intents and Purpoſes, to be the reſpective certain annual Maintenance (over and above Glebes and Perquiſites, Gifts and Bequeſts to the reſpective Parſon, Vicar and Curate of any Pariſh for the Time being, or to his or their reſpective Succeſſors, or to other Perſons for his or their Uſe) of the ſaid reſpective Parſons, Vicars and Curates who ſhall be legally inſtituted, inducted and admitted into the reſpective Pariſhes aforeſaid.

Aſſeſſors and Aſſeſſments.

And that the ſaid ſeveral Sums of Money for Tithes may be more equally aſſeſſed upon ſeveral Houſes, Buildings, and other Hereditaments whatſoever, within all the ſaid reſpective Pariſhes, Be it

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enacted by the Authority aforesaid, That the Alderman of such respective Ward or Wards within the said City, wherein any of the said Parishes respectively lie, and his or their Deputy or Deputies, and the Common Council-men of such their respective Ward or Wards, with the Church-wardens, and one or more of the Parishioners of such respective Parish, wherein the Maintenance aforesaid is respectively to be assessed, to be nominated by such respective Alderman, Deputy, Common Council-men and Church-wardens, or any Five of them, whereof the Alderman or his Deputy to be one, shall at some convenient and seasonable Time before the twentieth Day of May in the Year of our Lord God One thousand six hundred and seventy-one, assemble and meet together in some convenient Place within every of the respective Parishes, in such respective Ward wherein the Maintenance aforesaid is to be assessed; and they, or the major Part of them so assembled, shall proportionably assess upon all Houses, Shops, Warehouses and Cellars, Wharfs, Keys, Cranes, Water-houses, (which Water-houses shall pay in their respective Parishes where they stand, and not elsewhere) and Tofts of Ground (remaining unbuilt) and all other Hereditaments whatsoever, (except Parsonage and Vicarage Houses) the whole respective Sum by this Act appointed, or so much of it as more than what each Impropriator is by this Act injoyned respectively to allow, in the most equal Way that the said Assessors, according to the best of their Judgments can make it; which said Assessments shall be made and finished before the Four and twentieth Day of July then next insuing.

Variances, &c. redressed.

And be it further enacted by the Authority aforesaid, That if any Variance or Doubt shall happen or arise about any Sum so assessed, as aforesaid, or that any Parishioner or Parishioners, or Owner or Owners of any House, Shop, Ware-house or Cellar, Wharf, Key, Crane, Water-house, Toft of Ground, or other Hereditaments within any the said Parishes, shall find himself or themselves aggrieved by the Assessing of any Sum or Sums of Money, in manner and form aforesaid; that then upon Complaint made by the Party or Parties aggrieved, to the Lord Mayor and Court of Aldermen of the said City, within fourteen Days after Notice given to the Party or Parties assessed, of such Assessments made, the said Lord Mayor and Court of Aldermen summoning as well the Party or Parties aggrieved, as the Aldermen and such others as made the Assessment, shall hear and determine the same in a summary Way, and the Judgment by them given shall be final, and without Appeal.

Review.

Provided always, and be it enacted, That any Assessment or Rate to be made or laid by Virtue of this Act, shall or may in all or any the Parishes aforesaid, in like manner be reviewed, or altered, or laid again within three Months, after the Twenty-fourth Day of June One thousand six hundred and seventy-four, according to the aforesaid Rules, and any such Assessment or Rate shall or may be again reviewed, or re-assessed within three Months after the Twenty-fourth Day of June in the Year of our Lord One thousand six hundred eighty-one; and that all and every such new Assessment and Rate

Appeals.

shall be liable to the like Appeals, as aforesaid, and shall be collected, levied and paid as any other Assessment or Rate mentioned in this Act may or ought to be.

And if the said Aldermen, Deputy, Common Council-men and Parishioner or Parishioners appointed, as aforesaid, shall after Summons

mons and Request made in that behalf unto them, by the Lord Mayor and Court of Aldermen, or the Incumbent or Incumbents of any of the said respective Parish or Parishes, refuse and neglect to meet and make such Assessments, as aforesaid, then it shall and may be lawful to and for such Person or Persons as shall be thereunto authorized and required by the said Lord Mayor and Court of Aldermen, to make such Assessment, as by the said Aldermen, Deputy, Common Council-men, Church-wardens, Parishioner or Parishioners aforesaid, should or ought to have been made. Tithes in London. Refusal.

And be it further enacted by the Authority aforesaid, That the said Assessors within ten Days after such Assessments made, and the respective Appeals (if any be) determined, shall make three Transcripts thereof in Parchment, containing the respective Sums to be payable, or appointed to be paid out of all and every the Premisses within such respective Parish, and subscribe the same under their Hands, and within twenty Days after such Subscription as aforesaid, one of the said Transcripts shall be returned to the Lord Mayor of the City of London, to be kept and preserved by the said Lord Mayor, in and among the Records of the said City, for a Memorial thereof; and another of the said Transcripts shall be returned into the Registry of the Lord Bishop of London, to be kept and preserved, as aforesaid; and the other of the said Transcripts shall remain and be kept in the Vestry of such respective Parish, for a perpetual Memorial, as aforesaid. Transcripts.

And for the surer and better Payment of the said respective Sums of Money so to be assessed and taxed towards the raising of the said Maintenance of the respective Parsons, Vicars and Curates, of the said respective Parishes, as aforesaid; Be it farther enacted by the Authority aforesaid, That all and every such respective Sum and Sums of Money so to be assessed and taxed as aforesaid, towards the raising of the said Maintenance of the said respective Parsons, Vicars and Curates, of the said respective Parishes, shall be paid to the said respective Parsons, Vicars and Curates, and their Successors respectively, at the Four most usual Feasts, (that is to say) at the Annunciation of the Blessed Virgin Mary, the Nativity of St. John Baptist, the Feast of St. Michael the Archangel, and the Nativity of our Blessed Saviour, or within fourteen Days after each of the Feasts aforesaid, by equal Payments; the respective Payments thereof to begin and commence only from such Time and Times as the Incumbent or Incumbents of such respective Parish shall begin to officiate to preach as Incumbent or Parson in the respective Church, belonging to the respective Parish, or in some other convenient Place or Places in such respective Parish or Parishes, to be nominated or appointed by the Lord Bishop of London for the Time being, or by the Archbishop of Canterbury, in any Place within his Peculiars. How the Money is to be paid to the Parsons.

And in any Parish or Parishes where any Impropriations be, be it enacted by the Authority aforesaid, That all and every the Impropriator or Impropriators of any of the said Parishes, shall pay and allow what really, and bona fide, they have used, and ought to pay and satisfy to the respective Incumbent of such respective Parish, at any Time before the late Fire, and the same shall be esteemed and computed as Part of the Maintenance of such Incumbent; notwithstanding this Act, or any Clause or Matter, or Thing therein contained. Impropriations.

And

Tithes in London.

And be it farther enacted by the Authority aforesaid, That if any the Inhabitants in any respective Parish or Parishes, as aforesaid, shall or do refuse, or neglect to pay to the respective Incumbents aforesaid of any of the said respective Parishes, any Sum or Sums of Money to him respectively payable, or appointed to be paid by this Act, or any Part thereof, contrary to the true Intent and Meaning of this Act, (being lawfully demanded at the House or Houses, Wharf, Key, Crane, Cellar or other Premisses whereout the same is payable) that then it shall and may be lawful to and for the Lord Mayor of the City of London for the Time being, upon Oath to be made before him of such Refusal or Neglect, to give and grant out Warrants for the Officer or Person appointed to collect the same, with the Assistance of a Constable, in the Day-time, to levy the same Tithes or Sums of Money so due, and in arrear and unpaid, by Distress and Sale of the Goods of the Party or Parties so refusing or neglecting to pay, restoring to the Owner or Owners the Overplus of such Goods over and above the said Arrears of the said Monies so due and unpaid, and the reasonable Charges of making such Distress, which he is to deduct out of the Monies raised by Sale of such Goods.

Lord Mayor's Warrant for Distress and Sale.

Provided always, and be it enacted, That in case the Lord Mayor, or Court of Aldermen, shall refuse or neglect to execute any of the respective Powers to them by this Act granted, or to perform all and every such Thing, relating either to the Assessing or Levying of the respective Sums aforesaid, as they are by this Act authorized and required to perform, That then it shall and may be lawful for the Lord Chancellor, or Lord Keeper of the Great Seal of England for the Time being, or any Two or more of the Barons of his Majesty's Court of Exchequer, by Warrant or Warrants, under his or their respective Hands and Seals, to do and perform what the said Mayor and Court of Aldermen, according to the true Intent or Meaning of this present Act might or ought to have done, and by such Warrant, either to impower any Person or Persons to make their respective Assessments, as aforesaid, or to authorize the respective Officers or Persons appointed to collect the Sums aforesaid, to levy the same by Distress and Sale of the Goods of any Person or Persons that shall refuse or neglect to pay the same in manner and form aforesaid.

Lord Chancellor's Warrant, &c.

Of Parishes united.

Provided always, and be it enacted, That where any of the Parishes within the said City, have since the late Fire, by Death or otherwise, become Vacant, the surviving or remaining Incumbent of the other Parish thereto united, or therewith consolidated, shall have and injoy, and have like Remedy to recover the Tithes hereby settled to be paid, as if he had been actually presented, admitted, instituted and inducted into both the said Parishes, since the Union and Consolidation thereof.

Pleas, before whom to be holden.

Provided always, That no Court or Judge, Ecclesiastical or Temporal, shall hold Plea of or for any Sum or Sums of Money due and owing, or to be paid by Virtue of this Act, or any Part thereof, other than the Persons hereby authorized to have Cognizance thereof: Nor shall it be lawful to or for any Parson, Vicar or Incumbent, to convent or sue any Person or Persons assessed as aforesaid, and refusing or neglecting to pay the same, in any Court or Courts, or before any Judge or Judges, other than what are au-

Of Sir Thomas Overbury, and his Wife. 1
Of Sir Walter Raleigh. 8
Of Sir Francis Bacon. 13
Of Sir Edward Coke. 20
Of Sir Henry Wotton. 27
Of Sir Robert Cotton. 34
Of Sir Henry Spelman. 41
Of Sir Thomas Bodley. 48
Of Sir Thomas Smith. 55
Of Sir Philip Sidney. 62
Of Sir Francis Drake. 69
Of Sir Richard Grenville. 76
Of Sir John Hawkins. 83
Of Sir Martin Frobisher. 90
Of Sir Thomas Gresham. 97
Of Sir Thomas Chaloner. 104
Of Sir Thomas Pope. 111
Of Sir Nicholas Bacon. 118
Of Sir Thomas Wilson. 125
Of Sir Thomas Roe. 132
Of Sir Dudley Carleton. 139
Of Sir Henry Vane. 146
Of Sir Robert Naunton. 153
Of Sir Robert Sidney. 160
Of Sir Edward Herbert. 167
Of Sir Kenelm Digby. 174
Of Sir Thomas Browne. 181
Of Sir Matthew Hale. 188
Of Sir William Temple. 195
Of Sir Isaac Newton. 202
Of Sir Hans Sloane. 209
Of Sir Richard Steele. 216
Of Sir John Vanbrugh. 223
Of Sir Godfrey Kneller. 230
Of Sir Christopher Wren. 237
Of Sir Joseph Williamson. 244
Of Sir Joseph Jekyll. 251
Of Sir Robert Walpole. 258
Of Sir Charles Wager. 265
Of Sir Robert Brady. 272
Of Sir Edmund Berry Godfrey. 279
Of Sir Edmund Andros. 286
Of Sir William Phips. 293
Of Sir Francis Wheler. 300
Of Sir Cloudesley Shovel. 307
Of Sir George Rooke. 314
Of Sir John Leake. 321
Of Sir Stafford Fairborne. 328
Of Sir Clement Cottrell. 335
Of Sir Robert Clayton. 342
Of Sir Richard Hoare. 349
Of Sir Francis Child. 356
Of Sir Thomas Vernon. 363
Of Sir Thomas Abney. 370
Of Sir Peter Delme. 377
Of Sir Gilbert Heathcote. 384
Of Sir John Barnard. 391
Of Sir Robert Viner. 398
Of Sir Richard Hopkins. 405
Of Sir Richard Ford. 412
Of Sir Robert Kite. 419
Of Sir Thomas Hardy. 426
Of Sir Peter Warren. 433
Of Sir Edward Hawke. 440
Of Sir Edward Vernon. 447
Of Sir Charles Knowles. 454
Of Sir Piercy Brett. 461
Of Sir Charles Hardy. 468
Of Sir Edward Boscawen. 475
Of Sir George Pocock. 482
Of Sir Richard Lyttelton. 489
Of Sir Eyre Coote. 496
Of Sir Robert Boyd. 503
Of Sir Robert Murray Keith. 510
Of Sir Robert Harland. 517
Of Sir Charles Saunders. 524
Of Sir Charles Douglas. 531
Of Sir Charles Thompson. 538
Of Sir Hugh Palliser. 545
Of Sir Alexander Hood. 552
Of Sir Richard Bickerton. 559
Of Sir Samuel Hood. 566
Of Sir Richard Kempenfelt. 573
Of Sir Thomas Rumbold. 580
Of Sir Thomas Rich. 587
Of Sir Thomas Dundas. 594
Of Sir Thomas Troubridge. 601
Of Sir Thomas Pye. 608
Of Sir Thomas Williams. 615
Of Sir Thomas Parker. 622
Of Sir Thomas Lombe. 629
Of Sir Thomas Mansel. 636
Of Sir Thomas Frankland. 643
Of Sir Thomas Hanmer. 650
Of Sir Thomas Clarges. 657
Of Sir Thomas Littleton. 664
Of Sir Thomas Powys. 671
Of Sir Thomas Denison. 678
Of Sir Thomas Robinson. 685
Of Sir Thomas Sewell. 692
Of Sir Thomas Lee. 699
Of Sir Thomas Egerton. 706
Of Sir Thomas Trevor. 713
Of Sir Thomas Parker. 720
Of Sir Thomas Clarke. 727
Of Sir Thomas Wilbraham. 734
Of Sir Thomas Bootle. 741
Of Sir Thomas Plumer. 748
Of Sir Thomas Manners Sutton. 755
Of Sir Thomas Tyrwhitt. 762
Of Sir Thomas Bernard. 769
Of Sir Thomas Baring. 776
Of Sir Thomas Grenville. 783
Of Sir Thomas Phillipps. 790
Of Sir Thomas Lawrence. 797
Of Sir Thomas Acland. 804
Of Sir Thomas Dyke Acland. 811
Of Sir Thomas Neave. 818
Of Sir Thomas Baring. 825
Of Sir Thomas Grenville. 832
Of Sir Thomas Phillipps. 839
Of Sir Thomas Lawrence. 846
Of Sir Thomas Acland. 853
Of Sir Thomas Dyke Acland. 860
Of Sir Thomas Neave. 867

thorized and appointed by this Act for the Hearing and Determining of the ſame in manner aforeſaid. Tithes in London.

Provided always, That it ſhall and may be lawful to and for the Warden and Minor Canons of St. Paul's Church London, Parſon and Proprietors of the Rectory of the Pariſh of St. Gregory aforeſaid, to receive and injoy all Tithes, Oblations and Duties ariſing due within the ſaid Pariſh, in as large and beneficial manner as formerly they have, or lawfully might have done; any Thing herein to the contrary notwithſtanding. Stat. 22 & 23 Car. 2. cap. 15. Warden of St. *Paul's*, &c.

CHAP. XLVII.

The ſeveral Ways and Means Lands may be diſcharged of Tithes at Common Law. Of Real Compoſitions. Modus Decimandi, Non Decimandi, &c. *and if Glebe Lands ſhall pay Tithes.*

BY what hath been ſaid it appears, That Tithes *de Jure Communi*, are not to be paid of the Earth or Land it ſelf, nor Houſes of Habitations, &c. erected upon Lands, but only of the Fruits of the Earth; and yet the Rule at this Day is not general, that Tenth of the Fruits of all Lands here in *England* are to pay Tithes. For by the Law there are divers Ways by which Lands ſtand diſcharged from the Payment of Tithes to any Perſon, as by real Compoſition, Preſcription, and Acts of Parliament. But where Lands are thus diſcharged from the Payment of Tithes, and the Parſon, notwithſtanding ſuch Diſcharge, ſues for Tithes in kind, yet no Action of the Caſe lies againſt the Parſon for bringing ſuch Suit, for where ſuch Action was brought, the Court conceived it would not lie, though *falſo*, *malitioſe & ſcienter* were put in the Declaration, the Suit being brought by the Parſon in a proper Court. *Mich.* 26 *Car.* 2. *B. R. Biſhop* v.—— 3 *Keb.* 313. See *Hob.* 205, 206. 3 *Cro.* 836. 8 *E.* 4. 13. 1 *Roll's Abr.* 34. But if a Suit be brought in the Eccleſiaſtical Court to recover the Advowſon of a Church, and alſo the Tithes; in ſuch Caſe the Patron may have an Action of the Caſe for ſuch unjuſt Vexation. 1 *Roll's Abr.* 109. But if one ſue for Tithes in the Eccleſiaſtical Court, and the Defendant pleads Payment, and hath two Witneſſes to prove it, upon which the Plaintiff diſcontinues his Suit, then one of the Witneſſes dies; then the Plaintiff knowing that the Defendant hath but one Witneſs to prove the ſaid Payment, and that one Witneſs is not ſufficient in the Eccleſiaſtical Court, brings a new Action for the ſame Tithes, ſuppoſing now that the Defendant cannot prove Payment of them, yet no Action lies againſt the Plaintiff for this Vexation. *Trin.* 43 *Eliz. Bray* v. *Partridge*, 1 *Roll's Abr.* 101, 102. The Rule for Tithes, is not general.

Firſt, Lands may be diſcharged from the Payment of Tithes by real Compoſition. *Regiſt. fol.* 38. *F. N. B. f.* 44. This is when an Agree- Lands diſcharged for Compoſition.

Compoſition for Tithes.

ment is made with the Parſon or Vicar, together with the Aſſent of the Patron or Patrons and Ordinary, that certain Lands ſhall for the future be diſcharged from the Payment of Tithes in *Specie*, by reaſon of a Recompence agreed upon to be paid, or made to the Parſon, *&c.* in reſpect thereof in Money, either as an intire Sum, or as a yearly Payment, or by Settlement of Lands upon the Incumbent and his Succeſſors for ever, or by doing ſome other Thing that ſhall be of Advantage to the Parſon or Vicar to whom the Right of Tithes doth otherwiſe belong. *Doctor and Student, lib.* 2. *cap.* 55. *Mich.* 11 *Car. B. R. Sydown* v. *Holm, Jones, p.* 368. *Paſch.* 17 *Car. B. R. Hitchcock* v. *Hitchcock, Marſh* 87. But then this Compoſition to make it binding as to the Succeſſors, is to be made either by Deed under Hand and Seal, or by Fine in the King's Courts, *Hobart* 176, and alſo it ought to be made by apt Words; for if the Words of the Contract be, *Inter ſe convenerunt*, this is not ſufficient to make it a real Compoſition to bind the Succeſſors, although that the Biſhop call it *Realis Compoſitio*, for his Calling of it ſo will not alter the Nature of it, but that it ſhall remain as a perſonal Agreement, binding and obliging the Parties to it only, and ſhall not be extended to the Succeſſors. *Paſch.* 17 *Car. B. R. Hitchcock* v. *Hitchcock, Marſh, p.* 87.

First Compoſition between a Prebend and an Abbot, *&c.*

It was found by ſpecial Verdict, that the Abbey of *Fountain*, of the Order of the *Ceſtercians*, was before the Council of *Lateran* ſeiſed of the *Grange* of *S.* within the Prebend of *R.* and that betwixt the Years of 1216 and 1261 a Compoſition was made between the Abbot and Convent, and the Prebend of the ſaid Prebendary, that the Abbot and Convent ſhould for ever be free from the Payment of any Tithes for their Lands, which they tilled at their own Charge within their ſaid *Grange*, *Anno Domini* 1216, and that they ſhould pay Tithes for all other Lands there and elſewhere, and that the ſaid Abbot, *&c.* ſhould pay annually to the ſaid Prebend and his Succeſſors, the Sum of five Marks; the Verdict further found, that *Anno Domini* 1359 another Compoſition was made betwixt them, reciting the former (but they do not find, that it was confirmed by the Patron and Ordinary); and by this latter Compoſition the Prebend and his Succeſſors were to have their Election for all times to come yearly, either to receive Tithes in kind of Corn or Grain ariſing within the Places aforeſaid, as well of Lands in the Hands of the Abbot, as in the Hands of the Tenants, or elſe five Marks to be paid in lieu thereof, ſo as ſuch Election was notified to the Abbot or any of the Monks, *&c.* in the Preſence of a Proctor, or of two good Men, and when no Notice was given, the Prebend to be content with the five Marks, *&c.* In this Caſe the Court were of Opinion, that the ſecond Compoſition did not affect the Succeſſors of the Prebend, and therefore the Abbot was not bound by it. (The Reaſon ſeems to be, becauſe by the firſt Compoſition, the Prebend was bound only *quamdiu propriis manibus, &c.* and by the ſecond Compoſition, the five Marks go in Recompence of all, whether *in propriis manibus* or in the Hands of Tenants.) *Secondly*, The Court held that the Power of Election is gone, becauſe it cannot be made according to the Compoſition, and that therefore the firſt Compoſition ſhould ſtand *quoad terras in propriis manibus*, and for the others, Tithes in kind may be taken as before, and Judgment was given accordingly, *Mich.* 16 *Car.* 2. in *Scaccar.* Sir *William Ingolsby* Bar. v. *Robert Wivel* and *John Ullithorn, Hardres* 381. After the Compoſition is duly and firmly made, if the Lands be transferred, or granted to another, the Feoffee or Grantee ſhall have the Benefit thereof. *Mich.*

Second.

11 *Car. B. R. Sydown* v. *Holm*, *Jones* 268. But if any Real Compoſition hath been made with any Archbiſhop, or Biſhop, ſince the 1ſt of *Eliz.* or with any Dean and Chapter, College, Archdeacon, Prebend, Parſon, Vicar, *&c.* ſince the 13th of *Eliz.* the ſame is void, or at leaſt voidable by the Statutes, as to all Succeſſors whatſoever; for by the Statute of 1 *Eliz.* Archbiſhops and Biſhops, and by the Statute of 13 *Eliz. cap.* 10. all Collegiate and other Eccleſiaſtical Corporations aggregate and ſole, are reſtrained from making any Grants, other than for One and twenty Years, or for Three Lives, and without other Qualifications, which will be mentioned hereafter in their proper Place. And if any Parſon or Vicar doth make ſuch Compoſition for the binding of himſelf only during his Time, he ſhall not be bound thereby, but only whilſt he is reſident, and ſerving the Cure, without Abſence by Eighty Days, as will be hereafter alſo ſhewed.

Diſcharge of Tithes.

A ſecond Means by which Lands are diſcharged of Tithes, is by Cuſtom or Preſcription. Cuſtom and Preſcription differ in this; that Cuſtom is that which gives a Right to a Province, County, Hundred, City or Town, and then it muſt be common to all within the Limits where it is pretended to be: But Preſcription is that which gives a Right to ſome particular Perſon, with reſpect to ſome particular Houſe, Farm or other Thing. Both Cuſtom and Preſcription may be either *De Non Decimando*, or *De Modo Decimandi*. As for Cuſtom and Preſcription, whether they may be *de Modo Decimandi*, none at this Day diſpute; and it ſeems that a Cuſtom may be good *de Non Decimando*, in reſpect of this or that particular Tithe; ſo that a County or Part of a County ſhall not pay any ſuch ſort of Tithes, provided that there be beſides a ſufficient Maintenance for the Parſons. *Hill.* 14 *Jac. per Curiam*, *Burham* and *Gooſe*'s Caſe, and *Mich.* 17 *Jac. B. R.* Dr. *Andrews* and ——— 1 *Roll's Abr.* 653, 654.

Diſcharge by Cuſtom or Preſcription.

Upon this Account, a Man (being ſued in the Eccleſiaſtical Court for the Tithes of Milk of Ewes) did ſuggeſt that by the Cuſtom of the Country no Tithes of the Milk of Ewes had been paid within the Memory of Man; and a Prohibition was granted. *Mich.* 14 *Car. B. R. Sewell* and *Bickwell*'s Caſe, *per Curiam*, 1 *Roll's Abr.* 654. So it is ſaid to have been adjudged, that no Tithes of Underwoods ſhall be paid in Forty Pariſhes of the *Wild* of *Suſſex*, nor in the *Wild* of *Kent*. *Mich.* 13 *Jac. Porter* v. *Tike*, 1 *Roll's Abr.* 653. *Trin.* 15 *Jac. B. R. Bell* v. *Tard*, and *Mich.* 21 *Jac. Loane* v. *Dixon*, and *Trin.* 17 *Jac. B. R. Fawkner* and *Andrews*, *per Curiam*, *Roll's* 1 *Abr.* 654.

Milk of Ewes.

And upon the ſame Account it was adjudged, that a Cuſtom for Bakers within two Hundreds in two Counties, not to pay any Thing of Tithes for new erected Mills for the Uſe of their Trade, was good, *Paſch.* 15 *Car. B. R. Kidden* and *Edward*'s Caſe, 1 *Roll's Abr.* 654. But ſuch Cuſtom is ſaid not to be good for a ſingle Pariſh, *Hill.* 14 *Jac. B. R. Barham* and *Gooſe*, *per Curiam*, 1 *Roll's Abr.* 653, much leſs is a Cuſtom good *De Non Decimando*, abſolutely for a Pariſh or Places of greater Limits, to have their Lands free from the Payment of Tithes, without paying any Thing in lieu thereof, for that this would be to the Deſtruction of Divine Worſhip, and of ſuch Cuſtom no Inſtance hath been given; but generally ſpeaking, a Cuſtom *De Non Decimando* for a Hundred, *&c.* is good againſt ſuch Tithes as are due by Cuſtom only, and not of common Right, as of Wood, *&c.* for as ſuch Tithes are due by Cuſtom only, ſo by the like Cuſtom within a certain Hundred, *&c.* they may be diſcharged from the Payment of ſuch Tithes.

Bakers.

When

Diſcharge of Tithes.

De non Decimando, how good.

When 'tis ſaid, that Preſcription *de non Decimando* is good, this is to be underſtood chiefly as to Spiritual Perſons or Corporations; for theſe being capable of Tithes at Common Law in *Pernancy*, may preſcribe to be diſcharged generally, ſo that no Tithes ſhall be paid of their own Lands, nor any Recompence for them. *Paſch.* 38 *Eliz. The Biſhop of Winchester's* Caſe, 2 *Coke* 44. *Hill.* 33 *Eliz. B. R. The Biſhop of Lincoln* v. *Cowper*, 3 *Croke* 216. *Mich.* 13 *Jac. B. R. The Biſhop of Hereford's* Caſe, 1 *Roll's Rep.* 264. *Mich.* 11 *Car. B. R. Sydown* v. *Holme*, *Jones*, *p.* 368. *Bowles* v. *Atkins*, 2 *Keb.* 28, 60, 162, 175. And if Lands ſo diſcharged by Preſcription be aliened to a Lay-Man, and during the Alienation doth pay Tithes, *viz.* for divers Years, and then be regranted to a Spiritual Corporation; in this Caſe the Lands ſhall be diſcharged as formerly, for Tithe is not a Thing iſſuing out of Land, therefore Unity of Poſſeſſion, or a Releaſe of all Right in and to the Land, doth not extinguiſh them. *Hill.* 33 *Eliz. B. R. Biſhop of Lincoln* v. *Cooper*, 3 *Croke* 216. and *Mich.* 33 *Eliz.* ſame Caſe, 1 *Leon.* 248, and ſuch Lands as a Spiritual Perſon may hold Tithe-free by Preſcription, the Preſcription holds good, not only for diſcharging of the Lands in the Hands of Spiritual Perſons, but alſo of their Tenants and Farmers at Will, for Years, or Life. *Paſch.* 38 *Eliz. The Biſhop of Winchester's* Caſe, 2 *Coke* 44. *Mich.* 38 *Eliz. B. R. Wright* v. *Wright*, 3 *Croke* 511, ſame Caſe, *Moor* 425. *Mich.* 42 *Eliz. B. R. Crouch* v. *Fryer*, 3 *Croke* 785, ſame Caſe, *Moor* 618, alſo their Copyhold Tenants, that is, if no Tithes have been paid of the Lands of a Spiritual Perſon's Copyholders, Time whereof, *&c.* And it ſhall be intended, that this Preſcription had its Commencement at ſuch Time, when all was in the Hands of the Spiritual Perſon; by *Gawdy*, *Fenner* and *Yelverton* againſt *Popham*, *Mich.* 22 *Eliz. Crouch* v. *Fryer*, 3 *Croke* 785. *Paſch.* 1 *Jac. Crouch* v. *Fryer*, *Yelverton* 2, ſame Caſe, *Moor* 618, but then the Copyholder muſt preſcribe in the Name of the Lord. *Noy* 132. But in theſe Caſes, although the Preſcription may bar the Parſon of the Pariſh in which the Lands be from demanding Tithes, yet the Doubt remains, Whether the Tithes of the Lands occupied by the Spiritual Perſon's Farmers, and of his Copyholders Lands, ſhall belong to the Spiritual Perſon, or that his Tenants by Leaſe or Copy ſhall have the Advantage of ſuch Preſcription? And it ſeems that the Tithes ſhall be to the Spiritual Perſon in both Caſes; for this is granted in the Caſe of the Farmer. *Mich.* 38 & 39 *Eliz. B. R. Wright* v. *Wright*, 3 *Croke* 511, and 'tis ſaid by *Popham* and *Fenner*, that a Biſhop may preſcribe to have the Tithe of his Copyholders, and that it ſhall be good againſt a Rector, *&c.* of the Pariſh, *Mich.* 42 *Eliz. B. R. Crouch* v. *Fryer*, 3 *Croke* 785, but that is to be underſtood where Tithes have been uſually ſo paid to the Biſhop, in which Caſe it may be good againſt the Parſon of the Pariſh; but whether the Copyholders of a Spiritual Perſon, not having paid Tithes to any, ſhall be bound to pay them to the Lord of the Manor is the Doubt, which I ſuppoſe they ſhall not. *Quære.*

Lands aliened to Lay-Men.

Farmers of Spiritual Perſons.

No Tithes where there is an Unity of Poſſeſſion.

But from this that hath been ſaid, That Spiritual Perſons may preſcribe in *Non Decimando*, we may not collect, that in all Caſes where no Tithes have been paid by Spiritual Perſons occupying their own Lands Time whereof, *&c.* that no Tithes ſhall upon any Account be paid of ſuch Lands; for no Tithes can be paid of Lands where there is an Unity of Poſſeſſion, that is, where the Lands and Tithes or Rectory are in one Hand, in that a Man cannot pay Tithes to himſelf, and yet the Lands may remain Tithable in themſelves; therefore, although a Parſon or Vicar, whilſt his Glebe is in his own Hands, hath not paid Tithes, not have

have his Predeceſſors paid, Time whereof; yet Glebe Land, becauſe it is Glebe, is not therefore free from the Payment of Tithe, in whoſe Hands ſoever it ſhall come, and in all Caſes; for if a Parſon doth demiſe his Glebe Land rendering Rent, and free from all other Exactions and Demands, his Leſſee ſhall pay Tithes to him of the Glebe ſo demiſed, notwithſtanding the Words, [*free from all Exactions and Demands,*] for that the Tithes are an Eccleſiaſtical Inheritance collateral to the Land. *Trin.* 31 & 32 *Eliz. B. R. Parkins* v. *Hind*, 3 *Croke* 161. *Paſch.* 27 *Eliz. C. B. Stye* v. *Miles*, *Mich.* 31 & 32 *Eliz. Parkins* v. *Wild*, *Noy* 35. *Trin.* 31 *Eliz. B. R. Style* and *Miller*'s Caſe, 1 *Leon.* 300. Unity of Poſſeſſion of a Manor and Rectory will not exempt the Demeſne Lands from the Payment of Tithes when they come to be ſevered. *Comyns* 498. *Fox* and *Bardwell* and others; *et econtra.* Diſcharge of Tithes.

If a Parſon doth ſow his Glebe, and afterwards doth leaſe over the Land, and the Leſſee doth ſever the Corn, he ſhall pay Tithes thereof to the Parſon; or if a Parſon having ſown his Glebe doth afterwards ſell the Corn, reſerving the Land, the Parſon when the Vendee doth ſever the Corn, ſhall have Tithe thereof notwithſtanding his own Grant. *Paſch.* 40 *Eliz. B. R. Humphry*'s Caſe, *Dubitatur*, *Hill.* 11 *Jac. B. R. Moyle* and *Ewer*'s Caſe, *per Curiam*, and affirmed upon Error. *Roll's Abr.* 1. 655. So if a Parſon doth ſow his Glebe, and dies before Severance, and another is inducted, and then his Executor or his Vendee doth ſever the Corn, the Succeſſor ſhall have Tithes thereof; for though the Executor doth repreſent the Perſon of the Teſtator, yet he cannot repreſent him as Parſon, for that another is inducted, *contra Paſch.* 40 *Eliz. B. R. Humphry*'s Caſe, *Roll's Abr.* 1. 655. But if the Corn be ſevered, and the Parſon dies before the ſame be carried off from the Ground, there, I ſuppoſe, the Succeſſor ſhall not have Tithes of ſuch Corn ſo ſevered, though ſtanding in Rucks or Shocks upon the Ground; for in the like Caſe I take it to be, that the Executors of the dying Parſon, and not the Succeſſor, ſhall have the Tithes of all Corn within the Pariſh ſevered from the Ground at the Time of the Parſon's Death, and not carried away, although the Tithes were not then actually ſet out; for a Right to the Tithes was veſted in the dying Parſon by the Severance of the Corn from the Ground; and this I take to be warranted by the Opinion in the *Office of Executor*, *Chap.* 5. *fol.* 94. *Orphans Legacy* 81. See alſo 2 *Bulſt.* 184. 1 *Roll's Abr.* 656. Parſon ſows, and afterwards leaſes out his Land, &c.

If a Spiritual Perſon hath a Parſonage appropriate, and doth infeoff another of Part of the Glebe, yet he ſhall have Tithes againſt his own Feoffment, 42 *Ed.* 3. 13. *a.* and if he demiſeth his Glebe, he ſhall have Tithes of his Leſſee, *Dyer* 43. But it is ſaid to be otherwiſe, if the Parſonage be impropriated, and in Lay-Hands, becauſe of the Statute 32 *H.* 8. *Of Diſſolutions*, *Brewer*'s and *Verſey*'s Caſe, vouched by *Hutton* in *Noy* 132, (but of this I much doubt) and when it was urged for Law, the Court denied it, and ſaid, that the Caſe of *Perkins* and *Hind* was adjudged to the contrary in that very Point. *Booth* and *Franklin*'s Caſe, *Mich.* 3 *Car. B. R. Hetley* 31. If a Parſon doth let his Rectory, reſerving to himſelf his Glebe, he in this Caſe ſhall pay Tithe to his Grantee. 37 *H.* 8. *fol.* 35. Where a Parſon ſhall have Tithes, or pay Tithes, upon his own Feoffment, &c.

Though Glebe-Land in it ſelf conſidered, be all Tithable as any other Lands be, yet no Tithes ſhall be paid of the Glebe by the Parſon of a Church to the Vicar of the ſame Church, whilſt they are in the Hands of the Parſon himſelf, although that the Vicar be indowed of the Tithes of all Lands within the Pariſh, for that *Eccleſia Decimas Solvere Eccleſiæ* Tithe of Parſon's Glebe-Lands, how payable with reſpect to the Vicar.

Diſcharge of Tithes.

non Debet; and *Tanfield* ſaid, that then lately this Matter was in Queſtion betwixt *Young* and the Parſon of *Boxly* in the County of *Wilts*; and adjudged, that no Tithes ſhall be paid of the Glebe Lands: But by *Popham*, if the Vicar by Indowment be to have all the ſmall Tithes within the Pariſh, and then the Parſon doth make a Leaſe of his Glebe-Land, the Leſſee ſhall pay the Tithes ariſing therefrom to the Vicar, and the groſs Tithes thereof to the Leſſor; to which the Court agreed. *Trin.* 38 *Eliz. B. R. Blinco* v. *Marſton*, 3 *Croke* 479, ſame Caſe, *Moor* 457. Or if the Vicar had been eſpecially indowed of the minute Tithes of the Glebe-Lands of the Parſonage, the Vicar ſhould have had them, although they were in the Hands of the Appropriator. Note alſo, that it ought to be antient Glebe at the Time of the Indowment. *Mich.* 39 & 40 *Eliz. B. R. Blincoe* v. *Barſkdale*, 3 *Croke* 578, ſame Caſe, *Moor* 910.

How payable to the Vicar with reſpect to the Parſon.

And what is before ſaid of the Parſon's Glebe with Reſpect to the Vicar, holds as to the Vicar's Glebe with reſpect to the Parſon; for whilſt the Vicar doth retain his Glebe in his own Hands, he ſhall not pay Tithes thereof; but if he demiſe it to another, the Leſſee ſhall pay the groſs Tithes to the Parſon, and the Vicar's Tithes to the Vicar; and when the Caſe was, that the Vicar had ſowed his Glebe, and died, the Tithes thereof ought to be paid by the Executors to the Vicar. *Harris* v. *Cotton*, *Brownl.* and *Gouldſb.* 69. 1 *Roll's Abr.* 655. *contra Paſch.* 40 *Eliz. B. R. Humprey*'s Caſe. But it ſeems, if the Parſon's or Vicar's Glebe be in another Pariſh than where the Church is to which it belongs, that Tithes of ſuch Glebe ſhall be paid to the Incumbent of the Church where the Glebe is, unleſs the Parſon or Vicar, to whom the Glebe belongs, can preſcribe in *Non Decimando*. *Benton* and *Troff*'s Caſe, *Mich.* 40 & 41 *Eliz. Moor* 522. *Mich.* 13 *Car. B. R.* Doctor *Ward* and *Taylor*, *per Curiam*, 1 *Roll's Abr.* 653. *Selden Hiſtory of Tithes*, *cap.* 6. *fo.* 75, 76. So if a Parſon or a Vicar of a Church doth purchaſe a Manor or Lands within their Pariſh, though by this Purchaſe and Unity of Poſſeſſion the Lands which were tithable before are become Tithe-free, becauſe a Man cannot pay Tithes to himſelf; yet if the Parſon leaſe his Rectory, the Parſon himſelf ſhall pay Tithes of his Lands to his Leſſee; and if the Parſon makes a Feoffment of his Manor or Lands, the Feoffee ſhall pay Tithes to the Feoffor, being Parſon, becauſe Tithes cannot be extinguiſhed by any Unity of Poſſeſſion. *Mich.* 30 *H.* 8. *C. B. Dyer*, *fol.* 43. *Vide* 32 *H.* 8. *Brook* 7 *Ed.* 6. Tit. *Diſmes* 17. *Mich.* 3 *Car. C. B. Booth* v. *Franklin*, *Hetley* 31. Much more, if a Man being poſſeſſed of Lands ſown with Corn, do ſell the Corn to another, and afterwards doth become Proprietor of Tithes of the ſaid Land, he ſhall have the Tithes of the Corn by him ſold, for though the Parſon may ſell the Tithes before Severance, and before Severance hath ſuch an Intereſt and Right in them as he may diſpoſe of, ſo that the Propriety of them doth not grow unto him only by the Severance, the Severance giving unto him only the Lay Intereſt in them, yet they ſhall not before Severance paſs without expreſs Words. *Hill.* 11 *Jac. B. R. Moyle* v. *Ewer*, 2 *Bulſt.* 183.

Where a Man ſells his Corn, and after becomes Proprietor of the Tithes.

To whom Tithes belong.

Although, generally ſpeaking, the Tithes within every Pariſh do belong to the Rector, Vicar or Impropriator of ſuch Pariſh, and ſhall be ſo intended, if the contrary be not ſhewed, *Stile's Reg.* 623, yet may a Portion of Tithes within one Pariſh belong to the Rector, *&c.* of another Pariſh. By a Portion of Tithes, is to be underſtood, where a Parſon, Rector or other, hath ſome Part of the Tithes of a Pariſh in groſs, ſeparated and divided from the Rectory of the Pariſh wherein they ariſe; it

A Portion of Tithes ſeparated from the Rectory.

is ſaid, that the Original of theſe Portions of Tithes is to be referred to Time, before the Council of *Lateran*, when it was lawful to every one to diſpoſe of his Tithes to any Church at his Pleaſure, and was not reſtrained to pay them to any one Pariſh in certain. See for theſe Matters *Paſch.* 7 *E.* 6. *Dyer* 84. *b. Selden Hiſtory of Tithes, cap.* 6, and *cap.* 10. *Mich.* 26 & 27 *Eliz. Bozoun*'s Caſe, 4 *Coke* 35. *Godolf.* 35. *Biſhop of Wincheſter*'s Caſe, 2 *Coke* 44. 14 *H.* 4. 17. *a.* 44 *Aſſ.* 25. 20 *H.* 6. 17. *Linw.* Tit. *De locat' & conduct' c Licet* v. *Portiones*, though it may as probably be ſuppoſed that many of theſe Portions of Tithes have had their Commencement by Grants of Parſon, Patron and Ordinary ſince the ſaid Council of *Lateran*; however that be, a Portion of Tithes is in the Notion of Law ſo diſtinguiſhed from Tithes belonging to a Rectory, that if a Portion of Tithes in ſuch a Pariſh be granted (eſpecially in caſe of the King's Grants) Tithes belonging to the Rectory will not paſs thereby. *Bozoun*'s Caſe, 4 *Coke* 35. *Clayton's Rep. Caſe* 25. So in pleading to demand Tithes generally, a Portion of Tithes ſhall not be recovered, which I collect from the Caſe. 14 *H.* 4. 17. *a.*

Diſcharge of Tithes.

As Perſons meerly Spiritual, becauſe capable of Tithes, may preſcribe *De non Decimando*; ſo the King, who is ſaid to be *Perſona Mixta*, being alſo capable of Tithes, may in like Manner preſcribe to be abſolutely diſcharged from the Payment thereof, *Comes Hertford* v. *Leech*, *Jones*, *p.* 387. 22 *Aſſ.* 75. 33 *Ed.* 3. *Fitz. Aid del Roy* 103. 10 *H.* 7. 18. *Mich.* 39 & 40 *Eliz. Pyſot* v. *Heron*, *Moor* 483, for the Rule is, that he that may have Tithes, may be diſcharged from the Payment of them. *Brownl.* and *Gouldſb.* 1. *p.* 31. Therefore it is, that Lands lying within a Foreſt, and in the Hands of the King, do not pay any Tithes, although they be within a Pariſh. *Mich.* 24 *Car. B. R. Banniſter* v. *Wright*, *Stile* 137. *Stile's Regiſt.* 624. *Mich.* 3 *Car. C. B. Comins*'s Caſe, *Hetley* 60. And this is a Privilege which extends to the Leſſee of the King, but not to his Feoffee; by *Henden*, *Davenport* and *Athow*, Serjeants. *Mich.* 3 *Car. C. B. Comins*'s Caſe, *Hetley* 60, and *per Curiam Mich.* 24 *Car. B. R. Banniſter* v. *Wright*, *Stile* 137. *Paſch.* 12 *Car. B. R. Comes Hertford* v. *Leech*, *Jones* 387. But if the Lands be diſforeſted, and be within any Pariſh, they ought then to pay Tithes; the ſame Caſe in *Stile* 137.

Perſona Mixta diſcharged.

But Tithes of Lands which are not within any Pariſh do belong to the King, and there are ſaid to be divers Foreſts which are not within any Pariſh, 22 *Aſſ.* 75. *Selden Hiſtory of Tithes* 365, &c. 2 *Inſt.* 646. 1 *Roll's Rep.* 454, 457. *Stile* 137, but 7 *Eliz.* 3. 5. *a.* by *Herle* is to the contrary, that ſuch Extraparochial Tithes belong to the Biſhop: But he is to be underſtood by the Canon, and not by the Common Law; and that Canon which gave the Extraparochial Tithes to the Biſhop was never allowed or received in this Realm. 2 *Inſt.* 467. But as to the Tithe of Cattle kept and depaſtured on Waſte or Common where the Pariſh is not known, 'tis given to the Parſon of the Pariſh where the Owner of ſuch Cattle doth inhabit; by *Stat.* 2 & 3 *E.* 6. *cap.* 13. And it is ſaid to be ruled by Advice of all the Juſtices, upon a Caſe depending in the Exchequer 29 *Eliz.* that although the Queen ſhall not pay Tithe for her own Poſſeſſions, becauſe ſhe is *Perſona Mixta*, and might well retain them, yet if ſhe grants them by Patent in Fee, her Patentee ſhall pay Tithes, and ſo ſhall her Copyholder of Inheritance, for that they cannot participate of the Queen's Prerogative therein, *Crouch* and *Fryer*'s Caſe, *Mich.* 42 *Eliz. B. R.* 3 *Cro.* 785, and 'tis alſo admitted, that Lands held of the King *in Capite* ſhall pay Tithes. *Paſch.* 37 *Eliz. C. B.*

If the Lands lie not in any Pariſh.

Cattle depaſtured on Waſte, &c.

Queen's Patentee or Copyholder.

Diſcharge of Tithes. Chancery.

C. B. Vaughan v. *Beal*, 3 *Cro.* 393. 14 *Car.* 2, in *Scaccar. Compoſt* v.——*Hardres*, *p.* 315. But a Suit for the Subſtraction of ſuch Tithes was to be in Chancery, and not in the Spiritual Court. *Fitz. Nat. Br.* 40. *Selden Hiſtory of Tithes* 354. In *Foſſet* and *Franklin*'s Caſe it was agreed, that the King's Farmer is diſcharged, though the Diſcharge be only *in Propriis manibus:* And Sir *William Jones* ſaid, it had been ſo adjudged; but the Court remembred it not, and held, the King's Fee-Farm is not diſcharged; no more is his Leſſee coming under the Privilege of the Monaſtery; but agreed that the King as a Spiritual Perſon may preſcribe in Diſcharge of himſelf and Farmers; but by a general Preſcription the Farmers are not diſcharged, much leſs on a Diſcharge by Privilege of Order, *&c.* and the Court conceived, the Preſcription muſt be found for the King, his Farmers and Tenants, and that Non-payment by the Under-Tenants of the King's Farmer is ſufficient Evidence to prove ſuch Preſcription. *Mich.* 25 *Car.* 2. *B. R. Foſſet* v. *Franklin*, 3 *Keb.* 217.

King's Farmer.

Where Lay-Perſons may not preſcribe *De non Decimando.*

Though Perſons merely Spiritual, or mix'd, as the King, may preſcribe *De non Decimando* by the Common Law, that is, without the Aid of an Act of Parliament, yet no Lay-Perſon can ſo preſcribe; therefore, when one being ſued in the Eccleſiaſtical Court for the Tithes of rough Hay growing in the Marſhes, and to have a Prohibition did ſurmiſe, that the Pariſhioners paid Tithe-Hay and Grain growing upon their other Lands, and certain cuſtomary Rates for the Tithe of Cow and Calf, and that becauſe they had not ſufficient Graſs within the Pariſh to ſuſtain their Beaſts in Winter, they uſed to gather this Hay called Fenny Fodder for the Suſtenance of their Beaſts, for the better Increaſe of their Huſbandry, and for this Cauſe had been always freed from the Payment of Tithes, *&c.* it was adjudged, that this Preſcription was not good, becauſe it was but a Preſcription *De non Decimando*; and it was held to be a Preſcription *De non Decimando*, for that the beſtowing the Hay upon their Cattle there was no good Cauſe or Conſideration of a Diſcharge, in that they might as well preſcribe to be free from the Payment of Tithe-Corn, becauſe they ſpend Corn in their Family, or give it for Provender to their Cattle. *Mich.* 2 *Jac. Webb* v. Sir *Henry Warner*, 2 *Croke* 47, *Paſch.* 44 *Eliz. Moor* 685.

How by Church-wardens.

So admitting that Church-wardens of a Pariſh may have Land by Preſcription for the Reparation of their Church, yet they cannot preſcribe generally in *Non Decimando*, for that they be not Spiritual Perſons, though their Office be a Kind of an Eccleſiaſtical Office. *Paſch.* 37 *Eliz. B. R. Longley* and *Meredine*'s Caſe, *Roll's* 1 *Abr.* 653. and *Roll's* 2 *Rep.* 107. And the Reaſon why a Preſcription *De non Decimando* is not good for a meer Lay-man is, becauſe that none by the Common Law had Capacity to take Tithes but only Spiritual Perſons, or a mix'd Perſon, as the King; and regularly, no meer Lay-man was capable of them, if not in ſpecial Caſes, for at the Common Law he could not (ſave in ſome particular Inſtances) ſue for the Subſtraction of them in the Spiritual Court, 7 *Ed.* 3. 5. 11 *Aſſ.* 9. 44 *Ed.* 3. 10 *H.* 7. 18. *Dyer* 84. but it is ſaid, 43 *Ed.* 3. 34. 44 *Ed.* 3. 39. that a Farmer of a Parſon might ſue for Tithes; but it appeareth that ſuch Farmer was a Spiritual Man, as Vicar, *&c.* And ſo, it is ſaid, are all the other Books to be intended, as 31 *H.* 6. 11. 35 *H.* 6. 39. 2 *Ed.* 4. 15. 6 *Ed.* 4. 3. 12 *H.* 7. 24. (in which, in Truth, there are but Opinions,) and therefore was Remedy given to Lay-Perſons by Stat. 32 *H.* 8. *c.* 7. But if they had been capable of Tithes before, the Common Law would have given them Remedy,

Remedy; from which 'tis concluded, that they cannot preſcribe in *Non Decimando*. *Paſch.* 30. *The Biſhop of Wincheſter*'s Caſe, 2 *Coke* 44. *Mich.* 6 *Jac. C. B. The Caſe of Modus Decimandi*, 13 *Coke* 13. *Hill.* 38 *Eliz. Wright*'s Caſe, *Moor* 425. *Bowls* v. *Atkins*, 2 *Keb.* 28, 60, 162, 175. *Selden's Hiſtory of Tithes* 288. And upon his Reaſon that a Lay-Man cannot preſcribe in *Non Decimando*; If a Lay-Man hath a Grant from Parſon, Patron and Ordinary to be diſcharged of Tithes, (which is good of itſelf, without any Recompence or Conſideration) yet when it runs out to Preſcription it dies and periſheth; and although Preſcription and Antiquity of Time fortify all other Titles, and ſuppoſe the beſt Beginning the Law can give them, in this Caſe they work clean contrary, and that in Favour of the Church, leſt by Degrees it ſhould be ſpoiled by the Laity; ſo that though the Law will allow of a Lay-Man's Diſcharge by Grant, when it appears, yet when it appears not, it is preſumed, that it never was, becauſe of the dangerous Conſequence of preſuming the contrary. *Mich.* 15 *Jac. Slade* v. *Drake*, *Hobart* 297. See the Caſe of *Bowls* and *Atkins* before cited. And the Law, ſaith *Coke*, had great Policy therein, for that Lay-Men (to the Trial of whom all Preſcriptions are to be put) will rather ſtrain their Conſciences for their private Benefit than yield to the Church the Duties that belong thereto; and the Decay of the Revenues of Men of Holy Church in the End will be the Overthrow of the Service of God, and of his Religion; for it is recorded in Hiſtory, that there were (amongſt others) Two grievous Perſecutions, one under *Diocleſian*, the other under *Julian* called the *Apoſtate*; one of them intending to have rooted out all the Profeſſors and Preachers of the Word of God, *Occidit omnes Preſbyteros*, but notwithſtanding that Religion flouriſhed, for *Sanguis Martyrum eſt Semen Eccleſiæ*, and yet the ſame was a fearful and grievous Perſecution; but the Perſecution under the other was more grievous and dangerous, becauſe (as the Hiſtory ſaith) *Ipſe occidit Preſbyterium*, for he robbed the Church, and ſpoiled Spiritual Perſons of their Revenues, and took all from them whereon they might live; thereupon in ſhort Time did follow great Ignorance of the true Religion and Service of God, and thereby great Decay of the Chriſtian Profeſſion; for none will apply themſelves, or their Sons, or any other whom he hath in Charge, to the Study of Divinity, when they ſhall have after long and painful Study nothing to live upon. *Paſch.* 38 *Eliz. The Biſhop of Wincheſter*'s Caſe, 2 *Co.* 44.

Diſcharge of Tithes.

Two grievous Perſecutions.

And the ſame Reaſons are of equal Force againſt allowing Preſcriptions *De modo Decimandi*, which oftentimes for a Tithe-Gooſe do leave but a Feather to the Parſon or Vicar; yet becauſe Lay-Men, though not capable of Tithes in Pernancy, were capable of a Diſcharge of Tithes at the Common Law in their own Hands, with the Conſent of the Incumbent, Patron and Ordinary, *viz.* by Grant or Compoſition, 8 *E.* 4. 14. & *Regiſt.* 38, the Law hath allowed Preſcriptions *De modo Decimandi*. *Paſch.* 38 *Eliz. The Biſhop of Wincheſter*'s Caſe, 2 *Co.* 44. *Mich.* 6 *Jac. C. B. The Caſe of Modus Decimandi*, 13 *Co.* 13.

Preſcriptions to Lay-Men, wherefore allowed.

A *Modus Decimandi* is when Lands, Tenements or Hereditaments, or an annual certain Sum, or other Profit, Time out of Mind, have been given to the Parſon and his Succeſſors in full Satisfaction and Diſcharge of all the Tithes in Kind in ſuch a Place. So that a Lay-Man may preſcribe, that he and all thoſe whoſe Eſtate he hath in the Manor of *B.* Time whereof the Memory, &c. have paid to the Parſon for the Time being a certain Penſion yearly, for Maintenance of Divine Service there, in Satisfaction of all Tithes renewing or ariſing within the ſaid Manor;

Modus Decimandi what Preſcription by a Lay-Man for it.

Diſcharge of Tithes.

and further may preſcribe, that he and all thoſe whoſe Eſtate he hath in the ſaid Manor, Time out of Mind, *&c.* have uſed in reſpect of the ſaid Penſion ſo paid to the Parſon, to have the Tenth Part of all the Corn within the ſaid Manor, or any other Part thereof, or of all Lands holden of the ſaid Manor, and ſuch Preſcription is good; for it ſhall be intended, that at the Beginning the Lord had all in his Hands, and afterwards gave the Tenancies to hold of him, retaining the Tithes, ſo that now he takes but the Tithe, which he had before by Retainer. *Trin.* 42 *Eliz. B. R. Pigot* v. *Simpſon*, 3 *Cro.* 763. And of this latter Preſcription for the Lord to have the Tenth Shock of his Tenants, there is this Reaſon alſo given; becauſe he hath it as Parcel of, or as a Thing appurtenant to his Manor, and not as Tithes; for though a Lay-Man cannot have Tithes by Preſcription, yet he may have the Tenth Shock as a Temporal Profit apprender; and it may well be Parcel of a Manor, but otherwiſe of Tithes, for they cannot be Parcel of, nor appendant to a Manor, as was adjudged in *Winſcomb*'s Caſe, *Hill.* 35 *Eliz.* 3 *Cro.* 293. 10 *E.* 3. 5, and therefore a Man cannot preſcribe generally in himſelf and all thoſe whoſe Eſtate he hath in the Manor to have any Tithes appertaining to the ſame,

Preſcription for *Decimam Garbam.*

without ſome ſpecial Matter ſhewed, nor may he preſcribe to have *Decimas Garbarum*, but *Decimam Garbam. Hill.* 40 *Eliz. B. R. Pigot* v. *Hern*, 3 *Cro.* 599; vouched alſo in *The Biſhop of Wincheſter*'s Caſe, 2 *Co.* 45, ſame Caſe, *Moor* 483, and 3 *Cro.* 599. See *Sherwood* and *Winchcomb*'s Caſe, *Hill.* 37 *Eliz. B. R.* 3 *Cro.* 293. But where the Preſcription is to have *Decimam Garbam*, which is to be underſtood a Lay-Fee to be taken after the Parſon's Tithes, and not the Tithes, there the Land notwithſtanding ſuch Preſcription ſhall be liable to pay Tithes to the Parſon, or other Proprietor of Tithes of that Pariſh wherein ſuch Lands lie. See 44 *Aſſ.* 25. But a Lay-Man at this Day may have a Portion of Tithes within a Pariſh by Grant from the Crown, laying a Preſcription, *&c.* in ſome of the diſſolved Religious Houſes, who were ſeiſed of ſuch Portion of Tithes, and which by the Diſſolution of Monaſteries, *&c.* came to the Crown, and was granted by the King to ſuch Lay-Man who claims by or under the Grant. *Paſch.* 7 *E.* 6. *Dyer* 83. *Mich.* 26 *&* 27 *Eliz. Bozoun*'s Caſe, 4 *Co.* 35. 1 *Roll's Abr.* 657.

Preſcription for a Portion of Tithes.

Where the Parſon holds Parcel of a Manor upon a Gift to be quit of Tithes.

If a Man grants Parcel of his Manor to a Parſon in Fee, and the Parſon with the Aſſent of the Ordinary (without the Patron) in Conſideration of that Grant, grants to him, that he ſhall be quit of Tithes of the Reſidue of the Manor, and afterwards he or his Aſſignee be ſued in the Spiritual Court for Tithes of this Manor, they ſhall have a Prohibition, though the Grant was made before Time of Memory, if he hath always ſince continued to be quit of Tithes. See 8 *Ed.* 4. 14. *F. N. B.* 41. *g.* 3 *E.* 3. 17. 16 *E.* 3. Tit. *Annuity* 24. So if the Lord of a Manor hath always holden his Manor diſcharged of Tithes, in Conſideration that the Parſon's Predeceſſors before Time of Memory, or in antient Times, had divers Lands in the ſame Pariſh of the Gift of the Anceſtors of the ſaid Lord, of which the Parſon is ſeiſed at this Day in Fee. If the Parſon ſueth for Tithes of the Manor, the Lord of the Manor may ſhew this ſpecial Matter, how that the Parſon and his Succeſſors Time out of Mind have holden thoſe Lands, *&c.* of the Gift of one and his Anceſtors, or whoſe Eſtate he hath in the ſaid Manor, in full Satisfaction of the ſaid Tithes; and the Proof, that the Lord of the Manor gave the Lands that Tithes ſhould never be paid, at this Day is good Evidence to prove the Surmiſe of the Prohibition. *Mich.* 6 *Jac. C. B.* in *The Caſe of Modus Decimandi*, 13 *Coke* 15. Yet when a Prohibition was granted upon this

Suggeſtion, that one being a Lay-Man was ſeiſed of the Manor of *D.* and that he and all thoſe whoſe Eſtate he had, Time whereof the Memory of Man is not to the contrary, have uſed to have the Tithes within the ſaid Manor, and that therefore he and all thoſe whoſe Eſtate he had, have uſed to maintain a Chaplain in the Church of *A.* a Conſultation was prayed: *Firſt*, Becauſe it was not alledged that the Church of *A.* was within the ſame Pariſh where the Manor was, and ſo no Conſideration to the Parſon that was the Plaintiff. *Secondly*, Becauſe it doth not extend to the Maintenance of the Chaplain ſo long as he claims the Tithes, whereof the Memory, *&c.* *Thirdly*, Becauſe the Defendant had not proved the Maintenance of the Chaplain within the Six Months, but only the Reſidue of his Suggeſtion; this being the principal Matter to make his Preſcription good; and a Conſultation was awarded upon this laſt Exception, *per Curiam*, and *Coke* ſaid, it ſhall be granted for other Exceptions alſo. *Paſch.* 12 *Jac. B. R. Boothers* v. *Rogers*, 1 *Roll's Rep. p.* 2.

Diſcharge of Tithes.

A Preſcription to have the Tithes upon maintaining a Chaplain.

And as a Manor may be diſcharged of Tithes againſt the Parſon, upon the Account of a Penſion paid by the Lord, or Land given; ſo may a whole Pariſh, or Hamlet, be diſcharged of this or that Sort of Tithe, as of Wood, Hay, upon a Cuſtom, that all the Parſons of the Church of *D.* Time whereof, *&c.* have had ſuch Lands Parcel of the Manor of *H.* in Recompence of this or that Sort of Tithe within the ſaid Pariſh, or Hamlet, although all the Lands within the ſaid Pariſh, *&c.* at this Day do not belong to the ſaid Manor. *Mich.* 39 *&* 40 *Eliz. B. R. Somerton* v. Dr. *Cotton*, 3 *Cro.* 587. *Mich.* 16 *Jac. B. R. Moor* v. *Bullock*, 2 *Cro.* 501. *Hill.* 42 *Eliz. B. R. Auſten* v. *Piggot*, 3 *Cro.* 736. And it is ſaid to be ſufficient for the Pariſhioners to alledge, that the Parſons have had ſuch Lands in Recompence of ſuch Tithes not paid within Memory, and that it is not neceſſary that they ſhew how, or by what Title the Parſons had the Land; but if they had it in another Manner than in Satisfaction of the Tithes, the Parſon himſelf ought to ſhew that. *Hill.* 42 *Eliz. Auſten* v. *Piggot*, *Moor* 911. But where there is a Preſcription to be diſcharged of all Tithes of Hay-ground, *viz.* of all the Meadow in the Pariſh, in Conſideration that the Parſon had certain Acres of Meadow, if any arable Land be converted into Meadow, the Preſcription extends not to diſcharge that, as was ſaid to be adjudged 14 *Jac.* in *Conier*'s Caſe, vouched in *Pool* and *Reynol*'s Caſe, *Hutton* 58.

A whole Pariſh diſcharged upon a Cuſtom.

As a Pariſh, ſo any private Perſon may pay a *Modus* for his Lands, or ſome Part thereof, *viz.* a certain Rent or Sum of Money, or other Conſideration, and by that Means be diſcharged from the Payment of Tithes ariſing on ſuch Lands. But this Rule ever holds, that as a Lay-Man cannot preſcribe in *Non Decimando*, ſo to maintain his Preſcription *De modo Decimandi*, he muſt preſcribe to the Paying, or doing ſomething, Time whereof, *&c.* to the Benefit of the Parſon to whom the Tithes in kind were otherwiſe due; therefore when one preſcribed, that he ought to be diſcharged of Tithes, in Conſideration that he hath uſed Time out of Memory, *&c.* to imploy all the Profits of the Land in the Reparation of the Body of the Church, and to find all Neceſſaries for the Church; it was adjudged, that his *Modus* was not good, becauſe that the Parſon thereby hath no Recompence for the Tithe; but otherwiſe it would have been, if he had uſed with the Profits to repair the Parſon's Chancel, for that the Parſon being charged with the Repair thereof, hath Benefit thereby. *Paſch.* 37 *Eliz. B. R. Longley* v. *Meredine*, 1 *Roll's Abr.* 649, 650. So when one preſcribed to reap Corn, and to make it into Sheafs, and

Modus by a private Perſon for his Lands.

Diſcharge of Tithes.

and to ſet forth the Tenth Sheaf at his Charges, and to cut his Hay, and to ſever it from the Nine Parts at his Charges, in full Satisfaction of the Tithes of the Corn, Hay and Wool, it was adjudged inſufficient for the Wool, for the other Two were due of common Right, and ſo the Parſon had nothing for the Wool, and by conſequence the Preſcription is a *De non Decimando* as to that, therefore bad. *Trin.* 7 *Jac.* 13 *Co.* 45. And upon the ſame Reaſon the Court held, that a Preſcription to pay a Rate to the Rector, will not be to the Diſcharging of the Payment of Tithes to the Vicar, *Mich.* 14 *Jac.* *Wintel* v. *Child*, 3 *Bulſt.* 220, and that the Payment of five Shillings yearly to the Pariſh Clerk, is no Conſideration of a Preſcription to be diſcharged of the Tithe due to the Parſon. *Mich.* 29 & 30 *Eliz.* *Savil* v. *Wood*, 3 *Cro.* 11. But where the Plaintiff in a Prohibition did ſuggeſt, that the Prior of *N.* was ſeiſed of a Manor, and of the Tithes *ſimul & ſemel*, as of a Portion of Tithes, and in the 25th of *H.* 1, granted the ſaid Manor and Tithes to one *F.* and his Heirs, rendring Rent, and that the Heirs of the ſaid *F.* afterwards granted Parcel of this Manor with the Tithes to *S.* rendring five Shillings Rent, and brings down a Title from the ſaid *S.* to the Plaintiff in the Prohibition, and concludes that the ſaid *F.* and all thoſe whoſe Eſtate, *&c.* did pay the ſaid Rent to the ſaid Prior, and ſince the Diſſolution, to the King and his Aſſigns, in Diſcharge of all Tithes. It was objected, that the Plaintiff here would infer a *Modus* by the Payment of the Rent to the Prior, *&c.* which will not do, for unleſs the *Modus* doth go to the Perſon who by Law ought to have the Tithes, or for his Benefit, 'tis not good: But it was anſwered, and agreed to by the Court, that in this Caſe it doth appear, that there was a *Modus* in the Prior, which being received till it came to the Crown, 'tis good, though now paid to others; for if a *Modus* be payable to him who hath the Right of the Tithes, though it be not to the Parſon of the Pariſh, 'tis well enough, eſpecially as here, being alledged to be a Portion of Tithes belonging to the Prior, ſo that it cannot be ſaid that the Parſon hath not *Quid pro Quo*, for he had nothing at firſt, and the Compoſition being made with the Prior, the Plaintiff is only to ſhew Payment to him, and to thoſe who have his Right. *Trin.* 34 *Car.* 2. *B. R.* *James* v. *Trollop*, 2 *Mod. Rep.* 320. But when to have a Prohibition it was ſuggeſted, that the Dean and Chapter of *Carliſle* were ſeiſed of a Manor, whereof the Place, out of which Tithes are demanded, is Parcel, and that the Defendant againſt whom Tithes are demanded, is Copyholder in Fee of thoſe Lands; and that all the Tenants of that Manor had been diſcharged of the Fourth Part of their Tithes of all their Lands in what Place ſoever they did lie, paying ſo much to the Lords of the ſaid Manor for Quit-Rent; a Prohibition was denied; for *per Curiam*, it cannot be, that Lands held of other Lords can be diſcharged of Tithes by the Payment of this Rent; and it doth not appear that the Payment to the Lord was in any other Manner, but as his Rent. *Trin.* 17 *Car.* 2. *B. R.* *Wilkinſon* v. *Richardſon*, 1 *Sid.* 258, the ſame Caſe, 1 *Keb.* 906. And it is ſaid, if a Man preſcribe to pay one Penny or thereabouts for the Tithes of every Acre of arable Land, this is no good Preſcription by reaſon of the Uncertainty. *Mich.* 7 *Jac.* *B. R.* *Allen*'s Caſe, *per Curiam.* 2 *Roll's Abr.* 265. So a *Modus* to pay four Shillings for every Day's Plowing of Wheat, and two Shillings for every Day's Plowing of Barley, was held not to be good for the Incertainty, it not being averred how much every Day's Plowing did contain. 1 *Keb.* 612. In a Bill for Tithes in Kind, the Defendant inſiſted

ſiſted on ſeveral *Modus's*, one of which was, that the Inhabitants of ſuch a Tenement with the Lands uſually injoyed therewith had been accuſtomed to pay ſuch a *Modus* for Tithe-Corn. Diſcharge of Tithes.

Cur': This is quite uncertain, the Houſe may fall down, or be uninhabited, and then no *Modus* will be payable; alſo nothing can be more uncertain than Lands uſually injoyed with the Tenement, ſince the Lands let with a Farm-Houſe may probably be often ſhifted.

2*dly*, Tithes being demanded of Turkies, it was objected, that in *Moor* 599. (*Hugton* v. *Prince*) it was ſaid, that Turkies were Things *Feræ naturæ*, and not Titheable, any more than Partridges, and that Turkies were not brought hither from beyond Sea before Queen *Elizabeth*'s Time.

Cur': I cannot ſee but that Turkies are Birds as tame as Hens or other Poultry, and therefore muſt pay Tithes; it is true, if Tithes be once paid of the Eggs, there can be no Demand made a ſecond Time in reſpect of the Chicken hatched afterwards.

3*dly*, There was another Demand made by the Bill of the Tithe of a Corn-Mill, and it was inſiſted, that every 10th Toll-Diſh was due. 1 *Show.* 281. *Gumble* v. *Falkinham*, *Carth.* 215.

But it was replied, That this Matter was determined in the Caſe of *Chamberlain* v. *Kneate* in the Houſe of Lords, upon an Appeal from a Decree of the Court of Exchequer in 1706. *Abr. Caſes in Equity* 366. where the Bill was brought for the Tithes of a Malt-Mill in *Tiverton* in *Devonſhire*, and where the Lords determined, with the Aſſiſtance of eight Judges (whereof *Holt* C. J. was one), that Mills were Tithable, but that the ſame was a perſonal Tithe, and ſo ought to be paid out of the clear Gain after all Manner of Charges and Expences deducted; upon which Authority the Maſter of the Rolls decreed the Mill in Queſtion to pay Tithes, but that they ſhould be paid only as a perſonal Tithe.

Note; In this Caſe it was ſaid and admitted, that in a Bill brought by a Parſon for Tithes, tho' the Right thereto be ever ſo plain, yet in the Exchequer the Decree is not that the Defendant ſhall pay Tithes for the future, but that he ſhall account for and pay what Tithe is due to the Time of bringing the Bill, but in the Court of Chancery it is to the Time of the * Decree. Likewiſe in the Exchequer, where an Infant is Party and his Intereſt is concerned, the Court does not allow of an Order to examine a Witneſs *viva voce* to prove a Deed or Exhibit, but the Witneſs muſt be examined in the Office upon Interrogatories. 2 *Wms.* 462, 463, 464. *Carleton* v. *Brightwell.*

* *Quære*, If this be the eſtabliſhed Practice of the Court of Chancery, or done only of late in ſome few Inſtances.

Upon Suggeſtion of a *Modus* to pay 2 *d.* in the Pound out of the Rents reſerved; by *Holt* C. J. 1. This cannot be a *Modus*, it amounting to as much as the Tithes in Kind; but it may be a Compoſition. 2. A Cuſtom cannot be applied to Rents reſerved from Time to Time upon frequent new Reſervations. Rule for Prohibition diſcharged. *Byne* v. *Dodderidge*, 1 *Ld. Raym.* 696, 697.

A *Modus* to pay two Shillings in the Pound of the true improved yearly Value of the Land, is void. By the Courts of King's Bench, Common Pleas and Exchequer. *Startup* v. *Dodderidge*, 2 *Ld. Raym.* 1158, &c.

So a *Modus*, that all Perſons having Land within ſuch a Town, but not inhabiting within the ſame Town, ſhall pay 4 *d.* an Acre only in No greater Privilege is to Foreigners than to Inhabitants.

Diſcharge of Tithes.

Satisfaction of all Tithes, was held an unreaſonable Cuſtom, to give greater Privileges to Foreigners than to the Inhabitants which are at greater Charge, in reſpect of their Reſiancy, to the Ornaments of the Church, *&c. Mich.* 15 *Car.* 2. *B. R. Bawdry* v. *Buſhell*, 1 *Lev.* 116. But note it was held in Chancery, that a *Modus* that every Occupier of Land within the Pariſh of *A.* living out of the Pariſh, ſhall pay a Penny an Acre for all Paſture Land within the Pariſh, but if he lives within the Pariſh, to pay Tithes in Kind, a good *Modus.*

It was alſo held every *Modus* muſt be certain, or elſe it is void, and no Length of Time will make it good. Thus a *Modus* to pay a Penny *per Ann.* or thereabouts for every Acre, void.

Modus to pay 12 *d. per* Acre for every Acre of Up-Land, and 6 *d.* for every Acre of Marſh-Land, good; and

It is not neceſſary to ſhew a *Modus* had a reaſonable Commencement, for it might at firſt be ſo, and not now capable of being ſhewn at this great Diſtance of Time; and

It is ſufficient that the Parſon, Patron and Ordinary might at firſt make this Agreement, and bind the ſucceeding Parſons, and tho' the Inſtrument of the Agreement be loſt, yet the *Modus* will be good. 2 *Wms.* 565, &c. *Chapman & al'* v. *Monſon, & econtra.*

How a Cuſtom, *&c.* upon a *Modus* may be loſt.

After a Cuſtom or Preſcription to be diſcharged of Tithes upon a *Modus* is created by Continuance of Time, it may afterwards be loſt, and the Parſon ſhall have his Tithes in Kind, of which one Inſtance may be given, by not making Payment of the Conſideration of the Diſcharge, or by paying the Tithes themſelves; for Cuſtom and Preſcription may be loſt as well as gotten by Time; but an Interruption of the Uſage for ſuch Time only, as ſhall not deſtroy the Poſſibility of making Proof that ſuch Cuſtom or Preſcription was, ſhall not be to the Deſtruction of it; by *Coke* in *Price* and *Maſcal*'s Caſe, *Trin.* 12 *Jac. B. R. Bulſtrode* 240, for otherwiſe a Leſſee might pay Tithes in Kind where a *Modus* is, and ſo bar the Leſſor of the Benefit of the *Modus* in After-time, which ought not to be. *Maſcal* and *Price*'s Caſe, *Paſch.* 13 *Jac. B. R.* 1 *Roll's Rep.* 176. Alſo a *Modus* may be loſt by the Alteration or Deſtruction of the Thing for which the *Modus* was paid; as if there be a *Modus* to pay a certain Rate for the Tithe of a

For a Mill.

Mill, this *Modus* may be loſt; as if two Fulling Mills be under one Roof, for which a Rate Tithe hath been paid, Time whereof, *&c.* and after, theſe Mills are altered and made into one Corn-Mill, the *Modus* is gone, and Tithe for the Corn-Mill muſt be paid in Kind; or if there be but one Pair of Stones in a Mill, and a *Modus* is to pay a certain Rate for them, and then another Pair of Stones is put into the ſame Mill, 'tis ſaid that Tithes muſt be paid in Kind. *Brownlow* and *Goulds-borough, p.* 32. So if one be diſcharged from the Payment of Tithes for two antient Corn-Mills driven by Water, for a *Modus* of ſix Shillings and eight Pence annually paid to the Parſon, and the Water-courſe, that was wont to run to the Mills, is diverted by the Owner of the Mills, and runs into another Place a little Diſtance from theſe Mills, and then the Owner doth pull down one of theſe Mills and re-edifies it upon the Stream in the new Courſe, he ſhall pay Tithes thereof as for a new Mill, and the ſaid antient *Modus* ſhall not diſcharge it; but if by the Continuance of Time by the Act of God the Water-courſe that was wont to run to the Mill is altered, and the Mills therefore be pulled down, and built where ſuch new Stream is, the *Modus* ſhall continue,

continue, and he ſhall be diſcharged of Tithes for theſe new Mills, paying the ſaid ſix Shillings and eight Pence. *Per Curiam, Mich.* 11 *Car. B. R. Johnſon* v. *Dandridge*, 1 *Roll's Abr.* 652. So if a Man preſcribe in *Modo Decimandi* for Hay and Graſs in forty Acres of Land, and the Tenant doth convert it into Hop-garden, or into Tillage, the *Modus* is gone; for when the *Modus* is ſpecial, as for Hay and Graſs, *&c.* only, there it will be deſtroyed by the Converſion of the Land, *&c.* to other Uſes. *Hill.* 6 *Jac. B. R. Sharp* and *Coult's* Caſe, *per Cur.* 1 *Roll's Abr.* 651. Diſcharge of Tithes.

In like manner, if a *Modus* hath been paid for a Park, Time whereof, *&c.* and afterwards the Park is diſparked, and the Lands converted to Tillage, *&c.* if the *Modus* were general for a Park, it is gone, if the Park be diſparked; but otherwiſe it is, if the *Modus* be for ſo many Acres of Land contained in the Park. *Spardam's* Caſe, 1 *Roll's Abr.* 651, and *Shibden's* Caſe cited, *Noy* 148. So if a Preſcription be to pay a Buck or Doe out of the ſame Park, when 'tis diſparked, the Preſcription is gone, in *Pool* and *Reynold's* Caſe, *Mich.* 10 *Jac. Hutton* 57. And 'tis ſaid, the Court doubted whether one that had a Park, and was uſed to pay the Shoulder of a Deer for all Manner of Tithes, and the Park is diſparked, ſhall pay Tithes in Kind or not? *Paſch.* 10 *Jac. Brownl.* and *Goulſb.* 1. *p.* 31. And *Popham* ſaid, that where the Preſcription is to pay a Shoulder of every Buck or a Doe at *Chriſtmas*, if the Park be diſparked, the Tithes in Kind ſhall be paid. *Beddingfield* and *Feak's* Caſe, *Paſch.* 30 *Eliz. B. R.* 3 *Cro.* 467, ſame Caſe, *Moor* 909, and in *The Dean and Chapter of Norwich's* Caſe, *Paſch.* 38 *Eliz. B. R. Owen* 74. So if the Preſcription be to pay ten Shillings for the Deer and Herbage of the Park, and not for all the Park, and the Park is diſparked and ſown with Corn, Tithes in Kind ſhall be paid; or if the Preſcription be to pay ten Shillings and a Shoulder of every Deer, when the Park is diſparked Tithes ſhall be paid in Kind, and not the ten Shillings, as hath been adjudged, *Mich.* 21 & 22 *Eliz.* in *C. B. Rot.* 404, as is ſaid in *Beddingfield* and *Feak's* Caſe, *Moor* 909. And when a Preſcription was to pay two Shillings yearly and the Shoulder of every third Deer killed within the Park, *Winch* and *Warburton* held that by the diſparking of the Park, the Preſcription as to the Shoulders was determined, and by conſequence all the *Modus Decimandi*, and then that the Parſon ſhall have Tithes in Kind, and that if the Park be revived, the Preſcription and *Modus Decimandi* ſhall alſo be revived; but *Nichols* and *Hobart* held, that in ſuch Caſe the Preſcription ſhould indure, ſaying, that the two Shillings is clearly a *Modus Decimandi*, which is certain, and the Diſparking doth not hinder the Payment of it, and the Shoulders are but caſual, and upon the Diſparking, the Parſon ſhall loſe them, and recover in the *Court Chriſtian* a Recompence for them in Money; as if a Man will not ſet forth his Tithes, the Tithes themſelves ſhall not be recovered, but a Recompence for them; and in this Caſe, though he was to have the Shoulders according to the Number of the Deer killed, which makes the Value uncertain, yet the Spiritual Court ſhall ſet the Value according to what was uſually paid whilſt it was a Park. *Hill.* 12 *Jac. B. R. Cowper* v. *Andrews*, 1 *Roll's Rep.* 120, and *Hobart* 39. *Godbolt* 237. But according to the former Caſes, the Preſcription is gone, and Tithes are to be paid in Kind; however it is clear, that if a *Modus* hath been to pay a certain Rate in Money for all the Tithes of ſuch a Park, ſuch *Modus* ſhall hold, notwithſtanding the Upon a Park being diſparked, *&c.*

Diſcharge of Tithes.

the Park ſhall be diſparked. *Beddingfield* and *Feak*'s Caſe, 3 *Cro.* 467, ſame Caſe, *Moor* 909, *The Dean and Chapter of Norwich*'s Caſe, *Owen* 74, and *Price* and *Maſcal*'s Caſe, 2 *Bulſtrode* 240, ſame Caſe, 1 *Roll's Rep.* 176. Or if the *Modus* be to pay a Buck and a Doe for all Tithes of ſuch a Park, this *Modus* ſhall continue, though the Park be diſparked; for though they be *Feræ Naturæ*, and ſo not tithable in themſelves, yet they may be given for Tithes by Compoſition, and may be the Conſideration of a *Modus*. *Sharp* v. *Sharp*, *Noy* 148. *Pool* v. *Reynolds*, *Hutton* 57, and by *Carus* and *Catlin*, *Owen* 34. And ſo, though Partridges and Pheaſants in a Garden be not tithable, yet they may be by Compoſition paid in lieu of Tithes, and the Parſon ſhall not take them, but they ſhall be brought dead to him; and though, in the Caſe of the Park, the Park be diſparked, yet if the Payment of the Buck, *&c.* be not fixed to be had out of that particular Park, the Owner may give a Buck, *&c.* out of another Park, and the *Modus* will continue: But where the *Modus* of the Buck, *&c.* is to be had out of that Park only, then according to the Caſes before mentioned, the Park being diſparked, the *Modus* is gone, and the Tithes in Kind will revive; therefore in a Suit for Tithes of Corn growing in a Park diſparked, the Defendant pleaded a Cuſtom to pay a Buck in Satisfaction of all Tithes; and the Witneſſes proved a Buck paid yearly, but could not tell whether it was taken out of this Park or not. And the Jury was charged to inquire particularly of this; for if it were fixed to a Deer out of this Park only, then by diſparking the Park, the Cuſtom is gone: But if it had been often and moſt what paid out of this Park, yet this will not alter the Cuſtom, but it may be paid out of any other Park, if the Cuſtom were to pay a Buck generally. *Clayton's Rep.*

In a Bill to eſtabliſh a *Modus*, it was ſet forth to be payable on or about the 25th Day of *April*, *&c.* this is a void *Modus*, for it muſt be payable on a certain Day. But the Plaintiff was allowed to amend his Bill on Payment of Coſts. This was after Anſwer, and I ſuppoſe at Hearing. 1 *Mod. Caſes in Law and Equity* 375. *Blacket* v. *Fenny.*

CHAP.

CHAP. XLVIII.

Monaſteries diſcharged.

Lands how diſcharged of Tithes by ſeveral Acts of Parliament. What Abbies were diſcharged of Tithes. A Catalogue of Abbies above 200l. per Annum *Value diſſolved by Statute* 31 H. 8. *Unity of Poſſeſſion, and Barren Land.*

THE third and laſt Means by which Lands are diſcharged from the Payment of Tithes, is by ſeveral Acts of Parliament; and by this Means all Abbey Lands that are free from the Payment of Tithes receive their Diſcharge. 'Tis true, in antient Times divers Religious Corporations, eſpecially, were diſcharged of the Payment of Tithes by Special Privilege; and this Privilege was acquired by two Means. *Firſt*, By the Pope's Bull, for the Pope was wont to exempt what Abbies he pleaſed from the Payment of Tithes for their own Lands, as the *Præmonſtrantes*, *&c.* *Secondly*, By general Councils, for ſo ſome Orders were alſo diſcharged, as the Ciſtertians, Hoſpitallers and Templers; but this Privilege, as to ſuch Orders, was limited to the Time that the Lands remained in their own Hands, and were manured by them, *Slade* and *Drake*'s Caſe, *Mich.* 15 *Jac. Hobart* 297, and was but a perſonal Privilege, by whom, or to whomſoever it was granted. *Mich.* 11 *Car. B. R. Sydown* v. *Holm*, *Jones* 368, ſo that if all the Members of a Corporation had died, the Lands muſt have paid Tithes that were before free in their own Hands, *Mich.* 11 *Jac. C. B. The Dean and Chapter of Windſor* v. *Webb*, *Godbolt*; therefore the Abbies being now diſſolved, this Privilege of Exemption had fallen with them, unleſs upheld, and continued by thoſe Acts of Parliament that did diſſolve them, ſo that the Diſcharge at this Day, by which Abbey Lands are free from the Payment of Tithes, is not by other Law, or Authority, but by Act of Parliament.

Abbey Lands diſcharged by Act of Parliament.

The Acts of Parliament by which Monaſteries, Chauntries, Colleges, or free Chapels, *&c.* were diſſolved, and their Lands given to the Crown, were, *Stat.* 27 *H.* 8. *c.* 28. 31 *H.* 8. *c.* 13. 32 *H.* 8. *c.* 24. 37 *H.* 8. *c.* 74, and 1 *Ed.* 6. *c.* 14; therefore we are to ſee, what Lands given by the ſaid Statutes, or any of them, are diſcharged from the Payment of Tithes; as for *Stat.* 27 *H.* 8, the Lands thereby given to the Crown, were ſuch Monaſteries, Priories, or other Religious Houſes, as were not above the clear yearly Value of two Hundred Pounds, and theſe are not thereby made free from the Payment of Tithes; although they were by the ſame Statute given in as large and ample Manner as the Abbots, *&c.* had the ſame in the Right of their Houſes; alſo all ſuch Lands, *&c.* were by this Statute given, or confirmed to the Crown, which did belong to any Monaſtery, Abbey, or Priory, as at any Time within one Year next before the making of the ſaid Act had been given or granted to the King by the Governor thereof, under their Covent Seal, or that otherwiſe had then been ſuppreſſed or diſſolved; and this Statute, nor any

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Monaſteries diſcharged.

other, not containing any Clauſe, or Words of Diſcharge, the Lands thereby given have been, ſince the ſaid Statute, ſubject to the Payment of Tithes, altho' they might be free from that Duty, whilſt in the Hands of the Religious Poſſeſſors, or their Right to them did continue; therefore in this Caſe, if a Prior, *&c.* had been diſcharged by Privilege only, that is, by Bull, or Canon, by *Brampſton* Chief Juſtice, *Jones* and *Berkley* againſt *Croke*, the Statute of 27 *H.* 8. doth not preſerve this Privilege, becauſe that there be not any Words that the Lands given thereby ſhall be diſcharged, as the Abbots, *&c.* held them, and general Words will not preſerve Privileges which were determined, unleſs ſpecially revived; and they ſaid, that Statute 31 *H.* 8. doth not extend to Free Land given by the former Statutes; for all the Scope of the ſaid Statute is only to extend to Abbies which came to the King after the Fourth of *February*, 27 *H.* 8, and all Abbies which came to the King by the Statute of 27 *H.* 8, came unto him upon or before the Fourth of *February*, 27 *H.* 8, and to thoſe the Statute of 31 *H.* 8. doth not intend to extend. For in every Branch are mentioned only the Abbies, *&c.* which came to the King after 27 *H.* 8. And although this Clauſe to be diſcharged of Tithes, in the Body of the ſaid Clauſe, is, any Monaſteries, *&c.* and Abbots be not mentioned before in that Clauſe, therefore it ought to be expounded, and coupled with the Clauſes before, which mention and intend only what came to the King after the Fourth of *February*, 27 *H.* 8, and doth not extend to Abbies which came to the King the Fourth of *February*, 27 *H.* 8; and *Jones* ſaid, although it is no Statute until the End of the Seſſions, where the King's Aſſent is given, yet when there hath been a Seſſion, it ſhall have ſuch Relation to the firſt Day of the Seſſion, that they veſt actually in the King the ſaid fourth Day of *February*, 27 *H.* 8, that the King ſhall have the Rents incurred after the firſt Day, and before the laſt Day of the Seſſion; and if they be paid in the Interim to the Abbot, *&c.* they ſhall be paid again to the King. And *Jones* and *Brampſton* relied upon a Judgment 18 *Jac.* in the Common Bench, betwixt *Gerrard* and *Wright*, where it was held upon ſolemn Argument, by *Hobart*, *Winch* and *Hutton* Juſtices, that the Statute of 31 *H.* 8. doth not extend to Abbies which came to the King by the Statute of 27 *H.* 8, and that in this Court in the Caſe of *Whitton* and *Weſton*, for the Poſſeſſions of the Abbey of St. *John*'s of *Jeruſalem* 4 *Caroli*, where the Queſtion being, whether the ſaid Abbey came to the King by the ſpecial Act of 32 *H.* 8, all the four Juſtices agreed, that the Caſe of *Gerrard* and *Wright* was good Law, That the Abbies which came to the King by the 27 *H.* 8, were not within the Privilege of 31 *H.* 8, nor to have the Benefit of the ſaid Statute of 31 *H.* 8. And *Berkley* Juſtice inſiſted much, that this Privilege to be diſcharged of Tithes, being a meer Spiritual Privilege, was determined by the Diſſolution of the Abbies, and tied only to their Bodies and Perſons; nor can be revived without eſpecial Words, which are not in the Statutes of 27 *H.* 8, or 31 *H.* 8, and that although the Statute of 31 *H.* 8. extends to the ſaid Abbies ſuppreſſed by the Statute of 27 *H.* 8, yet there is a Saving in the ſaid Statute of 31 *H.* 8, of all Rights and Intereſt, except to the Donors, Abbots, *&c.* ſo that the Perſons which have Right to Tithes, are preſerved by this Saving; but this Point all the Juſtices in their Arguments denied, and held, that the Saving any Right, *&c.* doth not extend to Perſons to ſave their Right againſt ſuch Privileges, being againſt the Words and Intent of the Statute; wherefore, for the Reaſons before, but principally, for that the Abbey diſſolved appeared to be ſuppreſſed by

the Statute of 27 *H.* 8. by the Opinion of the ſaid Three Juſtices, it was adjudged for the Defendant, and that Conſultation ſhould be awarded. *Mich.* 11 *Car. B. R. Sydown* v. *Holme*, 1 *Croke* 422, ſame Caſe, *Jones* 368. *Hill.* 15 *Jac. Wright* v. *Gerrard*, &c. *Hob.* 306. *Jones* 368. *Hill.* 18 *Jac. Gerrard* v. *Wright*, 2 *Croke* 607. *Jones* 2.

Diſcharge by Privilege, &c.

As Diſcharges by Privilege only are not now good by the Aid of the ſaid Statutes, ſo not by Preſcription, or real Compoſition; for when upon a Prohibition a Surmiſe was made, that a Prior of a Priory, by this Statute, 27 *H.* 8. diſſolved, held the Lands for which Tithes were demanded by Suit in the Spiritual Court, diſcharged, Time whereof, &c. from the Payment of Tithes, for his Farmer and Tenants for Life, or Years of the ſaid Lands; two Points were moved and reſolved; *Firſt*, Whether the Prior having a Preſcription *De Non Decimando*, this Preſcription ſhall be determined by the Diſſolution of the Priory, or ſtill remain to the King, and ſo to his Patentee, without the Aid of the Statute 27 *H.* 8. & 31 *H.* 8. *c.* 13, as to which it was argued, that in regard the Land had been diſcharged in the Hand of Spiritual Perſons, Time whereof, &c. who were capable of being diſcharged of Tithes, it may by Intendment be originally by Compoſition real, and then it ſhall go with the Land, 8 *Ed.* 4. 14. *F. N. B.* 41, where 'tis ſaid, that a Lay Perſon may have a Compoſition, and thereupon a Prohibition, much more a Spiritual Perſon, and then it ſhall go with the Land; and 'twas alſo ſaid, that ſuch Preſcription *De Non Decimando*, being fixed in a Spiritual Perſon, by the Diſſolution comes to the King, being *Perſona Mixta*, and capable thereof, and ſo to his Patentee. But *Bramſton*, *Jones* and *Berkley* Juſtices, held the contrary, and firſt agreed, that ſuch Compoſition real in the Caſe of a Lay-man, if it may appear, ſhall be good, and the Diſcharge ſhall go with the Land; but becauſe a Spiritual Perſon may be diſcharged by Grant, and that in divers Manners, as well as by Compoſition real, it ſhall be intended in Favour of the Church, to be by the moſt general Courſe as by Grant of Privilege, which is a perſonal Diſcharge, and determines with the Corporation, and not by any real Compoſition, unleſs it could be ſhewed. *Mich.* 11 *Car. B. R. Sydown* v. *Holm*, 1 *Croke* 422, ſame Caſe, *Jones* 368, *Paſch.* 17 *Car.* in *Scaccario*, *Clark* v. *Ward* and *Hill*, 11 *Car. Cock* v. *Thorp*, adjudged, *Croke Contra*, 1 *Roll's Abr.* 654. But in the like Caſe, *Dodderidge* ſaid, that if it be alledged, that the Abbey was founded before the Time of Memory, and that from the Foundation until the Diſſolution, the Land had been diſcharged, this had been good; to which *Coke* agreed, *Trin.* 12 *Jac. B. R. Prowſe* v. Doctor *Leyfield*, *Roll's Rep.* 54, and by *Hobart*, who grants that Diſcharge by Compoſition, Bull, Canon and Order, was but perſonal, and doth die with the Body, without the Aid of a Statute to ſupport them, but holds, that Diſcharge by Preſcription is of another Nature; for having been always (as Preſcription preſumes) in Spiritual Hands, the Law judgeth that it was never charged with Tithes, as the Pleading is, that the Lands were *Immunes a Solutione Decimarum*, *negative*, *non privative*, *ſcilicet* uncharged, not diſcharged, as if they had been once chargeable; the Reaſon whereof was, that being Spiritual Perſons, they were able to miniſter to themſelves Spiritual Rights, and therefore performing *Officium*, they might retain *Beneficium*; and this Noncharge ſtanding upon Preſcription, was inherent to the Land, not as a Thing given, but as a *Non ens:* Lands that never yielded Tithes, and Land of the Little Monaſteries ſo free of Tithes, the King by the Statute 27 *H.* 8. and his Patentees were to hold free, not by reaſon of any Privilege,

Where Diſcharges by Privileges, are not aided by Preſcription, &c.

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vilege, which did need to be preserved by Statute, but even by the Grant of the Land by any Kind of Conveyance. And therefore, though Discharge by Bull, or Compoſition, was to die with the Corporation, yet if it were once run out, Time whereof Mind of Man, *&c.* it was then to be pleaded, and uſed as a Non-charge by Preſcriprion, which was a Title of Diſcharge by the Temporal Law; and if it were impugned, it was to be drawn by Prohibition to a Trial at the Common Law; and this without the Help of any Statute. But after he ſaith, that he is of Opinion, that the Defendant may avoid the Plea of Preſcription, by ſhewing the Abbey, to which the Lands belonged, had other Ways of Diſcharge, *Wright* v. *Gerrard* and *Hilderſham*, *Hill.* 15 *Jac.* *Hob.* 309, but the before-mentioned Judgments are more to be regarded, which are, that Preſcription is no Diſcharge for Lands given by the Statute 27 *H.* 8, for the Reaſons given in thoſe Judgments, and accordingly was it adjudged after ſeveral Arguments, *Hill.* 18 *&* 19 *Car.* 2. *B. R.* in the Caſe of *Bowles* v. *Atkins*, 1 *Sid.* 320. 1 *Lev.* 185, the ſame Caſe, 2 *Keb.* 28, 175, where it is ſaid by *Twiſden* Juſtice, that the Caſe of *Sydnam* and *Holmes*, 1 *Cro.* 422, hath been agreed for Law in all the Courts of *Weſtminſter*, and (*Keeling* Chief Juſtice) the ſame Point hath been adjudged by all the Courts; the like Opinion the Court was of, *Hill.* 20 *&* 21 *Car.* 2. *B. R.* 2 *Keb.* 472.

Preſcription no Diſcharge for Lands given by 27 *H.* 8.

Nor by Preſcription of Unity of Poſſeſſion.

And as Lands are not diſcharged by this Statute, upon the Account of Preſcription, ſo much leſs upon a Preſcription of Unity of Poſſeſſion of the Parſonage, and the Lands of which Tithes are demanded. *Hill.* 15 *Jac.* *Wright* v. *Gerrard*, *&c.* *Hob.* 311, the ſame Caſe, *Jones*, *p.* 2. *Hill.* & 2 *Croke* 607.

31 *H.* 8. *c.* 13.

The next Statute by which Religious Houſes, *&c.* were diſſolved, and the Lands given to the Cown, is 31 *H.* 8. *c.* 13, and in this Statute for the freeing of Lands given thereby from the Payment of Tithes, there is this Clauſe. **And where divers and ſundry Abbots, Priors, Abbeſſes, Prioreſſes and other Eccleſiaſtical Governors, and Governeſſes of the ſaid Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Religious and Eccleſiaſtical Houſes and Places, have had, poſſeſſed and injoyed divers and ſundry Parſonages appropriated, Tithes, Penſions and Portions, and alſo were acquitted and diſcharged of and from the Payment or Payments of Tithes, to be paid out of or for their ſaid Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Religious and Eccleſiaſtical Houſes and Places, Manors, Meſſuages, Lands, Tenements and Hereditaments: Be it therefore enacted by the Authority abovеſaid, That as well the King our Sovereign Lord, his heirs and Succeſſors, as all and every ſuch Perſon and Perſons, their heirs and Aſſigns, which have, or hereafter ſhall have any Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, or other Eccleſiaſtical Houſes or Places, Sites, Circuits, Precincts of the ſame, or any of them, or any Manors, Meſſuages, Parſonages appropriate, Tithes, Penſions, Portions, or other Hereditaments, whatſoever they be, which belonged or appertained, or which now belong or appertain unto the ſaid Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, or other Religious and Eccleſiaſtical Houſes or Places or unto any of them, ſhall have, hold, retain, keep and injoy, as well the ſaid Parſonages appropriate, Tithes, Penſions, and Portions, as the**

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ſaid Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Religious and Eccleſiaſtical Houſes and Places, Sites, Circuits, Precincts, Manors, Meaſes, Lands, Tenements and other Hereditaments whatſoever they be, and every of them, according to their Eſtates and Titles, diſcharged and acquitted of Payment of Tithes, as freely, and in as large and ample Manner as the ſaid late Abbots, Priors, Abbeſſes, Prioreſſes, and other Eccleſiaſtical Governors and Governeſſes, or any of them had, held occupied, poſſeſſed, uſed, retained, or injoyed the ſame, or any Parcel thereof, at the Days of their Diſſolution, Suppreſſion, Renouncing, Relinquiſhing, Forfeiting, giving up, or coming to the King's Highneſs, of ſuch Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, or other Religious or Eccleſiaſtical Houſes or Places, or at the Day of the Diſſolution, Suppreſſion, Renouncing, Relinquiſhing, giving up, or coming to the King's Highneſs of any of them; this Act or any Thing therein contained to the contrary notwithſtanding. Stat. 31 H. 8. c. 13. ſect. 21.

Monaſteries of the Value of 200 *l. per Annum*, &c. capable of being diſcharged of Tithes.

And here I ſhall ſet down the Catalogue of the ſeveral Monaſteries, that upon the general Survey taken the 26 *H.* 8, were returned to be of the annual Value of Two Hundred Pounds *per Annum*, and upwards, within *England* and *Wales*, and by Conſequence diſſolved by the Statute of 31 *H.* 8. *c.* 13, and by that Means are capable of being diſcharged of the Payment of Tithes, *viz.*

	l.	*s.*	*d.*	
Reading Benedictines, founded in the Time of *H.* 1.	1938	14	03	*Berks.*
Buſleſham Abbey Canons of St. *Auſtin*, founded in the 13 *Ed.* 3.	0285	00	00	
Abbington Abbey Benedictines, founded in the Year 702.	1876	10	09	
Newnham Priory Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0293	15	11	*Bedford.*
Elmeſton Abbey Benedictines, founded in the Time of *William* the Conqueror.	0284	12	11	
Wardon Abbey Ciſtertians, founded in the 4th of *Stephen*, in the Year 1139.	0389	16	06	
Chickſand Priory, White Canons *Gilbertines*, founded in the Time of *W. Ruf.*	0212	03	05	
Dunſtable Abbey Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0344	13	03	
Woobern Abbey Ciſtertians, founded in the Time of King *John.*	0391	18	02	
Aſhrugg College Canons of St. *Auſtin*, founded in the Time of *Ed.* 1.	0416	16	04	*Bucks.*
Notely Abbey Canons of St. *Auſtin*, founded in the Time of *H.* 1. in 1112.	0437	06	08	
Miſſenden Abbey Benedictines, founded in the Year 1293	0261	14	06	
Thorney Abbey Benedictines, founded in the Year 972.	0411	12	11	*Cantabr.*
Barewell Priory Canons of St. *Auſtin*, founded in the Time of *H.* 1. in the Year 1092.	0256	11	10	

Monaſteries.		*l.*	*s.*	*d.*
Ceſtr.	St. *Werburge Abbey Benedictines*, founded in the Year 1095.	1003	05	11
	Combermeer Abbey Ciſtertians, founded in the Year 1134.	0225	09	07
Cornub.	*Bodmin Priory* Canons of St. *Auſtin*, founded in the Year 936.	0270	00	11
	Launceſton Abbey Canons of St. *Auſtin*, founded in the Time of *Will.* the Conq.	0354	00	11
	St. *Germans Abbey* Canons of St. *Auſtin*, founded in the Time of King *Ethelſtone*.	0243	08	00
Cumbr.	*Carliſle Priory* Canons of St. *Auſtin*, founded in the Time of *William Rufus*.	0418	03	04
	Holmcoltrom Abbey Ciſtertians, founded in the Year 1135.	0427	19	03
Derb.	*Darley Abbey* Canons of St. *Auſtin*, founded in the Time of *H.* 2.	0258	14	05
Devon.	*Ford Abbey Ciſtertians*, founded in the Year 1133.	0374	10	06
	Newnham Abbey Ciſtertians, founded about the Year 1246.	0227	07	08
	Dinkeſwell Abbey Ciſtertians, founded in ther Year 1201.	0294	18	06
	Hertland Abbey Canons of St. *Auſtin*, founded in Time of *H.* 2.	0306	03	02
	Torre Abbey Præmonſtratenſes, founded in the Time of *R.* 1.	0396	00	11
	Buckfaſt Abbey Ciſtertians, founded in the Time of *H.* 2.	0466	11	02
	Plimpton Abbey Ciſtertians, founded in the Time of *E.* 1.	0241	17	09
	Taveſtock Abbey Benedictines, founded in the Year 961	0902	05	07
	Exon Priory Clun. founded in the Time of *H.* 1.	0502	12	09
Dorſet.	*Abbotſbury Benedictines*, founded about the Year 1016.	0390	09	02
	Middleton Abbey Benedictines, founded by King *Ethelſton.*	0538	13	11
	Tarrent Abbey Ciſtertians, founded by *H.* 3.	0214	07	09
	Shafton Abbey Benedictines, founded in the Year 941.	1166	08	09
	Cerne Abbey Benedictines, founded in the Time of King *Edgar.*	0515	17	10
	Sherburn Abbey Benedictines, founded about the Year 370.	0682	14	07
Dunelm.	Saint *Cuthbert Abbey Benedictines*, founded about the Year 842.	1366	10	09
	Tinmouth Priory Benedictines, founded——	0397	11	05
Eſſex.	*Berking Abbey Benedictines*, founded in the Year 680.	0862	12	05
	Stratford Langthorn Abbey Ciſtertians, founded in 1135.	0511	16	03
	Waltham Abbey Canons of St. *Auſtin*, about 1060.	0900	04	03
	Walden Abbey Benedictines, founded in the Year 1136.	0372	18	01
	St. *Oſwith Abbey* Canons of St. *Auſtin*, founded in 1120.	0677	01	02
	Colcheſter Abbey Canons of St. *Auſtin*, in the Time of *H.* 1.	0523	17	00

	l.	*s.*	*d.*	Monaſteries.
Briſtol Abbey Canons of St. *Auſtin*, founded about the Time of *Henry* 1.	0670	13	11	*Glouceſter.*
Hayles Abbey Ciſtertians, founded in the Year 1246.	0357	07	08	
Winchcomb Abbey Benedict. founded in the Year 787.	0759	11	09	
Tewkſbury Abbey Benedict. founded in the Year 715.	1598	01	05	
Cirenceſter Abbey Canons of St. *Auſtin*, founded in the Time of *H.* 1.	1051	07	01	
Kingſwood Abbey Ciſtertians, founded in the Year 1139.	0244	11	02	
Glouceſter Abbey Benedict. founded in the Year 680.	1946	05	09	
Lanthony Priory juxta Glouceſter Canons of St. *Auſtin*, founded in the Year 1136.	0648	19	11	
St. *Swithens Winten Abbey Benedict.* founded in the Year 634.	1507	17	02	*Hants.*
Hyde Abbey Benedictines founded by King *Alfrid.*	0865	18	00	
Wherwell Abbey Benedictines, founded in the Time of King *Edgar.*	0339	08	07	
Romſey Moniales Benedict. founded in the Year 907.	0393	10	10	
Twinham Priory Canons of St. *Auſtin*, founded *ante* 1042.	0312	07	00	
Belloloco Abbey Ciſtertians, founded in the Year 1024.	0326	13	02	
Southwick Priory Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0257	04	04	
Tichfield Abbey Præmonſtratenſes, founded in the Time of *H.* 3.	0249	16	01	
St. *Albans Abbey Benedictines*, founded in the Year 755.	2102	07	01	*Hertford.*
St. *Neots Abbey Benedictines*, founded about the Time of *H.* 1.	0241	11	04	*Hunts.*
Ramſey Abbey Benedictines, founded in the Year 969.	1716	12	04	
St. *Auſtin's prop. Cant. Abbey Benedictines*, founded in 605.	1413	04	11	*Kanc.*
Ledis Priory Canons of St. *Auſtin*, founded in the Year 1119.	0362	07	07	
Feverſham Abbey Clun. founded in the Year 1147, by King *Stephen.*	0286	12	06	
Boxley Abbey Ciſtertians, founded in the Year 1144.	0204	04	11	
Roffen Abbey Benedictines, founded in the Year 600.	0486	11	05	
Malling Abbey Benedictines, founded by King *Edmund.*	0218	04	02	
Dertford Abbey Canons of St. *Auſtin* founded 46 *Ed.* 3. *per ipſ. R.*	0380	00	00	
Whalley Abbey Ciſtertians, founded in the Year 1172.	0321	09	01	*Lanc.*
Leiceſter Abbey Canons of St. *Auſtin*, founded in 1143.	0951	14	05	*Leic.*
Croxden Abbey Præmonſtrat. founded about the Time of *R.* 1.	0385	00	10	
Launda Abbey Canons of St. *Auſtin*, founded in the Time of *W. Ruf.*	0399	03	03	

Lincoln

Monasteries.		*l.*	*s.*	*d.*
Lincoln.	*Lincoln* St. *Cath. Priory Gilbert.* founded in the Time of *H.* 2.	0202	05	00
	Kirksteed Abbey Cistertians, founded in the Year 1139.	0286	02	07
	Revesley Abbey Cistertians, founded in the Year 1142.	0287	02	04
	Thornton Abbey Canons of St. *Austin*, founded in the Year 1139.	0594	17	10
	Barney Abbey Benedictines, founded in the Year 712.	0366	06	01
	Croyland Abbey Benedict. founded in the Time of King *Ethelred*, *An.* 716.	1803	15	10
	Spalding Abbey Benedict. founded in the Year 1052.	0761	08	11
	Sempringham Abbey Gilbert. founded in the Year 1148, K. *Stephen.*	0317	04	01
	Epworth Moniales Carthusians, 10 *R.* 2. *Fundat.*	0237	15	02
Lond and *Midd.*	St. *John Jerusal. Priory*, founded in the Time of *H.* 1. *Anno* 1100.	2385	12	08
	St. *Barthol. Smithfield* Canons of St. *Austin*, founded in the Year 1102.	0653	15	00
	St. *Mary Bishopsgate Priory*, founded in the Year 1187, 9 *R.* 1.	0478	06	06
	Clerkenwell Priory Benedict. founded in the Time of King *Stephen.*	0262	19	00
	London Minors Benedictines, founded in the Time of *Ed.* 1.	0318	08	05
	Westminster Abbey Benedict. founded in the Time of King *Edgar.*	3471	00	02
	Sion Abbey Canons of St. *Austin*, founded by *H.* 5.	1731	08	00
	London, a House of *Carthusians*, founded in the Time of *Ed.* 3.	0642	00	04
	St. *Clare* without *Aldgate Monial.* founded in the Year 1292.	0418	08	05
	St. *Mary Charter-house Carthusians*, founded in the Year 1379.	0736	02	07
	St. *John Holiwell Monial. Nigr.* founded in the Year 1318.	0347	01	03
	St. *Mary East-Smithfield Abbey Cistertians*, founded 34 *Ed.* 3.	0602	11	10
Northfol.	*Thetford Abbey Clun.* founded in the Year 1103.	0312	14	04
	Whymundham Abbey Benedict. founded in the Year 1139.	0211	16	06
	Hulmo Abbey Benedict. founded by King *Canutus.*	0583	17	00
	Westdreham Abbey Præmonstratenses, founded in the Time of *H.* 2.	0228	00	00
	Walsingham Abbey Canons of St. *Austin*, founded about the Time of King *Stephen.*	0391	11	06
	Castle-Acre Abbey Clun. founded in the Year 1090.	0306	11	04
	West-Acre Abbey Clun. founded in the Time of *Will. Rufus.*	0260	13	00
Northon.	*Burgi Sti. Petri Abbey Benedict.* founded *per Rofere R. Mer.*	1721	14	00
	Pipewell Abbey Cistertians, founded in the Year 1143	0286	11	08

St.

	l.	*s.*	*d.*	Monaſteries.
St. *Andrews Priory Clun.* founded in the Year 1067.	0263	07	01	
Sulby Abbey Præmonſtratenſes, founded in the Time of King *Stephen.*	0258	08	05	
Lenton Priory Clun. founded in the Time of *H.* 1.	0329	05	10	*Nott.*
Thurgarton Priory Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0259	09	04	
Welbeck Abbey Canons of St. *Auſtin*, founded in the Time of King *Stephen.*	0249	06	03	
Warſop Priory Canons of St. *Auſtin. Fundat.*	0239	10	05	
Bella Valla Priory Carth. F. Circa 16 *Ed.* 3.	0227	08	00	
Newſteed Priory Canons of St. *Auſtin*, founded in the Time of *Ed.* 3.	0219	18	08	

Theſe two laſt are under Value in Mr. *Dugdale*, but thus *per Speed.*

Tinmouth, a Cell to St. *Albans*, a Nunnery.	0511	04	01	*Northumb.*
Godſtow Abbey Benedictines, founded in the Time of King *Stephen.*	0274	05	10	*Oxon.*
Eyneſham Abbey Benedictines, founded by King *Ethelbred.*	0441	12	02	
Oſney Abbey Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0654	10	02	
Thama Abbey Ciſtertians, founded in the Time of *H.* 1.	0256	13	11	
Oxford Priory, per Speed, fund. ante Conqu.	0224	04	08	
Dorcheſter, per eundem, Abbey Canons of St. *Auſtin*, founded 635.	0219	12	00	
Haghmond Abbey Canons of St. *Auſtin*, founded in the Year 1100.	0259	13	01	*Salop.*
Lilleſhull Abbey Canons of St. *Auſtin, F. per A. d'Elſtreda, R. Merciæ.*	0229	03	01	
Wigmore Abbey Canons of St. *Auſtin*, founded in the Year 1172, *per Speed.*	0267	02	10	
Wenlock Priory, Clun. founded in the Year 1181, *vel antea.*	0401	00	07	
Salop Abbey Canons of St. *Auſtin*, founded in the Year 108, *per Speed.*	0615	04	03	
Hales Owen Abbey Præmonſtratenſes, founded in the Time of King *John.*	0337	15	06	
Glaſſenbury Abbey Benedict. founded about the Year 300.	3311	07	04	*Somerſet.*
Brewton Abbey Canons of St. *Auſtin*, founded about the Time of the Conqueror.	0439	06	08	
Henton Priory Carthuſians, founded in the Time of *H.* 3.	0248	19	02	
Witham Priory Carthuſians, founded by *H.* 2.	0215	15	00	
Taunton Priory Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0286	08	10	
Bathon Abbey Benedict. founded in the Time of *H.* 3.	0617	02	03	
Keyneſham Abbey Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0419	14	03	
Michelney Abbey Benedictines, founded in the Year 740.	0447	04	11	
Buckland Priory Ciſtertians, founded in the Time of *E.* 1.	0223	07	04	

Monasteries.		*l.*	*s.*	*d.*
Staff.	*Dela Cres Abbey Ciſtertians*, founded in the Year 1153.	0227	05	00
	Burton ſup. Trent Abbey Benedictines, founded in the Time of *Eadred.*	0267	14	03
	Croxden Abbey Ciſtertians, Cont. Fundat.			
Suffolk.	St. *Edmundſbury Abbey Benedictines*, founded in the Year 1020.	1659	13	11
	Butley Abbey Canons of St. *Auſtin*, founded in the Year 1171.	0318	17	02
	Sibeton Abbey Ciſtertians, founded in the Year 1150.	0250	15	07
	Ixworth Priory Canons of St. *Auſtin*, founded in the Time of the Conqueſt.	0280	09	05
Surrey.	*Merton Priory* Canons of St. *Auſtin*, founded in the Year 1414, in the Time of *H.* 1.	0957	19	05
	Shene Priory Carthuſians, founded in the Year 1414.	0777	12	00
	Chertſey Abbey Benedictines, founded in the Year 666.	0952	15	08
	Newark Priory.	0258	11	11
	St. *Mary Overs Abbey* Canons of St. *Auſtin*, founded 7 *H.* 1.	0624	06	06
	Bermondſey Abbey Canons of St. *Auſtin*, founded 7 *H.* 1.	0474	14	04
Suſſex.	*Lewis Abbey* of *Clun.* founded in the Time of *Will. Rufus.*	0920	18	06
	Roberts-Bridge Abbey Ciſtert', founded in the Time of *H.* 2.	0248	10	06
	Battaile Abbey Black Monks, founded 1066.	0987	00	11
Warw.	*Combe Abbey Ciſtertians*, founded in the Time of King *Stephen.*	0311	15	01
	Kenelworth Abbey Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0538	19	00
	Meryval Abbey Ciſtertians, founded in the Year 1148.	0254	01	08
	Nunenton Monial Benedictines, founded in the Time of *H.* 2.	0253	14	01
Wilts.	*Malmſbury Abbey Benedictines*, founded about the Year 670.	0803	17	07
	Bradenſtock Priory Canons of St. *Auſtin*, founded in the Time of the Conqueror.	0212	19	03
	Edington Priory Canons of St. *Auſtin*, founded in 1352.	0442	09	07
	Ambreſbury Abbey Benedictines, founded in 1171.	0494	15	02
	Wilton Abbey Benedictines, founded in the Time of King *Ethelwolph.*	0601	01	01
	Fairely, a Cell to *Lewis*, *per Speed*, founded in the Year 1125, *Clun.*	0217	00	04
	Laycock Abbey Canons of St. *Auſtin*, founded in the Year 1232. *per Speed.*	0203	12	03

	l.	*s.*	*d.*	Monasteries.
Malverne Abbey Benedictines, founded in the Year 1083.	0308	01	03	*Wigorn.*
Eveſham Abbey Benedictines, in the Time of *Offee.*	1183	12	09	
Perſhore Abbey Ciſtertians, founded in the Year ——	0643	04	05	
Hales Owen Abbey Præmonſtratenſes, founded in the Time of King *John.*	0282	13	04	
Bordeſly Abbey Ciſtertians, founded in the Year 1138.	0388	01	10	
St. *Mary Eborum Abbey Benedictines*, founded in the Second Year of *Will. Rufus.*	1550	07	00	*Eborum.*
Selby Abbey Benedictines, founded in the Time of the Conqueror.	0729	12	10	
Kirkſtal Abbey Ciſtertians, founded in the Year 1147.	0329	02	11	
De Rupe Abbey Ciſtertians, founded in the Year 1147.	0224	02	05	
Monks Burton Abbey Clun. founded about the Year 1186.	0239	03	06	
Noſtel Abbey Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0492	18	02	
Pomfrait Abbey Clun. founded in the Time of the Conqueror.	0337	14	08	
Gisbourne Abbey Canons of St. *Auſtin*, founded in the Time of King *Stephen.*	0628	03	04	
Whitby Abbey Benedictines, founded in the Time of the Conqueror.	0437	02	09	
Montegratiæ Abbey Carthuſ. founded about the Year 1396.	0323	02	10	
Newburge Priory Canons of St. *Auſtin*, founded in the Year 1145.	0367	08	03	
Belland Abbey Ciſtertians, founded in the Year 1134.	0238	09	04	
Kirkham Abbey Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0269	05	09	
Melſa Abbey Ciſtertians, founded in the Year 1136.	0299	06	04	
Brilington Canons of St. *Auſtin*, founded in the Time of *H.* 1.	0547	06	11	
Walton Abbey Gilbertines, founded in the Time of King *Stephen.*	0360	16	10	
Bolton in *Craven*, *Priory*, Canons of St. *Auſtin*, founded in *H.* 1.	0212	03	04	
Rival Abbey Ciſtertians, founded in the Year 1132.	0278	10	02	
Jerval Abbey Ciſtertians, founded in the Time of King *Stephen.*	0234	18	05	
Furnes Abbey Ciſtertians, founded in the Year 1127.	0805	16	05	
De Fontibus Ciſtertians, founded in the Year 1132.	0998	06	08	
Warter Priory, Canons of St. *Auſtin*, founded in *H.* 1.	0221	03	10	
Richal, per *Speed.*	0351	14	06	
Old Maulton Abbey, founded in the Time of King *Stephen*, per *Speed.*	0257	07	00	
St. *Michael* near *Hull Carthuſians*, founded in the Year 1377.	0231	17	03	
Valle De Sancta Cruce com. Denbigh Ciſtertians, founded in the Time of *Ed.* 1.	0214	03	05	*Wallia.*

Strata

Monaſteries.		*l.*	*s.*	*d.*
	Strata Florida Cardiganſhire Ciſtertians, or *Clun.* founded in the Time of the Conqueror.	1226	06	00

Note, That in the Valuations aforeſaid, all Halfpence and Farthings are rejected.

Not all the Monaſteries under Value diſſolved by 27 *H.* 8, but ſome by Stat. 31 *H.* 8.

And here we are alſo to take Notice, that not all the Monaſteries, Priories, and other Religious Houſes, which were not above the clear yearly Value of two Hundred Pounds *per Annum*, were diſſolved by the Statute of 27 *H.* 8. *cap.* 28, although they might have been, but ſome of them by this Statute 31 *H.* 8, and the Reaſon is, becauſe there was a *Proviſo* in Statute 27 *H.* 8, (which is left out of the Statute in the Book of the Statutes at large) that notwithſtanding that Act, the King might by his Letters Patent under the Great Seal of *England*, continue any of the ſaid Monaſteries. Therefore ſuch of them as were continued by the King's Letters Patent, are not to be looked upon as diſſolved by Statute 27 *H.* 8; but by Statute 31 *H.* 8, and the Lands belonging to them that were held Tithe-free before their Diſſolution, remain ſo by the Force of the aforeſaid Clauſe in the Statute of 31 *H.* 8. So was it adjudged in the *Exchequer-Chamber* betwixt *Walklute* Farmer of the Rectory of *Uttoxater* in the County of *Stafford*, and *Wilſham* Owner of a Farm there, formerly belonging to the Abbey of *Croxden*, a ſmall Abbey of the *Ciſtertian* Order, which *Wilſham* ſhewed to be continued by Letters Patent, and not diſſolved but by Statute 31 *H.* 8. *Parſon's Counſellor*, *Part* 2. *cap.* 11. *fol.* 335.

Where the Land of leſſer Monaſteries were given to the greater.

But we are not from hence to collect, that ſuch Land which did belong to the leſſer Monaſteries diſſolved by Statute 27 *H.* 8, and thereby then held Tithe-free, being after the Diſſolution thereof given to ſome other greater Monaſteries that were not diſſolved; but by Statute 31 *H.* 8, ſhall be now held free from paying Tithe, by Force of the diſcharging Clauſe in Statute 31 *H.* 8; for upon the Diſſolution of the Corporations to which firſt they belonged, they immediately became Tithable, and ſo could not be held by the greater Abbies more free than the King their Donor had them; and by Conſequence though they came the ſecond Time to the King by 31 *H.* 8; yet they came to him as the Abbey held them, *viz.* ſubject to Tithes, and the Clauſe of Diſcharge therein doth not extend to them. *Hill.* 15 *Jac. Wright* v. *Gerrard*, &c. *Hobart* 307, ſame Caſe, *Jones*, *p.* 2, and 2 *Croke* 607.

What Land of the greater Monaſteries, *&c.* are diſcharged.

Nor muſt we underſtand, that all the other Lands that did belong unto the greater Monaſteries diſſolved by the 31 *H.* 8, or of the leſſer Monaſteries continued by the King's Letters Patent, and ſo alſo diſſolved by the ſame Statute, are diſcharged from the Payment of Tithes, but only ſuch of them as were held diſcharged by the Religious Perſons that did injoy them before the Diſſolution; and of theſe, ſome were held abſolutely diſcharged, others diſcharged only whilſt they did remain in the actual Occupation and Manurance of the Owners thereof.

Thoſe abſolutely diſcharged as to this or that Land, or this or that Sort of Tithe.

Thoſe that were held abſolutely diſcharged, were ſuch as were diſcharged originally, either by Compoſition real, or by Bulls, or Grants of the Pope for this or that Manor or Parcel of Land, or for this or that Sort of Tithe only; therefore when a Parſon ſued for the Tithe of Hay and Grain of the Demeans of a Manor within a Pariſh, of which the Dean and Chapter of *P.* after the Diſſolution of the Monaſteries were Owners, in regard that within the Time whereof the Memory of Man was not to the contrary, before the Diſſolution, and at the Time of the Diſſolution

Diſſolution of the Abbey to which the Manor, *&c.* formerly did belong, no ſuch Tithes, but only other Tithes, as Wool, Lamb, *&c.* were paid by the Farmers by Leaſe or at Will, being Lay Perſons: It was ſaid by the Juſtices and Clerks of the Court, that Prohibitions in this Caſe upon the Statute 31 *H.* 8, by Virtue of the Word [*Diſcharged*] were very ordinary. *Paſch.* 18 *Eliz. Dyer* 349. Monaſteries.

And thoſe Lands that were free in either Reſpect, that is, ſo that no Tithes ſhall be paid of the Lands, or that none ſhall be paid of this or that Sort of Tithe, are ſaid to be abſolutely freed; for that the Freedom extends not only to the Owner, but alſo to his Farmers, Tenants and Occupiers under him; yet not all that receive any Profits from the Lands belonging to a Manor freed as aforeſaid, ſhall be underſtood to be Farmers, Tenants or Occupiers; for if one or more Perſons have *Libertatem falcandi*, to make Hay only, or alſo to put their Cattle on Lands that belong to ſuch Manor, as appendant to their Houſes, *&c.* they are but Commoners, and not Farmers or Occupiers, becauſe what is taken, is taken as a Profit apprender; therefore if a Preſcription was, that the Abbot, his Farmers, Tenants and Occupiers ſhould be diſcharged of Tithes of the Lands where ſuch Commoners had ſuch Privileges, it ſhall not be extended to them. *Trin.* 12 *Jac. Suckerman* and *Coates* v. Sir *Henry Warner*, 2 *Bulſt.* 248, ſame Caſe, 1 *Roll's Rep.* 53. Theſe Titles of Diſcharge were indeed by Time for the moſt part loſt, and ran out into Preſcriptions, and from hence all other Preſcriptions *De non Decimando* are ſuppoſed to have their Beginning; ſo that it is needleſs, when a Diſcharge is to be ſhewed, to ſet forth other Original thereof, than that they were diſcharged by Preſcription, or that they were held by ſuch Monaſteries diſſolved by 31 *H.* 8, Time whereof, *&c.* free from the Payment of Tithes, for it ſhall be preſumed that it was by lawful Means, *Mich.* 32 *&* 33 *Eliz. B. R. Naſh* v. *Mollins*, 1 *Leon.* 241; yet in a Declaration upon a Prohibition, the Plaintiff ought to ſhew, not only that the Abbot held the Land diſcharged at the Time of the Diſſolution, but alſo how he held it diſcharged; for the Statute 31 *H.* 8. ſaith, in as large and ample Manner as the Abbot held, *&c.* and the Statute pincheth upon that; beſides, ſuch a Claim of Diſcharge of Tithes is contrary to common Right, therefore ſhall be taken ſtrictly; by *Hobart*, *Hutton* and *Winch*, *contra Warburton*. Yet to ſay that the Lands were held Tithe-free, Time whereof, *&c.* may be ſufficient. *Hill.* 15 *Jac. C. B. Slade* v. *Drake*, *Noy* 97. *Mich.* 18 *Jac.* ſame Caſe, *Jones*, *p.* 6, and *Hob.* 295, and a Diſcharge by Compoſition, Bull or Grant, cannot otherwiſe be made to appear but by Preſcription, and appearing by Preſcription, as to Lands given by 31 *H.* 8, it ſhall be allowed at this Day. *Mich.* 11 *Car. B. R. Sydown* v. *Holm*, *Jones* 368. And it is ſaid, that if an Abbot or Prior were ſeiſed of Land diſcharged of Tithe, he that now is Farmer of ſuch Land, ſhall be admitted to preſcribe in *Non Decimando* by the Statute of 2 *Ed.* 6, which wills, that none pay Tithes otherways than they were paid Forty Years before; but in no other Caſe ſhall a Man preſcribe in *Non Decimando*, but only in *Modo Decimandi*. *Mich.* 27 *&* 28 *Eliz. Branch*'s Caſe, *Moor* 219.

As to thoſe free in either Reſpect.

Declaration.

Preſcription in *Non Decimando* by 2 *Ed.* 6.

But it is to be noted, That no Abbot or Prior could make any ſuch Preſcription that was not founded before the Time of Memory, that is, before the firſt Year of *R.* 1, or the Year 1120, which is the Time of Limitation of all Preſcriptions at the Common Law. 2 *Roll's Abr.* 269, and *Paſch.* 18 *Car.* 2. *B. R. Allen* v. *Pory*, 3 *Keb.* 45. *Mich.* 25 *Car.* 2. *Foſſet* v. *Franklin*, 3 *Keb.* 217, and *Raym.* 225.

Limitation of Preſcriptions at Common Law.

Monaſteries.

2 *H.* 4. *c.* 4. Againſt purchaſing Bulls, to be diſcharged of Tithes.

Note alſo, That it hath been enacted as foiloweth: Item, For as much as our Lord the King, upon grievous Complaint made to him in this Parliament, hath perceived that the Religious Men of the Order of Ciſteaux in the Realm of England, have purchaſed certain Bulls to be quit and diſcharged to pay the Tithes of their Lands, Tenements and Poſſeſſions, let to Farm, or manured or occupied by other Perſons than by themſelves, in great Prejudice and Derogation of the Liberty of Holy Church, and of many Liege People of the Realm: Our Lord the King willing thereupon to ordain Remedy, by the Advice and Aſſent of the Lords Spiritual and Temporal, and at the Inſtance and Requeſt of the ſaid Commons, hath ordained and eſtabliſhed, That the Religious Perſons of the Order of Ciſteaux ſhall ſtand in the Eſtate that they were before the Time of ſuch Bulls purchaſed. And that as well they of the ſaid Order, as all other Religious and Seculars, of what Eſtate or Condition they be, which do put the ſaid Bulls in Execution, or from henceforth do purchaſe other ſuch Bulls of new, or by Colour of the ſame Bulls purchaſed, or to be purchaſed, do take Advantage in any Manner: That Proceſs ſhall be made againſt them, and every of them by Garniſhment of Two Months by Writ of Præmunire Facias: And if they make Default, or be attainted, then they ſhall incur the Pains and Forfeitures contained in the Statute of Proviſors, made the Thirteenth Year of the ſaid King Richard, 2 H. 4. cap. 4. It hath alſo been enacted, That no Perſon, Religious nor Secular, of what Eſtate or Condition that he be, by Colour of any Bulls containing ſuch Privileges, to be diſcharged of Diſmes pertaining to Pariſh Churches, Prebends, Hoſpitals, or Vicarages, purchaſed before the First Year of King Richard the Second after the Conqueſt, or ſithence not executed, ſhall put in Execution any ſuch Bulls ſo purchaſed, or any ſuch Bulls to be purchaſed in Time to come. And if any ſuch Religious or Secular Perſon, of what Eſtate or Condition he be, from henceforth by Colour of ſuch Bulls do trouble any Perſon of holy Church, Prebendaries, Wardens of Hoſpitals, or Vicars, ſo that they cannot take or injoy the Diſmes due or pertaining to them of their ſaid Benefices, that then ſuch Diſturbers ſhall incur like Proceſs and Pain as is ordained by the Statute made againſt them of the Order of Ciſteaux, in the Second Year of the Reign of our ſaid Lord the King that now is. 7 H. 4. cap. 6. By which Statute it appears, that as the Lands of Churches founded ſince the Time of the Firſt of *R.* 1. as aforeſaid, cannot plead Preſcription for an abſolute Diſcharge of Tithes; ſo neither by reaſon of this Statute can any Pope's Bulls purchaſed before the making thereof, or after, be pleaded as a Ground of an abſolute Diſcharge, *viz.* not only for the Owners whilſt occupied by themſelves, but alſo for their Farmers, Tenants or Occupiers, whether the Eſtate was belonging to any Religious Perſons, or did, or at this Day doth belong to any of the Secular Clergy; yet I ſuppoſe that a real Compoſition, if it can be ſhewed, may be a ſufficient Diſcharge, that is, if it was made ſince this Statute, or ſince the Time of Limitation of Preſcriptions, provided that it was alſo made before Statute 1 *Eliz.* where the Tithes did belong to a Biſhop, or before Statute 13 *Eliz.* where they did belong to any College, Dean, Dean and Chapter, Archdeacon, Prebend, Parſon, Vicar, *&c.*

The like by 7 *H.* 4. *c.* 6.

Conſequence of theſe Statutes.

Though a Preſcription *De Non Decimando,* without the Aid of an Act of Parliament periſheth when a Corporation is diſſolved, and the Lands

come to a Lay-hand; yet by reaſon of the aforeſaid Clauſe in the 31 *H.* 8. and the favourable Interpretation thereof, Preſcription is of that Force, that where any of the Lands belonging to the Monaſteries diſſolved by the 31 *H.* 8. were in the Pariſhes whoſe Churches were appropriated to any of the ſaid Monaſteries, ſo that the ſaid Monaſtery was ſeiſed both of the ſaid Lands and Rectory *Simul & Semel*, Time out of Mind, and paid no Tithes within the Memory of Man for the Lands, ſuch Lands ſhall be diſcharged from the Payment of Tithes by ſuch perpetual Unity of Poſſeſſion, as was adjudged *Mich.* 34 & 35 *Eliz. Knightly* v. *Spencer*, and *Hill.* 24 *Eliz. Roſe* v. *Gurling*, both vouched *Trin.* 38 *Eliz. B. R.* in *The Archbiſhop of Canterbury*'s Caſe, 2 *Coke* 47, 48. *Mich.* 40 & 41 *Eliz. Benton* v. *Trot*, *Moor* 528, where alſo 'tis ſaid to be ſo adjudged in *Green* and *Boſkin*'s Caſe, *Mich.* 30 *Eliz. Prowſe*'s Caſe, 4 *Leon.* 47. However, if in this Caſe of Unity, the Farmers of the Demeſnes had paid Tithes, *&c.* to the Abbot, *&c.* when uſed by their Farmers at Will, for Years or Life, then the Intendment of the Law, by reaſon of the ſaid Unity of Poſſeſſion, (which ought to be Time out of Mind, *&c.*) that the Land was diſcharged of the Payment of Tithes, will not hold place. *Mich.* 4 *Car. B. R. Brondhead* v. *Lewis*, *Jones* 412; therefore, if an Abbot had made a Leaſe for Years a Year before the Diſſolution, although that the Leaſe was made void by the Statute, yet this Leaſe ſhall deſtroy the Unity of Poſſeſſion, ſo that it may not be pleaded in Diſcharge of the Tithes; but otherwiſe it would have been, if there had been an abſolute Nullity of the Leaſe *ab initio* without a conſequent Statute to make it void. *Hill.* 11 *Jac. B. R. Arnold* v. *Bidgood*, *per Cur.* 2 *Bulſt.* 67. And ſo *Popham* ſaid, that Unity in Eſtate, and not in Occupation of the Land and Rectory at the Day of the Diſſolution by the Abbot, is not a Diſcharge of the Tithes within the Statute, no not tho' the Land was in Leaſe but for one Year at the Time of the Diſſolution, and though there had been an Unity of Poſſeſſion, Time whereof, *&c.* until the laſt Year, or other ſhort Time before the Diſſolution. *Mich.* 40 & 41 *Eliz. Benton* v. *Trot*, *Moor* 528. *Mich.* 39 & 40 *Eliz. Button* v. *Long*, 3 *Croke* 584. And accordingly, when the Caſe was, that an Abbot and his Predeceſſors had been ſeiſed of a Rectory, and of Land within the ſame Pariſh, Time whereof, *&c.* until the Twenty-ſixth Year of *H.* 8. at which Time the Abbot made a Leaſe of the Land for Sixty Years, and by that Leaſe demiſed all Tithes renewing, *&c.* upon the ſaid Lands, *viz.* Hay, Corn, *&c. reddendo perinde* certain Corn Rent, and by the ſame Indenture it was covenanted, that the Leſſee ſhall not ſet forth the Tithes of the Hay and Corn to the Leſſor and his Succeſſors, but that the Leſſee, his Executors and Aſſigns, ſhall ſet forth Tithe of Wool and Lamb to the Leſſor, *&c.* and ſmall Tithe to the Vicar, *&c.* And after, *viz.* the 31 *H.* 8. the Abbey was diſſolved, and in the ſame Year was the Statute made, **Which enacts, That the Purchaſer ſhall hold it diſcharged in the ſame Manner as it was in the Hands of Abbots,** &c. in this Caſe it was adjudged, when the Lands and the Tithes had ſeveral Proprietors, that this Unity of Poſſeſſion with the other Circumſtances, ſhall not diſcharge the Land from the Payment of Tithes; for there is a *Demiſe* of the Land, and of the Tithes alſo, which argues that they were due and payable in themſelves; *Secondly*, Here is a Proviſion for the Payment of other Tithes; *Thirdly*, Here is a Covenant, that the Tithes leaſed ſhall not be ſet forth; *Fourthly*, It is found that Lamb and Wool were paid in Kind, and a Payment of Part of the Tithes is a Seiſin of all; from which it follows, that the Land had never been diſcharged by

Monaſteries.

Where a Monaſtery was ſeiſed both of Lands and Rectory *Simul & Semel*, *&c.*

Where Unity in Eſtate and not in Occupation, is no Diſcharge.

Part of Tithes diſcharged upon a Leaſe, and Part reſerved, *&c.*

Monaſteries.

by real Compoſition, and ſo that though the Tithes of Corn and Hay were not paid during the Unity, yet becauſe they were paid ſome Time before the Diſſolution, by Right they were payable. *Mich.* 5 *Jac. B. R. Dobitoft* v. *Curteen*, 2 *Croke* 452.

If the Leaſe expired before the Diſſolution, &c.

So if Tithes were not paid in Time of Memory by a Houſe of Religion, and they leaſe the Land for Years, and receive Tithes of their Leſſee, the Leaſe expires two Years before the Diſſolution of the ſame Houſe, the King ſhall not be diſcharged of the Payment of Tithes by the Statute of 31 *H.* 8. by *Coke* and *Walmſly* againſt *Warburton* and *Foſter*, *Trin.* 9 *Jac. Priddle* v. *Napper*, 2 *Brownl.* and *Gouldſh.* 26. And if the Farmers have paid Tithes before the Statute, the ſame may be pleaded, and Iſſue thereupon may be taken; but if the Lands were always occupied by the Abbots, or demiſed over, and no Tithes paid before the ſaid Statute, the Land is diſcharged of the Payment of Tithes. *Grevil* and *Trott*'s Caſe touched in *The Archbiſhop of Canterbury*'s Caſe, 2 *Coke* 48. *Priddle* v. *Napper*, 11 *Coke* 14. *Slade* v. *Drake*, *Hob.* 298. And if Land that was diſcharged by Unity of Poſſeſſion, came to the King by 31 *H.* 8. then by Force of the ſaid Branch of Diſcharge of the Payment of Tithes, a general Allegation, that ſuch Prior, &c. held the Land at the Time of the Diſſolution of the ſaid Priory, diſcharged of the Payment of Tithes without ſhewing how, is ſufficient. *The Archbiſhop of Canterbury*'s Caſe, 2 *Coke* 48, ſame Caſe, *Moor* 420. Yet it hath been held, that if an Unity of Poſſeſſion by Way of Diſcharge be alledged generally, without ſhewing how, or adding, that it was perpetual, it is not ſufficient. *Mich.* 15 *Jac. Slade* v. *Drake*, *Hob.* 298. *Mich.* 10 *Jac. Priddle* and *Napper*'s Caſe, 11 *Coke* 14. and by *Gaudy* againſt *Popham* and *Fenner*, *Mich.* 37 & 38 *Eliz. Green* v. *Boſwin*, *Moor* 420, but in *Priddle* and *Napper*'s Caſe, 11 *Coke* 14, it was aſked, what if an Appropriation was made in Time of *Ed.* 4. *H.* 6. *H.* 4. *R.* 2. *Ed.* 3. &c. and yet in Law within Time of Memory, an Unity had continued from the Time of the Appropriation, until the Diſſolution, and Tithes were never paid by the Abbots, &c. or their Farmers, ſhould not the Statute extend to theſe Caſes? And it was anſwered, No, upon the Point of Unity, for if he will have Aid of the Act of 31 *H.* 8. the Unity, as hath been ſaid, ought to be perpetual. But in ſuch Caſe there may be alledged the Branch of the Act of 31 *H.* 8. concerning the Diſcharge of the Payment of Tithes, &c. that the Abbots, &c. Time out Mind, &c. until the Diſſolution, have held the Land diſcharged of Tithes, (as he may well preſcribe by the Common Law) and give ſuch Evidence, that may prove it; and ſo if in Truth the Land be diſcharged, he hath ſufficient Remedy to relieve himſelf; but if the Abbey, or Priory, &c. were founded within Time of Memory, there he cannot preſcribe at all. *Mich.* 10 *Jac. Priddle* and *Napper*'s Caſe, 11 *Coke* 14. / See *Engliſh* and *Jones*'s Caſe, 2 *Keb.* 459.

When a general Allegation is ſufficient upon Unity of Poſſeſſion.

Defendant confeſſed the Unity of Poſſeſſion, and pleaded to the Foundation.

So when Unity of Poſſeſſion, Time whereof, &c. was ſuggeſted, in order to obtain a Prohibition to ſtay a Suit for Tithes, the Defendant pleaded that the Abbey to which, &c. was founded 5 *Ed.* 1. (which is within the Time of Memory,) and confeſſed the Unity from the Foundation; *per Cur.* this Plea in Bar was good to avoid the Unity, and that it was not needful to traverſe the Preſcription; for the Shewing the Foundation of the Abbey to be after the Time of Memory, is a ſufficient Confeſſing and Avoiding. But if the Defendant incounter the Suggeſtion of perpetual Unity, and will ſhew how that the Demeſnes, before the Statute, and in the Time of the Abbey, were in the Hands of Farmers, &c. there he ought to traverſe the Preſcription. For although the Poſſeſſion

was

was chargeable in other Hands, yet as to the *Fee-ſimple* which remains in the Abbot, it is a Diſcharge in Right. *Hill.* 45 *Eliz. B. R. Gibſon* v. *Holcraft*, *Yelv.* 31. And accordingly in this Caſe, the Defendant traverſed the Unity at the Time of the Diſſolution, and thereupon the Plaintiff demurring, *Fenner* and *Clinch* (the other Juſtices being abſent) held the Traverſe to be good: But if the Diſcharge had been pleaded generally by Preſcription, and not by reaſon of Unity, then the Preſcription ought to have been anſwered, and not the Unity; and it was ſaid, that, *Trin.* 34 *Eliz.* betwixt *Calmady* and *Wyther*, it was ſo ruled, wherefore it was adjourned. *Mich.* 39 & 40 *Eliz. B. R. Button* v. *Long*, 3 *Croke* 584.

Monaſteries.

Preſcription to be traverſed.

Neither will Preſcription *De Non Solvendo* in the Caſe of Unity avail any Thing, if the Union was not juſt, for if the Abbots, *&c.* have held by Abuſe and Wrong, Time out of Mind, *&c.* the ſame is no Unity within the Statute. *Mich.* 10 *Jac. Priddle* and *Napper*'s Caſe, 11 *Co.* 14. *b. Paſch.* 5 *Eliz. Moor* 46. So if the Abbot did hold the Lands and Tithes in ſeveral Rights; therefore when the Caſe was, that an Abbot had a Manor within the Pariſh of *D.* and a Compoſition was made betwixt the Parſon of *D.* and the ſaid Abbot, that the Parſon ſhould have Yearly, certain Loads of Wood out of thirty Acres of the ſaid Manor, for and in Recompence of all the Tithes of Wood there; afterwards the Parſonage was appropriated to the ſaid Abbot, and then the Houſe was diſſolved, and the Manor granted to one, and the Rectory to another; it was holden that the Portion of Tithes was revived, for he had them, (*ſcil.* the Manor and the Tithes) in ſeveral Rights; and *Manwood* Chief Baron, and *Periam* Juſtice, to whom a Caſe depending in the Chancery was referred concerning the Diſcharge of Tithes, by Unity of Poſſeſſion, delivered their Opinions, that ſuch an Unity is not any Diſcharge within the ſaid Statute. *Trin.* 33 *Eliz. B. R. Knightly* and *Spencer*'s Caſe, 1 *Leon.* 355.

If the Union was not juſt.

So when the Caſe was, that an Abbot had a Parſonage appropriate in *D.* which was diſcharged of Tithes, and afterwards the Abbot purchaſed Part of the Lands, ſo that the Tithes were ſuſpended during the Poſſeſſion of the Abbot, but after that, the Abbey was ſurrendred into the Hands of the King, in the 30th Year of *H.* 8, and afterwards the ſame Poſſeſſion was given to the King, by the Statute of 31 *H.* 8. as they were in the Hands of the Abbot, the Opinion of Mr. *Plowden* was, that the Lands ſo purchaſed by the Abbot before the Surrender, were not diſcharged of Tithes by the Statute, for that no Lands are diſcharged by the Statute, but ſuch Lands as were lawfully diſcharged in Right by Compoſition, or other lawful Means; and the Lands in this Caſe were not diſcharged in Right, but ſuſpended during the Poſſeſſion of the Abbot in his own Hands; and ſo he ſaid it is, when the Land is purchaſed by One, and the Parſonage by another, the Right of Tithes is renewed, and the Lands charged as before the Purchaſe of the Abbot; and ſo it had been adjudged. *Mich.* 17 *Eliz. B. R. Godbolt*, *p.* 1.

Where the Tithes were ſuſpended during the Poſſeſſion of the Abbot, *&c.*

Alſo when upon a Prohibition the Surmiſe was, that the Land out of which the Tithes were demanded, was Copyhold, Parcel of a Manor of which a Prior was ſeiſed in Fee, and was alſo *Parſon Imparſonee*, and that by this Union the Tithes were extinct, it was held, that the Surmiſe was not good, for that the Union was no Diſcharge of Tithes of the Copyholders. *Mich.* 27 & 28 *Eliz. Bruncher*'s Caſe, *Moor* 219. And ſo *Popham* held in *Benton* and *Trot*'s Caſe, *Mich.* 40 & 41 *Eliz. Moor* 528.

Union no Diſcharge of the Tithes of Copyhold.

Monaſteries.

Three Sorts of Orders diſcharged from paying Tithes for Lands in their own Hands.

Thoſe Lands that before the Diſſolution, and to that Time, were held diſcharged from the Payment of Tithes, whilſt in the actual Occupation and Manurance of the Owners thereof, and diſſolved by the Statute of 31 *H.* 8. were the Lands held by thoſe of the Orders of the Ciſtertians, Hoſpitallers, and Præmonſtrans; for though in the Time of *H.* 2. and about the Year 1150, Pope *Adrian* the Fourth reſtrained this Privilege to Three Orders, *viz.* the Ciſtertians, the Templers and Hoſpitallers; and after, Pope *Clement* the Third did, by his Bull, give the ſame Privilege to the Præmonſtratenſes. See *Dickenſon*'s Caſe, *Hill.* 1 *Car. Bendloes* 164. *Selden of Tithes* 120. So that Four Orders were then ſo privileged, yet the Templers being condemned for Hereſy, and diſſolved in the 4 *Ed.* 2. there remained but Three of the aforeſaid Orders that were free from paying Tithes for the Lands in their own Hands, when the Statute 31 *H.* 8. was made, and yet not all the Lands they had at that Time were ſo privileged; for no Lands obtained by any of thoſe Orders after the Council of *Lateran*, which was in the Year of our Lord 1215, were freed from the Payment of Tithes whilſt manured by themſelves, and by conſequence no Lands belonging to the Abbies of thoſe Orders that were founded after that Council are diſcharged of the Payment of Tithes, either in the Owner, or in the Tenants Hands; for by that Council the Privilege was limited to ſuch Lands, as thoſe Orders had at the Time of the Council. *Selden's Hiſtory of Tithes* 121. And it hath been held *per Curiam*, that the Council of *Lateran*, which thus freed theſe Orders from the Payment of Tithes, was a general Law received in *England*, and if Lands were diſcharged of Tithes by that Council, that no After-Covenant or Contract made by any Abbot to pay Tithes could diſpenſe with this Privilege, or make them liable to Tithes, for once diſcharged by this Council, and always diſcharged, this Council being as forcible as an Act of Parliament which concludes all Parties: And the Court were alſo of Opinion, that if there were Agreement for Payment of Tithes before this Council, that yet the Council as a general Law, which includes all Mens Conſent, had diſſolved ſuch Agreement, *Paſch.* 1657, in *Scaccar. Stavely* v. *Ullithorn*, *Hardres Rep.* 101, nor were all the Houſes of thoſe Orders not ſurrendred or diſſolved by Statute 27 *H.* 8. diſſolved, or ſurrendred by Force of Statute 31 *H.* 8. for thoſe of the Hoſpital of St. *John*'s of *Jeruſalem* were diſſolved by Statute 32 *H.* 8. *c.* 24, and not before, *Hurry* v. *Boyes*, *Brownl.* and *Goldſb.* 2. *part* 8, ſo their Lands not privileged from paying Tithes by Statute 31 *H.* 8. as will be ſhewed. But the Lands of ſuch of the Houſes of theſe Orders that were diſſolved by Statute 31 *H.* 8. ſhall be free from the Payment of Tithes, ſo far as they were free in the Hands of the Church-men, *viz.* whilſt they ſhall be in the Hands and Manurance of the Owners thereof; it is therefore neceſſary for the Party who pretends to have Advantage of this Privilege, expreſly to ſhew and aver, that the Lands are in his Hands and Manurance; for to ſay, that he is ſeiſed of the Land is not ſufficient, for he may be ſeiſed thereof, and yet another manure them. *Hill.* 1 *Car. Dickenſon*'s Caſe, *Bendloes* 164, and *Noy*'s Opinion in Sir *Richard Weſton*'s Caſe, *Bendloes* 168, 169. And if the Lands of ſuch Orders ſo privileged were in Leaſe for Years at the Time of their Diſſolution, and for certain Years before, yet the Lay-Owners ſince the Diſſolution ſhall hold them diſcharged whilſt manured by themſelves; for although the Farmer paid Tithes at the Time of the Diſſolution, yet as to the Abbot the Inheritance was then diſcharged of Tithes, and the King or his Patentee ſhall have and hold it diſcharged as the Abbot held it. *Hill.* 17 *Jac. B. R.*

Council of *Lateran*, a general Law in *England*, &c.

St. *John*'s of *Jeruſalem* were diſſolved by 32 *H.* 8. *c.* 24.

Lay Owners ſince the Diſſolution.

Porter v. *Bathurſt*, 2 *Croke* 559, and *Paſch.* 13 *Car.* 2. in *Scaccar.* *Wilſon* v. *Reedman*, *Burton & al'*, *Hardres* 190. Monaſteries.

Yet when an Abbot having ſuch Privilege, had in the Time of *Ed.* 4. made a Gift in Tail, though the Abbey was diſſolved by the 31 *H.* 8. it was reſolved, that by the Clauſe of Diſcharge of Tithes in the aforeſaid Statute, the Donee and his Heirs ſhould not be diſcharged of Tithes, for the Statute diſchargeth none but as the Abbot was diſcharged at the Time of Diſſolution; ſo that they muſt claim the Eſtate and Diſcharge under the Abbot; but if by a common Recovery the Reverſion had been barred before or after the Statute, or if that the Land had returned to the Abbot, or King, before or after the Statute, the Caſe had been otherwiſe. *Hill.* 4 *Car.* *Farmer* v. *Sherman*, *Hetley* 133, ſame Caſe, *Hob.* 248. Where Donee and his Heirs not diſcharged.

Alſo whilſt the King's Title to ſuch Lands doth remain, ſo that they be manured by his Farmers, or Tenants for Years, or at Will, no Tithe ſhall be paid of them, although Tithes of them ſhould have been paid by the Farmers, or Tenants of the Abbots, or Priors that had them, and the Reaſon given is, becauſe the King himſelf cannot manure them; but if the King having leaſed them, granteth over the Reverſion, or doth ſell them, the Farmers ſhall pay Tithes; by *Manwood* Chief Baron, 29 *Eliz.* in the *Exchequer*, the Counteſs of *Linnox*'s Caſe, 2 *Leon.* 71, ſame Caſe, *Owen*, *p.* 56. But *Tanfield* Chief Baron ſaid, that the King's Tenants for Life or Years ſhall not be free in this Caſe, but only his Tenants at Will, *Moor* 915; and it was agreed *per Curiam*, that the King's Patentee is to be intended of the King's Farmers; not Patentees in Fee, for in the Caſe of the Foreſt of *Savernacle*, it was agreed, that the King's Patentee ſhould pay Tithes. *Paſch.* 18 *Car.* 2. *Bowls* v. *Atkins*, 2 *Keb.* 29; ſo it is alſo ſaid in the Caſe of *Compoſt* v.----*Mich.* 14 *Car.* 2. *Hardres* 315, that if the King alien any of the Lands whereof he is diſcharged of Tithes, his Patentee ſhall pay Tithes, and not only ſo, but the Preſcription is deſtroyed for ever, though the ſame Lands ſhould afterwards come into the King's Hands again by Eſcheat, or otherwiſe, however the Reverſioner and King's Patentee and their Aſſigns ſhall have the ſame Privilege that the Abbot had, *viz.* to hold them free whilſt in his own Hands, and manured by him, and not let to, or manured by another. *Paſch.* 21 *Jac.* *Stonehouſe* v. *Read*, *Bendlows* 143. Where the King's Farmers or Tenants are diſcharged.

The next Statute after the 31 *H.* 8. for the Diſſolution of Religious Houſes, *&c.* was 32 *H.* 8. *c.* 24, which was made on Purpoſe to diſſolve the Hoſpitals of St. *John*'s of *Jeruſalem* in *England* and *Ireland*, either for that (as ſome think) thoſe of this Order had Power to purchaſe, but not to ſurrender, or becauſe they were beyond Sea at this Time, and would not, nor could not be compelled to ſurrender, as other Religious Houſes did, whoſe Poſſeſſions therefore are at this Day held Tithe-free as the Spiritual Men held them, by Virtue of 31 *H.* 8. although ſurrendred after the Statute was made; and ſo would the Lands of the Hoſpital of St. *John*'s of *Jeruſalem* without doubt, and the Templers Lands given to them by Stat. 17 *Ed.* 2. had they been ſurrendered as others were, and not diſſolved by ſpecial Act of Parliament, *viz.* 32 *H.* 8, upon which Occaſion great Doubt and Diſpute hath been, whether they ſhall be held Tithe-free by the King and his Patentee, as the Religious Corporations held them, *viz.* whilſt they are manured by the Owners thereof. As to which, two Queſtions have been made, Firſt, whether by the Stat. 31 *H.* 8. they were diſcharged; if not, if by Stat. 32 *H.* 8. I find that when the Caſe was, that the Prior of Saint *John*'s of *Jeruſalem*, *&c.* made a Leaſe for Stat. 32 *H.* 8. *c.* 24. of the Hoſpitals of St. *John*'s of *Jeruſalem*. Their Lands were not ſurrendred.

Monasteries.

for Years of a Manor, two or three Years before the Diſſolution, and the Leſſee did pay Tithes to the Church of *Rocheſter* Proprietary, and after the Diſſolution, the King granted a Reverſion in as ample Manner as the Prior had the ſame; it was held in Chancery by the Lord Keeper, *Sanders*, *Southcott* and *Dyer*, upon Conſideration of Stat. 31 *H.* 8. *c.* 13. that after the Lands came to the Hands of the Reverſioner, they ſhall be diſcharged from the Payment of Tithes until they be let out to others to farm. *Trin.* 10 *Eliz.* *Dyer* 277. After this, upon a Suit for the Tithes of Lands formerly belonging to the Templers, and which came to the Crown by the Diſſolution of the Hoſpital of Saint *John*'s of *Jeruſalem*, as all the Lands formerly the Templers did among others, it was held, that the Patentee of ſuch Lands ſhould not crave the Privilege to be diſcharged from paying Tithes in reſpect thereof; for by the Common Law, a Lay Perſon was not capable of this Privilege. And if ſuch Lands had come to the King by the Relinquiſhment, or Diſſolution of any Monaſtery, the King ſhould not have had the Benefit of that Privilege until the Stat. of 31 *H.* 8. And by that Statute it is appointed, that all Monaſteries, Abbies, *&c.* which before had come, or afterwards ſhould come to the King by Suppreſſion, Surrender, *&c.* the King ſhould have in ſuch Manner and Form, *&c.* and that he ſhould have them diſcharged from the Payment of Tithes, as the Abbots, *&c.* ſo as the Makers of that Law intended, that by the firſt Clauſe without the laſt, the King ſhould not hold them diſcharged; therefore they added that Clauſe. But this Statute extends only to ſuch Poſſeſſions, which came to the King by Surrender, *&c.* and ſhould be veſted in him by Force of the ſaid Act, and doth not extend to Poſſeſſions which veſted in him by another Act of Parliament, according to the Rule taken in 2 *Coke*, *fol.* 46, in *The Archbiſhop of Canterbury*'s Caſe. And theſe Lands were here given to the King, by a Special Act of Parliament, 32 *H.* 8, which hath the ſame Words in the firſt Clauſe as the Act of 31 *H.* 8, hath, but hath not the Second, therefore there is no Cauſe of holding them diſcharged from Tithes. And it was adjudged accordingly, and in the ſame Term a like Judgment was between the ſame Parties in a Prohibition upon a Demurrer, *Hill.* 2 *Jac. B. R.* *Cornwallis* v. *Spurling*, 2 *Croke* 57. *Hill.* 44 *Eliz.* *Quarles* v. *Spurling*, *Moor* 913, and in *Urrey* and *Bowyer*'s Caſe, 2 *Brownlow* 8, 20, it was holden by *Coke* and *Nichols* againſt *Winch* and *Warburton*, that a Purchaſer of Lands of St. *John*'s of *Jeruſalem* ſhould pay Tithes, and in the 18 of *Jac. C. B.* all the Judges but *Warburton* held, that the Purchaſer ſhould pay Tithes as is ſaid. *Noy*, *Paſch.* 3 *Car. B. R.* in *Whittle* and *Weſton*'s Caſe, *Godbolt* 392, and in *Bendloes Rep. Hill.* 1 *Car.* and *Trin.* 2 *Car.* 168, 185. And at laſt it was argued at the Bench by the Four Juſtices. *Whitlock* held, that the ſaid Lands were not diſcharged of Tithes, neither by the 31 *H.* 8, nor by the 32 *H.* 8. *Hide* Chief Juſtice held, that they were diſcharged by the 32 *H.* 8, and not by the 31 *H.* 8. *Doderidge* and *Jones* held, that they were diſcharged by the Clauſe of Diſcharge in the 31 *H.* 8, if not, yet by the 32 *H.* 8, ſo that of the Four Juſtices, only *Whitlock* held, that ſuch Lands were not free from the Payment of Tithes; therefore Judgment was given that no Tithes ſhould be paid of ſuch Lands, *viz.* whilſt manured by the King, or his Patentee, and not let to others. *Trin.* 4 *Car. B. R.* *Whitton* v. *Weſton*, *Jones* 182. *Latch* 89. And afterwards, this Matter came into Queſtion again, and upon a Special Verdict found, it was adjudged by *Hales*,

Diſcharged in the Reverſioner's Hands until, *&c.*

Patentee of Templers Lands not diſcharged.

Purchaſer to pay Tithes.

then being Lord Chief Juſtice, that the Lands which came to the Crown by Stat. 32 *H.* 8. *c.* 24, ſhall not pay Tithes by reaſon of the Word [Privileges] in that Statute, and here all the Caſes before-mentioned were cited and conſidered. 25 *Car.* 2. *B. R. Foſſet* v. *Franklin*, *Raym.* 225. 3 *Keb.* 208, 217. Monaſteries.

After the King had gotten all, both leſſer and greater Monaſteries, and the Hoſpital of St. *John*'s of *Jeruſalem*, the Parliament proceeded to diſſolve, and give away the Lands to the King belonging to Chantries and Free Chapels, for which End the Statutes of 37 *H.* 8. *c.* 4, and 1 *Ed.* 6. *c.* 14, were Enacted; but I find no Caſe of Law adjudged, or mentioned in the Books, concerning the Lands that came to the Crown by Stat. 37 *H.* 8, but only upon thoſe that came by Stat. 1 *Ed.* 6, which ſeems to be the ſame, and therefore I ſuppoſe the Law is the ſame as to both. 37 *H.* 8. *c.* 4. and 1 *Ed.* 6. *c.* 14. as to Chanteries and Free Chapels.

As to the Statute 1 *Ed.* 6. the Caſe was, that the Maſter of a College, (the Lands belonging to which came to the King by this Statute) held ſome of his Lands with a Rectory *ſimul & ſemel* diſcharged of Tithes at the making of this Statute, and of the Stat. 31 *H.* 8. and after the Statute, the Farmer of the Rectory ſuing the Farmer of the Lands for the Tithes thereof, the Defendant ſhewed this Matter, and alledged the Branch of Diſcharge in 31 *H.* 8. and it was reſolved, that the College, *&c.* that came to the King by 1 *E.* 6. came to him by that Statute only, and not by the general Words in 31 *H.* 8. **All Colleges, &c. which hereafter ſhall happen to be diſſolved, or by any other Means come to the King's Highneſs, &c. ſhall be adjudged to be in the actual Poſſeſſion of the King, &c.** *Firſt*, becauſe the Words [all other Means] cannot be intended of an Act of Parliament, being put after Words inferior thereunto, as Renouncing, Relinquiſhing, Forfeiture, *&c.* an Act of Parliament being the higheſt Manner of Conveyance; upon which Reaſon it hath been adjudged, that Biſhops are not intended in Statute 13 *Eliz.* *c.* 10, by the Words [others holding ſpiritual Promotions,] thoſe Words being put after Colleges, Deans and Chapters, *&c.* *Secondly*, becauſe the Statute of 1 *Ed.* 6. doth enact, **That all Colleges, &c. ſhall be by Force of that Act adjudged to be in the actual and real Poſſeſſion of the King**; therefore that Statute thus enacting, they cannot be in the King by the former Statute. And it was alſo adjudged, that the Branch in 31 *H.* 8. did not extend to any other Monaſteries, than what came to the King by the Statute of 31 *H.* 8. becauſe what would be given by another Statutte, or that any Thing would be given thereby, could not be then foreſeen, and that Lands, which came to the Crown by the 1 of *Ed.* 6. are not diſcharged of Tithes by the Words of that Statute, that the King ſhall have the Lands of Colleges, *&c.* **in as ample and large Manner, as the ſaid Prieſts, Wardens, &c. had or injoyed the ſame,** for that theſe general Words ſhall not diſcharge the Land of any Tithes, becauſe they do not iſſue out of the Land, but are things diſtinct from the Land. *Trin.* 38 *Eliz.* *B. R.* *The Archbiſhop of Canterbury*'s Caſe, 2 *Coke* 46, ſame Caſe, *Moor* 240. That Colleges coming to the King by 1 *Ed.* 6. came to him by that Statute only. 1. Reaſon. 2. Reaſon. That Lands which came to the Crown by 1 *Ed.* 6. are not diſcharged by 31 *H.* 8.

As by Act of Parliament Lands are made perpetually Tithe-free, as hath been ſhewed; ſo by Act of Parliament Lands are free from the Payment of Tithes for a certain Time, as by 2 & 3 *Ed.* 6. in which there is this Proviſo, **Provided always, and be it enacted by the Authority aforeſaid, That all ſuch barren Heath or Waſte-Ground, other than ſuch as be diſcharged from the Payment of Tithes by Act** Land freed by Act of Parliament for a certain Time. 2 & 3 *Ed.* 6. *c.* 15.

Diſcharge of Tithes.

of Parliament, which before this Time have layen barren, and paid no Tithes by reaſon of the ſame Barrenneſs, and now be, or hereafter ſhall be improved and converted into arable Ground or Meadow, ſhall from henceforth, after the End and Term of ſeven Years next after ſuch Improvement fully ended and determined, pay Tithe for the Corn and Hay growing upon the ſame; any Thing in this Act to the contrary in any wiſe notwithſtanding.

Provided always, and be it enacted by the Authority aforeſaid, That if any ſuch Barren, Waſte or Heath-Ground, hath before this Time been charged with the Payment of any Tithes, and that the ſame be hereafter improved or converted into arable Ground or Meadow, that then the Owner or Owners thereof ſhall, during the ſeven Years next following from and after the Improvement, pay ſuch kind of Tithe as was paid for the ſame before the ſaid Improvement; any Thing in this Act to the contrary in any wiſe notwithſtanding. Stat. 2 & 3 Ed. 6. cap. 13.

Heath and barren Ground intended by the Statute.

The Heath and barren Ground intended by this Statute, ought to be ſuch Land which is barren in its own Nature, and will not bear Corn, *&c.* of itſelf without very great Coſt in the extraordinary Manuring thereof. *Paſch.* 14 *Jac. B. R. Witt* v. *Buck*, 3 *Bulſt.* 65. To the ſame Effect it was ſaid by *Powell* Juſtice; barren Land incloſed, which is within the Meaning of Stat. *Edw.* 6. to be exempted from Payment of Tithes, muſt be ſuch Land as is Barren *ſuapte natura*, which is afterwards burnt, and the Land converted into Tillage. And on a Suggeſtion for a Prohibition to a Suit for Tithes of ſuch Land, it muſt be alledged to be barren *ſuapte natura*, 2 *Ld. Raym.* 991. and albeit that it doth yield ſome Fruit, yet if it be barren Land *quoad agriculturam*, as to Tillage, which this Statute meant to advance, it is within this Act, 2 *Inſt.* 655, yet it is ſaid by *Richardſon*, that if ſuch Land yielded before the Improvement any Profit, as if Sheep were kept thereon, or if it produced any other Profit that did yield Tithes, ſuch Tithes ſhall be paid as hath been paid thereof. *Mich.* 5 *Car. C. B. Flower* v. *Vaughan*, *Hetley* 147.

If barren in its own Nature.

This is by the expreſs Words of the Proviſo in the Statute: But if the Land be truly barren in its own Nature, although it paid, before its Improvement for Tillage by extraordinary Charge, Tithe of Wool and Lamb, yet no other Tithes ſhall be paid thereof than Wool and Lamb, and that by this Statute. *Mich.* 1 & 2 *Eliz. Dyer* 170, 171. But if barren Land, by reaſon of Sheep, *&c.* kept thereon, might have yielded ſome Tithes, and yet no Tithes were paid thereof, if it be Land capable of a Diſcharge from the Payment of Tithes, of which this Non-payment may be an Evidence, if ſuch Land by Charge and Induſtry be improved and made fruitful, yet it ſhall not pay any Tithes; for the Improvement of Land not Tithable by Law cannot make it become Tithable; for this were to alter the Law, and to make a Conſtruction contrary to the Intent of the Statute, which was to incourage Improvements by freeing ſuch Land for ſeven Years from paying Tithes, which elſe was liable; but not to charge Lands with the Payment of Tihtes, which by Law before the Improvement were Tithe-free, *Stile's Regiſt.* 625, and the Statute doth particularly except Lands diſcharged from the Payment of Tithes by Act of Parliament, that ſuch Lands ſhall not after the ſeven Years be liable to pay Tithes by Force of this Statute; but if Land hath not paid Tithes within the Memory of Man by reaſon of its Barrenneſs, occaſioned by Accident only, and not from its own natural Sterility, and the Owner, or Occupier, with great Charge makes it fit

If Land was barren by Accident only, and after improved.

for Tillage, Hay, or Paſture, yet Tithes ſhall be preſently paid upon the Improvement thereof, without reſpect to the Favour of this Proviſo. Diſcharge of Tithes.

Therefore, if Marſh and Sandy Land hath been covered with Salt-Water, ſo that Time out of Mind no Graſs had been there known to grow, nor any Profit at all thereof made, until at length, by great Charges and Induſtry, this Ground had been lately gained from the Sea, by making coſtly Banks and Sea-Walls, and continual Reparation thereof; yet this yielding no Profit as being barren by Accident only, *viz.* through the Flowing of the Sea thereon, and not from its natural Barrenneſs, ſhall have no Benefit of this Statute for ſeven Years, but ſhall yield a Tithe to the Parſon immediately; and though Land that hath formerly paid Tithe, be after overflown for two, three, or more Years, the Parſon can have no Tithe for the Time, yet if the Land be regained, though at great Charges and Induſtry, Tithes ſhall be paid thereof, as of other Lands, according to the Profit that it yields; and all this was agreed *per Cur. Paſch.* 14 *Jac. B. R. Witt* v. *Buck*, 3 *Bulſt.* 65, ſame Caſe, 1 *Roll's Rep.* 354, and *Sherington* and *Fleetwood*'s Caſe, 3 *Croke* 475; ſo it hath been adjudged, that Fenny Land drained ſhall pay Tithes, notwithſtanding this Statute. *Hill.* 38 *Eliz. Moor* 430. So if Lands have been full of Thorns and Buſhes, Time whereof, *&c.* and by grubbing are made arable, or Meadow Land, Tithes ſhall be preſently paid thereof, notwithſtanding this Statute; for ſuch Land of their own Nature are not barren, but by Negligence and ill Huſbandry became ſo. *Sherrington* and *Fleetwood*'s Caſe, 3 *Croke* 475, ſame Caſe, *Moor* 909; and *Coke* Chief Juſtice ſaid, that it had been reſolved in one *Farrington*'s Caſe, that Wood Ground is not barren Ground within this Statute, and that if one do ſtock or grub up Wood, and after convert it into arable Ground, tho' by this he hath meliorated the Land, and that by great Coſt and Labour, yet he ſhall pay Tithes for this Ground preſently, becauſe the Land in its own Nature is not barren; in *Witt* and *Buck*'s Caſe, *Paſch.* 1 *Jac. B. R.* 3 *Bulſt.* 65, and to this *Dodderidge* agreed in the ſame Caſe, 1 *Roll's Rep.* 354. 2 *Inſt.* 655. And if the Queſtion be, whether barren Land or not, it ſhall be tried at the Common Law, and not in the Spiritual Court, *Paſch.* 13 *Car.* 2. 1 *Keb.* 253; therefore in a Suit for Tithes in the Spiritual Court, if the Defendant pleads 'tis barren Land, and that Plea be refuſed, or Iſſue taken upon it, there a Prohibition ſhall be granted; but a Prohibition ſhall not be granted upon Suggeſtion only that 'tis barren Land, before it be pleaded in the Spiritual Court. *Mich.* 14 *Car.* 2. *B. R.* 1 *Keb.* 387.

Land gained from the Sea, Tithable.

So Fenny Land drained.

So Thorny Land made Arable.

Barren Land or not, how triable.

CHAP.

Predial Tithes.

CHAP. XLIX.

Predial Tithes, what, and in what manner payable, and what Modus Decimandi *in Diſcharge of ſuch Tithes is good.*

Tithes, *de Jure Communi*, are only to be paid in reſpect of Land.

BY what hath been ſaid it appears, that Tithes are to be paid only for Lands not exempted from the Payment thereof; I am next to ſhew, in what reſpect Tithable Lands are to yield their Tithe, or of what Things, with reſpect to the Lands, Tithes are or are not to be paid. *Firſt*, Then we muſt remember what hath been ſaid, that *De Jure Communi* Tithes are to be paid only in reſpect of Land, of the Fruits of the Earth, or of ſuch Things which do yield a yearly Increaſe by the Act of God, yet not of all ſuch Things, or of them in all Caſes. That I may therefore ſhew of what Fruits of the Earth, or Things, Tithes by Law are payable, it may be of Uſe here to note, that Tithes have been divided into Predial, Mixt and Perſonal. Predial Tithes are ſuch which ariſe meerly of the Earth, as the Fruits thereof, of which Sort are all Kinds of Grain, 2 *Inſt.* 649; Hay, Underwood titheable, Trees, and the Fruits of all Trees, as Acorns, Maſt, Apples, Pears, Cherries, Grapes, *&c.* 2 *Inſt.* 649; the Seeds of Rape and Woad, Hops, Saffron, Flax, Hemp; Garden-Herbs, as Mint, Parſly, Annis, Rue, Sage, *&c.* Mixt Tithes are thoſe which are from the Earth alſo, but by Means of Beaſts depaſtured thereupon, or otherwiſe nouriſhed with the Fruits thereof, as Colts, Calves, Lambs, Roes, Kids, 2 *Inſt.* 649. 1 *Roll's Abr.* 635. Milk, Cheeſe, Wool, Eggs, Chickens, Geeſe, Ducks, Swans, *&c.* 2 *Inſt.* 649. Perſonal Tithes are ſuch Profits which ariſe by the honeſt Labour and Induſtry of Man, imploying himſelf in ſome perſonal Work, Artifice, or Negotiation, as by Buying, Selling, Merchandizing, Fiſhing, Fowling, Hunting, following any Trade, as of Carpenter, Smith, Maſon, Butcher, *&c.*

1. Predial Tithes, what.

2. Mixt Tithes, what.

3. Perſonal Tithes, what.

Preſcription againſt Predial Tithes.

This being premiſed, I proceed farther to declare, what Things are titheable, and what are not; and Firſt, I ſhall ſpeak of Predial Tithes; as to which the Tithe of all Corn or Grain ought to be duly ſet forth and paid. Yet this Rule doth admit of Exceptions, for a Preſcription may be within a Pariſh, that by reaſon that they have not ſufficient Meadow for Milch Kine, and Draught Cattle, they have uſed to cut ſome of their Tares green, and give them to the aforeſaid Stock, and to be diſcharged of Tithes for the ſame; this is a good Cuſtom, and Conſideration; for that the Parſon hath an Advantage thereby, as well as the Pariſhioner, *viz.* in the Tithe Milk, and Manuring of the other Corn Land; and [*Wray*] ſaid, the Matter is the Want of Meadow, and Paſture, and that the Surmiſe is as if it had been ſaid, that for Want of Meadow and Paſture, they have uſed to eat their Meadows with their Plow-Cattle, and for ſo much as they did eat, to pay no Tithes, which had been good, *Mich.* 30 *Eliz. B. R. Perry* v. *Somes*, 2 *Leon.* 27, and the ſame Caſe, *Croke* 3. *part*, 139; ſo if a Man according to the Cuſtom of the Coun-

try,

try, doth ſow his Land to feed his Horſes for Tillage, and the Uſe hath been to ſuffer the Horſes to be fed upon the Land without any Mowing of the Grain, the Parſon ſhall not have any Tithes thereof, becauſe it is no more than Paſture for his Horſes. *Mich.* 3 *Jac. B. R.* and this is ſaid to be one *Somes*'s Caſe of *Eſſex*, 1 *Roll's Abr.* 646. But it ſeems, that without ſuch Cuſtom green Tares cut to feed labouring Cattle, ſhall be priz'd Tithes, and ſo ſhall the Tithe of Corn ſowed on Headlands, though imployed to the ſame Uſe. For when one libelled for the Tithes of green Tares cut, and Corn ſowed on Headlands, fed with labouring Horſes, a Prohibition was granted, not upon the general Suggeſtion, but upon the Cuſtom of the Pariſh, that no Tithes were paid in thoſe Caſes. *Hill.* 10 *Car. B. R. Mead* v. *Thirman*, *Jones* 337, ſame Caſe, 1 *Croke* 393. 1 *Roll's Abr.* 650, and in theſe Caſes it is ſaid, that in a Prohibition it is not needful to preſcribe to be diſcharged of Tithes, for ſuch Horſes, for that they be diſcharged by the Law, *Hill.* 15 *Jac. B. R. Kneebon* v. *Woodreſt*; by *Mountague* and *Dodderidge*; but *Haughton* thought the contrary, for that their Labour is in manner of a *Modus* for their Tithes; but *Clinch* and *Clarke* ſaid, that of latter Times they have not uſed to preſcribe, but that otherwiſe it was antiently. 1 *Roll's Abr.* 646, 647. In like Manner, if a Man gather green Peaſe to eat in his Houſe, no Tithe ſhall be paid of them, and that by the Law of the Land; but otherwiſe it is, if he gather them to ſell, or to feed his Hogs. *Paſch.* 12 *Jac. B. R. per Cur.* 1 *Roll's Abr.* 647. And in Evidence to a Jury it was ſaid (by *Windham*) that of Hay mown to feed Deer no Tithes are paid; but by *Glyn* and *Finch*, they are due of common Right, and ſhall be paid, unleſs there be a Cuſtom to the contrary. *Paſch.* 18 *Car.* 2. *Proger* v. *Venning*, 2 *Keb.* 22.

Predial Tithes.

Sowing to feed Horſes for Tillage.

Gathering green Peaſe to eat.

Of common Right, the Owner of the Corn ought to cut down, and prepare the ſame, *Mich.* 3 *Jac. B. R. Perry* and *Chancey* adjudged, 1 *Roll's Abr.* 644, and to make it up into Sheafs, Cocks, or Shocks, *Hill.* 15 *Jac. C. B.* Dr. *Bridgman*'s Caſe, *Noy* 31. *Paſch.* 7 *Jac. Roll's Rep.* 172, and *Paſch.* 18 *Car.* 2. *B. R. Ledgar* v. *Langley*, 1 *Sid.* 283, and 2 *Keb.* 25; and if the Owner refuſe to do it, the Parſon may ſue him therefore in the Spiritual Court; but then the Suit ought to be Special, for not ſetting them forth in Cocks; and not generally, for not ſetting them forth. *Layton*'s Caſe, *Latch* 125. But having made the Corn into Sheafs, he is not bound to ſet it up in Heaps, unleſs the Cuſtom of the Place oblige him thereunto; but having bound it into Sheafs, or made it into Cocks, he may ſet forth the Tithes thereof, and thereby they become Lay Chattels, *Smith*'s Caſe, *C. B. Goldſborough*, and then he may heap his own Sheafs, or do with them as he pleaſeth, and the Tithes being ſet forth, the Owner is not bound to watch or look after them till the Parſon carries them away. *Hill.* 15 *Jac. C. B.* Dr. *Bridgman*'s Caſe, *Noy* 31. *Hill.* 6 *Jac. B. R. per Cur.* 1 *Roll's Abr.* 644. And the Parſon is to carry them away in reaſonable Time; therefore an Action on the Caſe (but no Treſpaſs *vi & armis*) lies againſt a Parſon, *&c.* for not carrying away his Tithes being ſevered from the nine Parts; and it is not lawful for the Pariſhioner to put in his Cattle, and eat the Tithe-Corn. *Shapcott* v. *Mugford*, 1 *Ld. Raym.* 187, 188, 189; and by *Holt* C. J. ſuch Turning in of Cattle makes the Severance fraudulent. *Gale* v. *Ewer*, *Comy.* 24. In this laſt Caſe, it is determined that Notice is not neceſſary.

For not ſetting out Corn in Sheafs, Cocks, &c.

If the Cuſtom of the Place be, to meaſure forth to the Parſons the tenth Part of the Corn whilſt growing upon the Land, this Manner of Tithing is I conceive to be obſerved, and the Parſon muſt ſit down by it;

Cuſtoms of ſetting out Tithe Corn.

Predial Tithes.

or if the Cuſtom be, that the Parſon ought to have for his Tithe of Corn, the tenth Land of Corn, beginning at ſuch Land as is next to the Church, this Cuſtom is good; and when in ſuch Caſe, the Pariſhioners by Covin, to defraud the Parſon, did not manure and ſeed ſuch Lands (the Corn upon which would by the Cuſtom be to the Parſon) ſo ſufficiently as their other Lands, and the Parſon therefore did ſue in the Spiritual Court generally for the tenth Sheaf and Shock, a Prohibition was awarded, notwithſtanding the Covin; becauſe 'twas ſaid, that the Parſon might have his Remedy at the Common Law for the Fraud. *Paſch.* 30 *Eliz.* *Stebbs* and *Goodlock*'s Caſe, *Moor* 913, ſame Caſe, and 2 *Leon.* 70. But *Wray* Juſtice was of the Opinion, that the Cuſtom was againſt common Reaſon, but agreed that if that Cuſtom be good, the Parſon ſhall have his Action on the Caſe, for the fraudulent Sowing and Manuring of the Lands.

The Tenth of common Right.

When the Tithes of any Sort of Corn are ſet forth, the Tenth thereof muſt be appointed for the Parſon, that is, of common Right; therefore if a Preſcription be to pay certain Sheafs of Corn for all Tithes of Corn, this is no good Preſcription, for the Pariſhioner ought to make it into Sheafs, and therefore Part of his Duty in Kind, cannot be in Satisfaction of the Reſidue. *Paſch.* 13 *Jac. B. R.* 1 *Roll's Rep.* 173. But where Tithes are not due of common Right, but by particular Cuſtom, there a Cuſtom to pay a leſs Share than a Tenth, without other Conſideration (as for Tithe Fiſh, *&c.*) may be good, although this is left as a *Quære.* *Paſch.* 18 *Car.* 2. *B. R.* *Shippard* v. *Penrows,* 1 *Sid.* 278. 1 *Lev.* 179, and 2 *Keb.* 2. *Holland* v. *Heale, Noy* 108, and when one did preſcribe to pay in one Part of the Land the third Part of the Tenth, and in another Part the Moiety of the Tenth of Corn, for all manner of Tithes, the Court did incline that the ſame was a good Preſcription. *Hill.* 19 *Eliz. B. R.* *Root*'s Caſe, *Godbolt* 7.

Of odd Sheafs or Shocks.

And if the Cuſtom be, that if the odd Sheafs, or Shocks, under the Number of Ten, ſhall not be tithed, by reaſon that they ſet the Tithes up in Heaps, or Shocks, which of common Right the Owner of the Corn is not bound to do, the Owner is not bound to divide the ſaid Sheafs, or Shocks, and ſet forth the Tenth thereof, for that ſuch Cuſtom upon ſuch Conſideration is good. *Anonymus, Latch Rep.* 226.

If Tithe of Rakings.

The tenth Sheaf, or Shock, being ſet forth for the Parſon, if the Owner of the Corn, after the Sheafs or Shocks be carried away, ſhall rake his Land on which they grew, by the Cuſtom of this Realm, no Tithe ſhall be paid of the Rakings, as was ſaid to be adjudged 41 & 42 *Eliz. B. R.* in *Grent* and *Hunt*'s Caſe, cited in *Berd* and *Adams*'s Caſe, *Trin.* 31 *Eliz.* *Moor* 278. 1 *And.* 199. But in that Caſe of *Berd* and *Adams*, the contrary was adjudged, *viz.* that Tithes ſhall be paid of Rakings, becauſe the tenth Sheaf, or Shock of Corn, is Satisfaction for no more than the Grain of which it is the Tithe, and no Satisfaction for the Rakings; and this ſeems alſo to be agreed, and it is ſaid to be adjudged accordingly, *Mich.* 36 & 37 *Eliz. B. R.* *Jeſop* and *Paine,* 3 *Croke* 363; ſo it is ſaid to have been adjudged in Sir *Charles Moriſon*'s Caſe, that if one preſcribed to pay the tenth Part of Corn in the Sheaf, for the Tithes of all that is in the Sheafs, and of all which is raked, it is a void Preſcription, becauſe the Owners of the Corn are to pay the Tithes of both, and it is an unreaſonable Preſcription, for that then the Owner might put the leſſer Part into Sheafs, and leave the greater Part to be raked. *Griſman*'s Caſe v. *Lewis, Mich.* 37 & 38 *Eliz. C. B.* 3 *Croke* 446.

Predial Tithes.

Difference reconciled.

But to reconcile this Difference, if the Cuſtom be laid, to put the Corn into Sheafs, or Cocks, and to pay the tenth Cock in Satisfaction of the Tithes of the Corn, and of the Rakings, *minus voluntarie* diſperſed, this is good. *Mich.* 41 *Eliz. B. R. Green* v. *Hun*, 3 *Croke* 702. *Mich.* 2 *Jac. B. R. Parry* v. *Chanſey*, *Noy* 15, and the Books generally ſay, that if the Corn reaped be not covenouſly ſcattered, or left unbound, to the Intent to deceive the Parſon, then no Tithes are to be paid of the Rakings; but if fraudulently left, and raked, the Tithe of all the Rakings is to be paid. *Hill.* 8 *Car. Saunders* and *Paramour*'s Caſe, *per Cur. Mich.* 14 *Jac. B. R. Joyce* and *Parker*'s Caſe, and *Hill.* 14 *Jac. Peck* and *Harris*'s Caſe, 1 *Roll's Abr.* 645. *Paſch.* 41 *Eliz. Awberry*'s Caſe, *Moor* 910. *Paſch.* 14 *Jac. B. R. Pitt* v. *Harris*, 1 *Roll's Rep.* 379. *Paſch.* 41 *Eliz. B. R. Johnſon* v. *Awberry*, 3 *Croke* 660. *Mich.* 41 *Eliz. Green* v. *Hun*, 3 *Croke* 702. *Sherrington* v. *Fleetwood*, 3 *Croke* 475, and by *Haughton* Juſtice in *Foſſe* and *Parker*'s Caſe, *Bulſtrode* 3 *Part*, 243. *Peters* v. *Prideux*, 3 *Keb.* 251, 284. If a Prohibition be granted upon a Suggeſtion, that a Perſon is ſued for Rakings, in the Spiritual Court without any Averment that the Rakings were *minus voluntarie* diſperſed, 'tis good, for that ought to be ſhewed on the Part of the Defendant to have a Conſultation, if the Rakings were foul Rakings, and of conſiderable Value. *Paſch.* 14 *Jac. B. R. Pitt* v. *Harris*, 1 *Roll's Rep.* 379. *Mich.* 41 *Eliz. Green* v. *Hun*, 3 *Croke* 702. Yet in this Caſe of *Pitt* and *Harris*, as abridged 1 *Roll's Abr.* 645, it is ſaid to be adjudged, that upon a Prohibition, the Suggeſtion ought to be, that the Rakings were *minus voluntarie ſparſæ*, otherwiſe it is not good, and that it is not ſufficient to ſay that they were *Lapſæ & diſſipatæ in Collectione.* See the Caſe of *Peters* v. *Prideux* before cited, 3 *Keb.* 251, 284; neither is it a good Suggeſtion, that in Conſideration that the Pariſhioner having Barley, the greater Part of which he cut down and bound into Sheafs, and put into Cocks, whereof the Parſon hath the tenth Cock, that he uſed to leave a ſmall Parcel of the Barley ſtanding, to the Intent to cut it down afterwards to make Bands for the Rakings involuntarily ſcattered, and to be diſcharged of the Tithes of this ſmall Parcel of Barley, when cut down. *Hill.* 8 *Car. B. R. Saunders* and *Paramour*'s Caſe, *per Cur.* 1 *Roll's Abr.* 650.

If foul Rakings.

If Tithes of Stubble or After-Crop.

As no Tithes are to be paid of the Rakings of Corn duly tithed, ſo neither of the Stubble left on the Ground in Reaping thereof, though the ſame be cut for Thatch, or other Uſes; and this Juſtice *Tanfield* ſaid, had been adjudged in one *Edolp*'s Caſe, *Green* and *Auſten*'s Caſe, *Paſch.* 4 *Jac. B. R. Yelv.* 86. *F. N. B.* 53. *b.* 1 *Rolls Abr.* 640, 641; neither is the Owner of the Corn, having ſet forth and paid the Tithes thereof, to pay any Tithe of the After-Crop, or Grotten, or Graſs of the ſame Lands. *Baxter* v. *Hopes*, *Mich.* 9 *Jac. Brownl.* and *Gouldſb.* 2 *Part*, 30. 2 *Inſt.* 552, *nor for any Agiſtment in ſuch Lands.* 1 *Roll's Abr.* 641. Yet I conceive, that if Corn do ſhed in the Fields, being beaten out by Winds, or loſt upon the Ground, for that it was not ſeaſonably cut, and this Corn doth grow, and become a Crop in the Year following, (which ſometimes happens) and is called ſelf-ſown Corn, Tithes ſhall be paid thereof, as the Tithes of the Land for the following Year. If Tithe hath been paid of Corn growing in one Year, and in the next Year the ſame Land is not ſeeded but lies fallow, to the End of making it more fruitful in the third Year, and then is manured and ſown, no Tithe is to be paid for ſuch Land the ſecond Year. *Paſch.* 7 *Jac. B. R. Smith*'s Caſe, *per Cur.* 1 *Roll's Abr.* 642. And it is a good

If Tithes of ſelf-ſown Corn.

Modus

Predial Tithes.

Modus Decimandi, that in Conſideration that they that ſow the Lands, ought to reap, bind, and ſever the Tenth from the Nine, and ſet it up into Heaps, that the Parſon ſhall not have any Tithes of this Land the next Year inſuing, the Land lying ley, and not tilled nor converted into Meadow; for of common Right the Pariſhioner is not bound to gather, and ſet up the Tithes in Heaps. *Hill.* 6 *Jac. B. R. per Cur.* 1 *Roll's Abr.* 649.

Tithes of Hay.

The Tithe of Hay alſo of all Lands Titheable in each Pariſh, and of Graſs cut for Hay in Orchards, is a Predial Tithe, and to be yielded to every Parſon and Vicar, who hath Right thereto. 2 *Inſt.* 652.

Guided by Preſcriptions, &c.

Yet the Payment of this Tithe alſo is directed and guided by Preſcription and Cuſtom uſed within particular Pariſhes; as if in a Pariſh there be a Cuſtom, that the Owners of the Headlands, have uſed Time out of Mind to make the Tithe of Hay of that Pariſh for the Parſon, and in Conſideration thereof, to be diſcharged of the Tithes growing upon Headlands, being ſmall Headland on which a Team turns in Plowing, this is a good Conſideration to make the Preſcription good. *Mich.* 5 *Car. C. B. Wood* and *Carvener* v. *Symond*, *Hetley* 147. *Lane's Rep.* 16. But a Preſcription, to pay the tenth Part of Corn for the Hay alſo that grows upon the Headlands, is not good, becauſe the tenth Part is due for the Corn, *Mich.* 2 *Jac. B. R. Parrey* v. *Chaunſey*, *Noy* 15; yet if the Preſcription be, that the Pariſhioner hath uſed to cut, or reap, bind, or ſhock the Parſon's Corn; and in Conſideration thereof, to be diſcharged from Tithing the Hay of his Headlands, *&c.* this is ſaid to be good, and a reaſonable Conſideration; becauſe the Pariſhioner is not bound to reap, *&c.* the Parſon's Part; and by the Civil Law, the Parſon is to have the tenth Ridge of Corn. But this Reaſon I take to be falſe, and contrary to the other Caſes as before ſhewed; but the Setting the Parſon's Corn into Heaps, may be a reaſonable Conſideration of the Preſcription; becauſe this they are not tied to do of common Right. *Hill.* 29 *Eliz. C. B.* 2 *Leon.* 70. But it ſeems, that a Preſcription not to pay the Tithe of Hay growing upon Headlands, on which the Horſes and Plow turn, is good, without laying any Thing in Conſideration thereof; but then it muſt be averred, that the Headlands are but ſufficient to turn the Plow upon; *per Cur. Hill.* 10 *Car. B. R. Mead* and *Thurland*, and *Paſch.* 15 *Car. Bird* and *White*, 1 *Roll's Abr.* 646.

Giving green Graſs to Cattle.

So if a Farmer do cut down his Graſs, and only doth put it into Swarths, and then carry it away, and doth give it green to his own Cattle for their neceſſary Suſtenance, not having Graſs ſufficient to maintain them otherwiſe, no Tithes ſhall be paid thereof. *Mich.* 2 *Car. C. B. Crawley* v. *Wells*, 1 *Roll's Abr.* 645.

If the After-mowth be diſcharged.

And if Lands be ſo ſtrong, as to afford two Crops of Hay in one Year, and the Occupier of the Land can preſcribe, in Conſideration that the Owner doth make the firſt Tonſure into good and ſufficient Hay, and ſet it forth in Cocks ſufficiently dried, that he ſhall be diſcharged of the Tithes of the After-mowth, this is a good Preſcription and Diſcharge, by reaſon of his Coſts he beſtowed in making the firſt Tonſure into Hay, *Paſch.* 11 *Car. B. R. Langford*'s Caſe reſolved, and *Trin.* 36 *Eliz. B. R. Johnſon* and *Kebleth-wait*, 1 *Rolls Abr. p.* 648. *Paſch.* 11 *Car. B. R. Anonymus.* 1 *Croke* 404, and *Paſch.* 41 *Eliz. Rot.* 284. *Johnſon* and *Awberry*'s Caſe, 3 *Croke* 660. *Paſch.* 4 *Jac. Green* v. *Auſten*, 2 *Croke* 116, and *Moor* 910. *Mich.* 2 *Jac. Hall* and *Fettyplace*'s Caſe, 2 *Croke* 42. Or if the Preſcription be to be diſcharged of the Tithe of the After-mowth only, upon Conſideration that they have uſed, Time

whereof, *&c.* to cut down the Graſs of the firſt Mowth to feed, and gather the ſaid Graſs ſo diſperſed into Weaks and Wind-rows, and put it into ſmall Cocks at their own Coſt; this is ſufficient, though it be made into perfect Hay. *Paſch.* 2 *Jac.* *Hall* v. *Fettyplace*, 2 *Croke* 42. But it ſeems of the After-mowth, that Tithes *De Jure* are to be paid without ſuch like Preſcription for a Diſcharge. *Paſch.* 41 *Eliz.* *B. R. per Cur.* and *Hill.* 10 *Jac.* *B. R.* the Parſon of *Stanfield*'s Caſe, *per Cur.* 1 *Roll's Abr.* 640; alſo ſuch Repairing of the Graſs mowed for Hay, is a good Conſideration upon which to be diſcharged of the Tenth of all After-profit, that may be made the ſame Year of the ſame Land, ſo that if the After-graſs be eaten with Cattle, no Tithe ſhall be paid for them. *Paſch.* 4 *Jac.* *B. R.* *Green* v. *Auſten*, *Yelv.* 86. *Trin.* 4 *Car.* *C. B.* *Anonymus*, *Hetley* 98. *Mich.* 42 & 43 *Eliz.* *Johnſon* and *Popinger*, 1 *Jac.* *Eeles* and *Vachin*, 3 *Jac.* *Eeles* and *Saunder.* *Hill.* 8 *Jac.* *Eeles* and *Winterbolt.* In all theſe Caſes, Prohibitions were granted in *B. R.* and *Mich.* 14 *Jac.* *Johnſon* moved for a Conſultation upon the ſaid Prohibition granted in 43 *Eliz.* againſt *Popinger*, but it was denied. *Paſch.* 41 *Eliz.* *B. R.* between *Awberry* and *Johnſon.* *Paſch.* 11 *Car.* *B. R.* *Langford*'s Caſe. Prohibition granted upon ſuch Surmiſe for After-mowth, *Paſch.* 14 *Car.* *B. R.* between *Manning* and *Clapham*, a Prohibition was granted for fatting of Sheep upon the After-paſture. *Paſch.* 16 *Jac.* *B. R.* between *Nicholls* and *Hopper*, 1 *Roll's Abr.* 648, 649. But *Popham* ſaid, that he had known it to be reſolved, that of Right without any ſpecial Cuſtom alledged, no Tithes ſhall be paid of the Hay of the After-mowth, for that the Rule of the Law is, that Tithes ſhall be paid *Ex annuatis renovantibus ſimul & ſemel*, and ſo by Conſequence not of the After-graſs depaſtured, *Paſch.* 2 *Jac.* *Hall* v. *Fettyplace*, 2 *Croke* 42. *Hob.* 250; and it hath been reſolved, that no Tithe is to be paid of After-graſs *De Jure.* *Paſch.* 16 *Car.* *Nichols* and *Hopper*'s Caſe, *per Cur.* and 3 *Jac.* *B. R.* *Spencer* and *Johnſon*'s Caſe, and *Paſch.* 17 *Jac.* *B. R.* *Kinneſton*'s Caſe, 1 *Roll's Abr.* 640. But this is to be underſtood only where no more Graſs is left by the Sithe than is uſual, for if Graſs be fraudulently left, the Caſe is otherwiſe. 2 *Bulſt.* 238. Therefore it is ſaid, that if an Inn-keeper doth pay Tithe Hay of certain Land, and the Reſidue of the Year after, doth put into the ſame Land the Horſes of his Gueſts which come to the Market in the ſame Town, no Tithes ſhall be paid for the Herbage of thoſe Horſes, for this is but the After-paſture of the Land, whereof he hath before paid Tithes, *Trin.* 16 *Jac.* *B. R.* between *Richardſon* and *Cable*, *per Cur.* 1 *Roll's Abr.* 641, nor ſhall Tithes be paid for Agiſtment in ſuch After-paſture. 2 *H.* 4. *Rot. par Num.* 93.

Predial Tithes.

After-graſs eaten.

If Graſs be fraudulently left.

Tho', as hath been ſaid, Tithe-Hay of common Right be to be paid in Kind, yet by Cuſtom, or Preſcription, ſome other Conſideration may be due and payable in lieu thereof; but then what is paid, how little ſoever it be, it muſt be to the Benefit of him to whom the Tithe-Hay of common Right was payable; for Example, when one ſurmiſed, that Time out of Mind the Owners of certain Lands had found Straw for the Body of the Church, in Diſcharge of all Tithes of Hay, it was held by the Opinion of the whole Court, that this is no Cauſe of Diſcharge, for that the Parſon was not chargeable with the finding of the Straw, nor had any Benefit by the others finding it; but otherwiſe it had been, if it had been alledged, that the Straw was given to the Parſon, and he beſtowed it in the Body of the Church; and 'tis ſaid to be ruled, *Hill.* 30 *Eliz.* that where one preſcribed, that he had uſed to pay the Pariſh Clerk his Wages,

Other Conſiderations for Tithe-Hay.

Predial Tithes.

in Satisfaction of Tithe-Hay, this was no good Diſcharge. *Paſch.* 34 *Eliz. B. R. Scory* v. *Barber*, 3 *Croke* 276. A Cuſtom was ſuggeſted, that if any Pariſhioner fed his Sheep with his Graſs until *June* and *Auguſt*, that then he might mow the coarſe Graſs, with which they fed their Sheep in the Winter, whereby the Parſon had *Uberiores decimas* of the Sheep; it is a void Cuſtom by the Court of *B. R. Selby* v. *Clarke*, 1 *Ld. Raym.* 677.

Modus for Tithe-Hay continued.

If there is a *Modus* ſufficient to diſcharge Lands of the Tithe of Hay, and the ſame Lands be ſowed divers Years with Corn, this doth not deſtroy the *Modus*, but the ſame ſhall continue when the Lands are again turned into the Meadow, and whilſt they are ſowed with Corn, the Parſon ſhall have Tithe in Kind thereof. *Trin.* 10 *Jac. C. B. Brown*'s Caſe, *Godbolt*.

When the Owner ought to cut down and make the Graſs into Hay, *&c.*

When the Tithe of Hay is to be paid in Kind, the Owner ought of common Right to cut down and make the Graſs into Hay; *per Cur. Paſch.* 13 *Jac. B. R.* 1 *Roll's Rep.* 172; for when the Caſe was, that one had uſed to pay a Load of Hay for all Tithes of Hay growing and renewing upon the Land where, *&c.* and alledged, that they uſed to make the Graſs into Hay, by their own Labour, a Prohibition was denied *per totam Curiam* upon this Reaſon, that the Pariſhioner ought to make the Graſs into Hay; and ſo this is but Tithes in Kind, which cannot be a Conſideration of a *Modus Decimandi*, no more than if a Man doth preſcribe to pay certain Sheafs of Corn for all Tithes of Corn, for he ought to make it into Sheafs, and therefore Part of the Duty in Kind, cannot be a Satisfaction for the Reſidue; *per Cur. Paſch.* 13 *Jac. B. R.* 1 *Roll's Rep.* 172; yet it hath alſo been held, that to make the Parſon's Hay is more than the Owner is bound to do, and that the Uſe for making it for the Parſon, may be a good Conſideration of a Diſcharge as to ſome other Thing. *Mich.* 5 *Car. C. B. Wood* and *Carvener* v. *Symond*, *Hetley* 147. *Paſch.* 37 *Eliz. Rot.* 284. *Awbery* v. *Johnſon*, vouched *Paſch.* 2 *Jac.* in *Hall* and *Fettyplace*'s Caſe, 2 *Croke* 42. And it hath alſo been held, that the Pariſhioner is not bound of common Right to ted and ſhake the Graſs abroad, and to gather it into Weaks or Wind-rows, for that the Tithe may be ſet forth in Graſs-Cocks, before it be tedded, and that the doing of that only is a good Conſideration of a Diſcharge of the After-mowth. *Hill.* 16 *Jac. Hide* v. *Ellis*, *Hob.* 250. *Paſch.* 2 *Jac. Hall* v. *Fettyplace*, 2 *Croke* 42. 1 *Roll's Abr.* 644. But as *Moor* reports this Caſe of *Hall* v. *Fettyplace*, to make the Graſs into ſmall Cocks is no Conſideration for the Diſcharge, but to make it into great Cocks is a good Conſideration; and ſo 'tis ſaid to be held in *Johnſon*'s Caſe, *Moor* 758; but this Caſe as reported by *Moor* is miſtaken, and the Caſe is as reported by *Croke*, for ſo it appears by the Roll. From the Reſolution of theſe Caſes it ſeems to follow, that Graſs of common Right is Titheable when it is put into Graſs-Cocks, and not before, for that then the Tenth may be ſevered from the Nine Parts; and accordingly it hath been adjudged *per Cur. Paſch.* 14 *Jac. Hyde* v. *Ellis*, *Hob.* 250. *Contra per Cur. Hill.* 14 *Jac. B. R. Barbum* v. *Gooſe*, *Trin.* 15 *Jac. per Cur. Popinger* v. *Johnſon*, and a Prohibition denied. 1 *Roll's Abr.* 644. *Quære. Mich.* 11 *Geo.* 1. Held in the Court of Chancery, Tithe-Hay ought to be paid in Graſs-Cocks. 2 *Mod. Caſes in Law and Equity* 118. *Smithſon & al'* v. *Dodſon.*

Cuſtoms to be obſerved notwithſtanding Common Right.

But whatever the Owner is obliged to do of Common Right, the Cuſtom of each Place is to be obſerved; and therefore, if the Cuſtom be to meaſure out the Tenth Part of the Graſs ſtanding for the Tithe

thereof, and that the Parſon ſhall cut and make it, this is good. *Hob.* 250. And in this and all other Caſes, when the Tithe of the Graſs is ſet forth, and the Owner not to make the Parſon's Tithe into Hay, the Parſon *De Jure* may make the Graſs into Hay upon the Land on which it grew, although the Uſage Time whereof, *&c.* hath been to the contrary; and it is needleſs for the Parſon to alledge a Cuſtom for the doing of it; and the Parſon may paſs over the Pariſhioners Ground to that End, keeping the Path leading thereto, if there be one, for this is incident to to the other. *Hill.* 14 *Jac. B. R. Newberry* and *Reynold's* Caſe, *per Cur.* 1 *Roll's Abr.* 643. And for theſe Things denied, the Parſon hath Remedy in the Eccleſiaſtical Court, and by *Fitz. N. B.* may have his Action on the Caſe at Common Law. *Mich.* 14 *Jac.* 1 *Roll's Rep.* 420. Predial Tithes.

The Tithe of Wood being accounted a predial and great Tithe, ſhall next be ſpoken of. *Firſt* then, The Tithe Wood of Copices, and of all Underwoods are to be paid, that is, *De Jure*, after they are cut, or if there be a Cuſtom for it, by meaſuring for the Parſon the Tenth Acre, *Herbert Rep.* 250, not only when they are cut to grow again, but alſo of the Roots and Branches, when grubbed up to make the Land arable, and alſo the Roots of Hedges or Hedge-rows, when they ſhall be grubbed up. *Trin.* 12 *Jac. B. R. Price* and *Maſcal*, 2 *Bulſt.* 238. So Tithes are to be paid of Heath, Turf and Broom; but if the Occupier of the Lands hath paid Time out of Mind, Tithe of Wool, Milk, *&c.* ariſing from Cattle depaſtured thereupon, and in reſpect thereof hath been free from the Payment of other Tithes, this may diſcharge him of the reſt. *Mich.* 28 *&* 29 *Eliz. B. R. Godbolt*, *p.* 44. But of this Conſideration as to the Reaſon of the Diſcharge, I much doubt: However, if Broom be grubbed up, the Tithe thereof ought to be paid, altho' that it be grubbed up for the End of making the Land arable; *per Cur. Trin.* 12 *Jac. B. R. Price* v. *Maſcal*, 2 *Bulſt.* 239. Yet it is ſaid to be adjudged *per Curiam*, that if a Man doth cut a Copice, and thereof doth pay the Tithe of the Wood, and then before any new Branches are grown doth grub up the Roots and Stubs of the Wood, he ſhall not pay Tithes of them, becauſe they are Parcel of the Freehold, and do not renew yearly. *Mich.* 15 *Car. B. R. Bedford* v. Doctor *Skinner*, 1 *Roll's Abr.* 637. But *per Legem Terræ*, Tithes of all Underwoods are to be paid, yea, though the Wood be ſpent for Fuel in the Houſes of Perſons uſing Lands in the Pariſh where it is cut; for when the Tithe of ſuch Wood was demanded in the Spiritual Court, and a Prohibition was granted upon a Surmiſe, that the Wood was ſpent in the Houſe for Firing, and that there was a Cuſtom in the Pariſh, that the Owners of any Houſe or Land within the ſame Pariſh, who pay Tithes to the Parſon, ought not to pay Tithe of Wood ſpent in their Houſes; and Iſſue being joined upon the Cuſtom, it was found for the Defendant, and moved in Arreſt of Judgment, that although it be found that there is no ſuch Cuſtom, yet no Tithes ought to be paid of Wood ſpent in Houſes, nor for fencing Stuff for Hedges, but that ſuch ought to be diſcharged of them *per Legem Terræ*; yet the Court reſolved the contrary, and ſaid, that it was uſual in Prohibitions to alledge Cuſtoms upon Conſideration of an Hearth-penny, or that they have other Lands whereof they pay Tithes, and by reaſon of the Wood burnt better Tithes, ſo that the Parſon hath a Benefit thereby, but not to alledge a Diſcharge *per Legem Terræ*, and a Conſultation was awarded. *Trin.* 4 *Car. C. B. Norton* v. *Fermer*, 1 *Croke* 113. *Paſch.* 4 *Car. C. B. Norton* and *Buſket* v. *Hopper*, *Hetley* 88. Therefore if a Man hath an Houſe of Huſbandry with Lands, and demiſeth the Lands, reſerving

Tithe of Wood a predial and great Tithe.

Q.

2 *Salk.* 656. Hearth-Penny.

Prædial Tithes.

Tithes of Hedging, &c.

reſerving the Houſe, upon this Reaſon, by *Hutton*, Tithe of Fire-wood is payable; and by *Harvy*, if a Libel be for Tithes of Hedging and Fencing, a Surmiſe ought to be made to diſcharge ſuch Tithes demanded. *Paſch.* 4 *Car. C. B. Thornhill's* Caſe, *Hetley* 93. *Paſch.* 14 *Jac. Lane's* Caſe, *Moor* 917. And yet it is ſaid to be held generally by all the Juſtices, that for Broom, Furs, or any other Fuel expended in a Pariſhioner's Houſe, no Tithes ought to be paid. *Paſch.* 40 *Eliz. B. R. Auſtin* v. *Lucas*, 3 *Croke* 609, ſame Caſe, *Moor* 909, nor for Wood cut for fencing of Tithable Lands. *Trin.* 38 *Eliz. B. R. Ran* v. *Patteſon*, *Trin.* 10 *Car. Brown* and *Nixon's* Caſe, 1 *Roll's Abr.* 644. And though all the Wood cut for Fencing be not ſo imployed, yet Tithes ſhall not be paid of that which remains. 3 *Cro.* 499. And when a Prohibition was prayed to ſtay a Suit for Tithes of Wood, the Plaintiff ſuggeſted that he had a Houſe in the Pariſh, and that the Wood was cut for Fuel burnt in this Houſe; the Court ſaid, that this would not ſerve, unleſs it was expreſſed that the Houſe was for Maintenance of Huſbandry, by reaſon of which the Parſon had *Uberiores Decimas*, *Paſch.* 22 *Car.* 2. *B. R. Anonymus*, 1 *Vent.* 75, the ſame Caſe, 2 *Keb.* 628; this Caſe ſeems to admit, that Wood cut for Fuel to be ſpent in Houſes for Maintenance of Huſbandry, by the Law of the Land is Tithe-free; yet when to have a Prohibition it was ſuggeſted, that there was above 400 Acres of arable Land within the Pariſh, and that the Corn thereon growing could not be preſerved without fencing the Land whereupon it grew, and that the Tithes of the Corn ſo fenced, had always been paid to the Impropriator, *&c.* and that within the Pariſh there was this Cuſtom, That if any Underwood be cut and imployed in fencing the Corn, whereof Tithes are to be paid, and do not ſell, nor otherwiſe diſpoſe of it, ſuch Underwood hath been always diſcharged of Tithes, and ſhews that the Underwood cut was ſo imployed in fencing the Corn, *&c.* In this Caſe, in as much as the Corn fenced did not appear to be the Plaintiff's own Corn, (although the Plaintiff did aver, that he did not ſell any of the Wood,) it was adjudged, that the Preſcription was not good, for that if the Plaintiff give his Wood to others to fence their Corn, Tithes ſhall be paid for ſuch Wood: But *Wild* Serjeant, being of the Counſel with the Plaintiff, ſaid, that the Caſe deſerved greater Conſideration than the Court took of it. *Hill.* 19 & 20 *Car.* 2. *Croucher* v. *Collins*, 1 *Sanders Rep.* 141, ſame Caſe, 2 *Keb.* 319. If wood be cut to make Hop-poles, where the Parſon or Vicar have Tithe-Hops, no Tithes ſhall be paid of this Wood. *Hugh. Abr.* 689. However by Cuſtom Tithes may be paid of Wood conſumed in an Houſe. *Mich.* 14 *Jac. B. Watley* and *Hanfurie's* Caſe, 1 *Roll's Abr.* 642. And by Cuſtom alſo, upon a Conſideration, Wood ſpent in the Houſe without Doubt may be Tithe-free; for *Hutton* ſaid, that it is a Cuſtom in the North Parts, to give an Half-penny for Eſtovers burnt, by which they are free from the Tithe of Wood burnt for Fuel. *Paſch.* 4 *Car. C. B. Wolmerſton's* Caſe, *Hetley* 85, and by *Hutton*, *Croke* and *Yelverton*, *Trin.* 4 *Car. Norton's* Caſe, *Hetley* 88, ſame Caſe, *Littleton's Rep.* 143. See alſo in the ſame Book, *fol.* 5, and *Paſch.* 4 *Car. C. B. Thornhill's* Caſe, *Hetley* 93, if a Man cut his Woods, and burn it to make Bricks for the Reparation of his Houſe within the Pariſh, for the Habitation of him and his Family, no Tithes ſhall be paid thereof, becauſe that the Parſon had the Benefit of the Labour of his Family.

Fuel burnt in a Huſbandman's Houſe, *& Uberiores Decimas.*

Preſcription for fencing Wood.

Alſo if a Man cuts his Woods, and burns it to make Bricks for the Inlargement of his Houſe within the Pariſh, for the neceſſary Habitation of

of his Family, no Tithes ſhall be paid for ſuch Wood. But if a Man cut his Wood, and burns it to make Bricks for the Inlargement of his Houſe within the Pariſh, more than was neceſſary for his Family, only for his Pleaſure and Delight, he ſhall pay Tithes thereof; and a Conſultation was granted accordingly, where the Plaintiff in the Prohibition had affirmed, that he burnt it for the Reparation and Inlargement of his Houſe generally, without ſaying, for the neceſſary Habitation of his Family; for the Court ſaid, that by this Surmiſe he might make a Caſtle, and yet pay no Tithes. *Trin.* 10 *Car. B. R. Nixon* and *Brown*'s Caſe, *per Cur.* 1 *Roll's Abr.* 656. Prædial Tithes.

It ſeems, that in antient Times Controverſy was betwixt the Clergy and Laity about the Tithes of Timber-Trees, which was ſettled by Act of Parliament, as followeth. Item, **At the Complaint of the ſaid great Men and Commons, ſhewing by their Petition, That whereas they ſell their great Wood of the Age of Twenty Years, or of greater Age, to Merchants to their own Profit, or in Aid of the King in his Wars, Parſons and Vicars of Holy Church do implead and draw the ſaid Merchants in the Spiritual Court for the Tithes of the ſaid Wood, in the Name of this Wood called** Sylva cædua, *Sylva cædua.* **whereby they cannot ſell their Woods to the very Value, to the great Damage of them and of the Realm: It is ordained and eſtabliſhed, That a Prohibition in this Caſe ſhall be granted, and upon the ſame an Attachment, as it hath been uſed before this Time.** Stat. 45 Ed. 3. c. 3. Fitz. Nat. Br. 51. Paſch. 26 Eliz. B. R. *Daws* and *Mollin*'s Caſe, 2 Leon. 79. Timber-Trees.

By this Statute it is out of Doubt, that Timber-Trees of Twenty Years Growth or more, that are apt for Timber, are free from the Payment of Tithes, and are ſaid to be Parcel of the Inheritance. *Mich.* 12 *Jac. B. R. Stamp* v. *Clinton*, alias *Lifford*, 1 *Roll's Rep.* 100, and *Hill.* 2 *Jac. Rot.* 229. *Brook* and *Roger*'s Caſe, there vouched and reported, *Moor* 908. But ſtill the Doubt remains what Trees are to be accounted great Wood or Timber by the aforeſaid Statute, and thereby made free from yielding a Tithe; and firſt it is evident by the Statute, that none under the Age of Twenty Years, of what Sort or Benefit ſoever they may be of, for the Uſe of Building, are thereby accounted great Wood, and Tithe-free. *Hill.* 44 *Eliz. B. R. Foſter* and *Peacock* v. *Leonard*, 3 *Croke*, *p.* 1. *Paſch.* 5 *Jac. Man* v. *Sommerton*, 1 *Brownl.* and *Gouldſb.* 94. And yet it is ſaid to be held by *Wray* and *Clench*, that if one doth cut Trees which are or may be Timber-Trees, or Oaks, Elms, *&c.* although they be under the Age of Twenty Years, no Tithes are due for them. And ſo if Trees of that Age be cut, and new Germins grow, no Tithe is due, though they be cut under that Age. *Paſch.* 29 *Eliz. B. R.* 3 *Croke* 55, ſame Caſe, *Moor* 908. However, it is to be granted, that if any ſuch young Trees, or others, be cut for Houſe-boot, Hedge-boot, Plough-boot, Cart-boot, or Fire-boot, no Tithes be due thereof, *Hill.* 43 *Eliz. Ramſey*'s Caſe, *Gouldſb.* 145, 172; nor are all Trees, if of Twenty Years Growth or more, free from the Payment of Tithes, *Paſch.* 5 *Jac. Moon* v. *Somerton*, 1 *Brownl.* and *Gouldsb.* 64; and yet there is no Queſtion but Oak, Elm and Aſh of that Growth are free, as being moſt uſeful for the Building of Houſes and Ships, and therefore moſt valuable, and of theſe therefore the Statute is intended. *Hill.* 17 *Eliz. B. R. Soby* v. *Molyns*, *Plowden* 468. And 'tis made a *Quære*, Whether the Parſon, by Preſcription, may have the Tithe of ſuch Trees againſt the Common Law, and Statute of *Sylva Cædua.* 1 *Roll's Abr.* 640. But as for Beech, *Tanfield* What Timber-Trees free from Tithes. If Oaks, Elms and Aſh be cut under Age. If Beech be Tithable.

Prædial Tithes.

field Juſtice held, that by the Common Law they are not Timber; and ſaid, that it was ſo adjudged in *Cary* and *Paget*'s Caſe; therefore of Common Right they ought to pay Tithe of what Growth ſoever they be. Q. *Trin.* 38 *Eliz.* *Leonard*'s Caſe, 1 *Roll's Abr.* 640. But this is to be underſtood to be true but in ſome Woody Countries, where better Trees are plentiful; for in *Buckinghamſhire*, and ſuch like Countries, where Wood is ſcarce, Beech is accounted Timber, and there it ſhall have the Privilege of being Tithe-free. *Paſch.* 5 *Jac.* *Man* v. *Somerton*, 1 *Brownl.* and *Gouldsb.* 94. *Paſch.* 14 *Jac.* B. R. *Lapthorn*'s Caſe, 1 *Roll's Rep.* 355. *Hill.* 15 *Jac.* C. B. *Pinder* v. *Spencer*, *Noy* 30. *Mich.* 39 & 40 *Eliz.* *Holiday* v. *Lee*, *Moor* 541. But Birch is not accounted Timber in any Country, nor is it ſuch Wood as the Statute intends by the Name of groſs Woods, as not being uſeful for Building; therefore a Tithe thereof ſhall be paid, although it be not cut until it be above Twenty Years Growth. *Hill.* 44 *Eliz.* B. R. *Foſter* and *Peacock* v. *Leonard*, 3 *Croke*, *p.* 1, ſame Caſe, *Moor* 707. *Anonymus*, 2 *Croke* 199. And the Law is the ſame to *Willows*, *Guſly* v. *Pinder*, *Hob.* 219. *Noy* 30, though they grow by a Houſe, and it be Waſte to cut them; reſolved, *Mich.* 5 *Jac.* B. R. 1 *Roll's Abr.* 640; the ſame as to Aſp, *Hill.* 43 *Eliz.* *Ramſey*'s Caſe, *Gouldsb.* 161; ſo to Holly, Olders and Maples, *Anonymus*, 2 *Croke* 199. *Mich.* 5 *Jac.* *Roll's Abr.* 460, and to Hornbeam, Hazel, Sallows, and ſuch other like Trees of baſe and inferior Nature unfit for Buildings. *Hill.* 17 *Eliz.* B. R. *Soby* v. *Molins*, *Plowden* 468. But peradventure the Scarcity of other Timber, and Cuſtom of the Country, to put theſe Trees to the Uſes of good Timber, may free them, being Twenty Years Growth or more, from the Payment of Tithes. *Hill.* 15 *Jac.* C. B. *Pinder* v. *Spencer*, *Noy* 30.

Birch.

Willows.

Aſp, Holly, Olders, Maples.

If Timber ſtand till it be ſpoiled, &c.

And although Trees once good Timber, do ſtand ſo long as to be fit at length for no better Uſe than Fire-wood, and are cut for that Uſe; yet no Tithes ſhall be paid thereof, for that being once diſcharged of Tithes, they ſhall always be diſcharged. *Trin.* 38 *Eliz.* B. R. *Ram* v. *Pattenſon*, 3 *Croke* 477, ſame Caſe, *Gouldsb.* 145. *Mich.* 39 & 40 *Eliz.* *Holiday* v. *Lee*, *Moor* 541. *Mich.* 3 *Jac.* B. R. *Brook* and *Rogers*'s Caſe, 2 *Croke* 100. *Mich.* 12 *Jac.* B. R. *Stamp* v. *Clinton*, alias *Lifford*, 1 *Roll's Rep.* 100. Yet *Croke* is ſaid in his Argument of this Caſe to hold, that for ſuch Trees Tithes ought to be paid.

Tithe-free as to the Bark, Root, Germins, &c.

Such Trees as are diſcharged from the Payment of Tithes, are free not only as to the Trunk or Timber itſelf, but alſo as to the Bark, Root and Germins that grew upon the antient Stock. *Mich.* 12 *Jac.* B. R. 1 *Roll's Rep.* 100. *Coke* 11. 48. *b.* *Lifford*'s Caſe, and likewiſe as to the Branches, although that they be lopped every Seven Years. *Hill.* 38 *Eliz.* B. R. *Ram* v. *Pattenſon*, *Moor* 980, *Hill.* 2 *Jac.* *Brook* v. *Rogers*, *Moor* 908, ſame Caſe, 2 *Croke* 100. *Paſch.* 9 *Jac.* C. B. Dr. *Newman*'s Caſe, *Godbolt*, *Hill.* 17 *Eliz.* B. R. *Soby* v. *Molyns*, *Plowden* 468. 11 *H.* 4. 89. 1 *Roll's Rep.* 100. *Littleton's Rep.* 149. *Doct.* & *Stud.* 175. Nor is it material, whether they be lopped within every Twenty Years or not, for they remain ſtill free. *Trin.* 2 *Jac.* in *Reynold*'s Caſe, *Moor* 762. *Trin.* 38 *Eliz.* B. R. *Ram* v. *Pattenſon*, 3 *Croke* 477. *Sampſon* and *Worthington*'s Caſe, 1 *Roll's Abr.* 640. But if ſo be that Timber-Trees, that be Twenty Years Growth or more, were lopped before they were of that Growth, (in which Caſe the Loppings are to be tithed,) and then after the Twenty Years they be lopped every Ten or more Years, Tithes ſhall be paid of ſuch Loppings. *Hill.* 2 *Jac.* *Brook* v. *Rogers*, *Moor* 908. But then the Parſon ſuing for the

Tithe of ſuch Loppings in the Spiritual Court, if a Prohibition be brought, to have a Conſultation he ought to alledge and ſhew this in the Temporal Court. *Paſch.* 26 *Eliz. B. R. Dawes* and *Mollin*'s Caſe, 2 *Leon.* 79. 1 *Sid.* 300. From which it may be collected, that although the Trees be of more than Twenty Years Growth, or ſo old that their Age is not known, upon which Account it cannot be proved that they were lopped before they were Twenty Years old, yet if the Tithes of the Loppings have been uſually paid, this may be ſufficient, for that it may well be preſumed that they were lopped before the Trees for their Age did by Law become Tithe-free. Yet note, That it is ſaid to be held by the whole Court, that if a Man doth lop a Tree under the Growth of Twenty Years, and ſuffering the Body to remain, doth after it is Timber, and free from the Payment of Tithes, lop it again, no Tithes ſhall be paid of ſuch Loppings. 1 *Brownl.* and *Gouldsb.* 33, and *Mich.* 10 *Jac.* by *Coke*, 1 *Roll's Abr.* 640. But if there be a Wood commonly uſed as Coppice, and the Owner will let it grow till it be Forty Years Growth, to the Intent it may not pay Tithes, yet when it is cut it ſhall pay Tithes; for one ſhall not by this Means avoid the Payment of Tithes, ſo long as the Wood cut is intended for Firing. *Mich.* 18 *Car.* 2. *B. R.* 1 *Sid.* 300, the ſame Caſe, 2 *Keb.* 90, and 1 *Lev.* 189.

Predial Tithes.

Lopt when under Growth, and lopt again after 'tis Timber.

Not only the Loppings of Timber-Trees ſhall be free from the Payment of Tithes, but theſe Loppings, as the Caſe may be, may free the Loppings of other Trees in their Nature titheable, and alſo Underwood from yielding of Tithes to the Parſon; for if there be a Wood, the moſt Part of the Trees therein being Timber, and free from Tithe, and there do grow *ſparſim* amongſt theſe Trees, other Trees in their Nature titheable, and the Owner doth ſell the whole Wood, and cauſe it to be promiſcuouſly cut out, and bound up into Faggots together, for that the moſt Part of every Faggot is of Wood Tithe-free, and the Reſidue of ſo little Value, that the Severance thereof from the Tithe-free Wood would not quit the Charge; in ſuch Caſes, Tithes ſhall not be paid for any of the Wood or Faggots. But on the other Side, if moſt Part of the Wood be Underwood, or Trees titheable when cut, and *ſparſim* there grow Oaks, *&c.* and the Owner cuts down all the Wood, and makes it into Faggots promiſcuouſly; in ſuch Caſe, Tithes ſhall be paid (I ſuppoſe) of the Whole, by Parity of Reaſon. *Paſch.* 26 *Eliz. B. R. Dawes* and *Mollins*'s Caſe, 2 *Leon.* 79. Yet it is ſaid, that in this very Caſe a ſpecial Conſultation was granted upon a ſpecial Plea, that the Faggots were Part of Wood titheable, *Buckhurſt* and *Newton*'s Caſe, 3 *Croke* 347; by which it ſeems to be then taken, that the greater Part being Tithe-free Wood, ſhall not free the leſſer. However, if in this Caſe, only ſome ſmall Part of the Faggots is of Wood Tithe-free, (poſſibly put in with Deſign of defrauding the Parſon) and the Parſon ſuing in the Spiritual Court for the Tithes of the Faggots, a Prohibition is obtained upon a Surmiſe that they are made of Wood Tithe-free; the Parſon to have a Conſultation muſt ſhew the ſpecial Matter, *viz.* how much of the Faggots were of titheable Wood, and that the Wood Tithe-free was ſo intermixed therewith, that he could not otherwiſe ſue than for the Faggots, and thereupon pray a Conſultation as to the titheable Wood, otherwiſe no Conſultation is to be granted. *Mich.* 36 *&* 37 *Eliz. Buckhurſt* v. *Newton*, 3 *Croke* 347. *Hill.* 43 *Eliz. Gouldsb.* 127. See *Mich.* 18 *Car.* 2. *Cornell* v. *Haws*, 1 *Sid.* 300, the ſame Caſe, 2 *Keb.* 90.

Trees Titheable growing *ſparſim* amongſt Timber.

If the greater Part of the Faggots is of Wood Tithe-free.

As of Wood and Trees for Fuel, *&c.* as is aforeſaid, Tithes ſhall be paid; ſo if young Fruit or other Trees be planted in a Nurſery upon Deſign to

Fruit-Trees, *&c.* planted in a Nurſery,

Predial Tithes.

Equity.

to be rooted up, and ſold to be planted in other Pariſhes, Tithes ſhall be paid thereof. *Hill.* 14 *Car. B. R. Gibs* and *Wybourne*, 1 *Croke* 526, ſame Caſe, *Jones* 416, and 1 *Roll's Abr.* 637. And upon a Bill in Equity for the Tithes of a Nurſery, at Hearing of the Cauſe, divers Doubts and Queſtions were made: *Firſt*, Whether Tithes ſhould be paid of Nurſeries, if they yield no other Fruit? *Secondly*, Whether Tithes ſhould be paid for thoſe Trees that yield Fruit which pay Tithes? Or, if ſome yield Fruit, and ſome not, whether or no thoſe Trees that yield Fruit ſhall privilege and exempt other that yield none, when they are ſold together? And *Laſtly*, Whether Tithes ſhall be paid for them when they are ſold and tranſplanted within the ſame Pariſh? And it was decreed, that Tithes were payable in all ſuch Caſes. *Mich.* 16 *Car.* 2. *Scaccar. Hardres* 380.

Cuſtoms and Preſcriptions freeing Wood from Tithes.

Whatever the Parſon's Due be, as to the Tithe of Wood or Trees, of Common Right, yet by Cuſtom, or Preſcription upon a Conſideration alledged, a Perſon, Town, or Hamlet, may be freed from the Payment thereof. As for Example: If a Parſon hath a certain Wood, or a certain Parcel of Wood, allotted to him by the Lord of a Manor, and that in Conſideration thereof he and his Tenants have been Time out of Memory free from the Payment of the Tithe of their Underwoods and titheable Trees within the Pariſh, or the like; this is a good Diſcharge. And *Coke* ſaid, that in the Pariſh where he lived, Tithe had not been ever paid of Wood, and that the Parſon had a Wood which is called the Tithe-Wood, for which he pays yearly to the Lord Four-pence, of whom he holds it; and therefore it ſhall be intended, that it was given upon a Conſideration for all Tithe-Wood within that Pariſh, for that no Tithe-Wood hath ever been paid there. *Paſch.* 14 *Jac. B. R. Lapthorn's* Caſe, 1 *Roll's Rep.* 355.

Tithes of Willows.

But if one preſcribes to pay a certain Rate for the Tithes of all Willows cut down by him within the Pariſh, this is not good, unleſs he ſay upon his own Lands. *Mich.* 28 *Eliz. B. R. Godbolt* 60, and *Linwood*, and *Doctor and Student*, *fol.* 166. *b.* ſay, that a whole Country may preſcribe in *Non Decimando*; and likewiſe, ſo we find that in a Suit for the Tithe of Underwood in the Wild of *Kent*, a Prohibition was prayed upon a Suggeſtion, that they had a Preſcription to be diſcharged of the Payment of the Tithe of Underwood growing in the Wild there, (which is ſaid to contain about Forty Pariſhes:) But *Coke* Chief Juſtice anſwered, That what was ſaid by *Linwood* and *Doctor and Student*, was with this Proviſo, That there be beſides this ſufficient Maintenance for the Parſons, otherwiſe it is not good; and that the Statute of 2 *Ed.* 6. *c.* 13, did not at all aid in this Caſe, for that a private Man cannot in this Manner preſcribe; yea, and that the Statute was againſt them, although that no Tithe had been ever paid: And further he ſaid, that no Tithe could be paid formerly of Underwoods in this Place, becauſe there were only great Timber-Trees there growing, which are free by Law; but now theſe Trees being deſtroyed by Iron Mills, and Underwood being grown up in the Place of them, Tithes ſhall be paid thereof as in other Places: And the whole Court was clearly of this Opinion. And *Dodderidge* ſaid, that by *Linwood* and *Doctor and Student*, a whole Country may be diſcharged of the Payment of Tithes; but this at the firſt of Neceſſity ought to have a lawful Commencement by Way of Compoſition, or the like, which could not here be ſhewed: And with him *Coke* and the whole Court agreed, and ſo a Prohibition was denied. *Mich.* 12 *Jac. B. R. Ruſſel* v. *Barkhurſt*, 2 *Bulſt.* 285. *Paſch.* 12 *Jac. B. R. Porter* v. *Tike*,

If Underwood in the Wild of *Kent*, &c. be Titheable.

Tike, 1 *Roll's Rep.* 22. Yet to my Knowledge no Tithes of Wood are at this Day paid in the Wilds of *Kent* and *Suſſex* upon the Pretence of ſuch Preſcriptions, and they have been upon Trials allowed to be good. And ſo *Finch* Recorder ſaid, that it was reſolved in one *Dawley*'s Caſe for the Wild of *Suſſex*, and *Mich.* 13 *Jac. B. R.* and in the Caſe of *Porter* and *Dike* for the Wild of *Kent*, that their Preſcription *De non Decimando* was adjudged good. *Norton*'s Caſe, *Trin.* 4 *Car. C. B. Hetley* 110. So where a Prohibition was granted againſt the Proprietor of the Parſonage of *Tunbridge* to be diſcharged of Tithes of Wood, and upon a Suggeſtion that it was within the Precinct of the Wild of *Kent*, which Time whereof, *&c.* was diſcharged of Tithes; the Preſcription was traverſed, and found for the Plaintiff, and allowed to be good, on *Mich.* 17 *Jac. B. R.* Earl of *Clanrickard*'s Caſe, *Palmer* 37. And theſe Preſcriptions of *Non Decimando* for Wood have been allowed alſo for other Places, and chiefly, as I ſuppoſe, upon this Reaſon, That Wood is not titheable of common Right, but by Cuſtom only, (it is ſaid, that the Tithe of Wood was firſt introduced to be paid to the Clergy in the 17 *Ed.* 3. by Canon made by *John Stratford* Archbiſhop of *Canterbury*. *Palmer* 38. 2 *Roll's Rep.* 122.) and therefore as by Cuſtom Wood is made titheable, ſo by the like Cuſtom it may be exempt from the Payment of Tithes; but ſuch Preſcriptions of *Non Decimando* have never been allowed to diſcharge Corn, Hay, or any ſuch like Thing, which be of common Right titheable.

Predial Tithes.

Nota.

2 *Danv.* 585. *F.*

As of divers Sorts of Trees Tithes ſhall be paid, ſo of the Fruit thereof; and though Timber-Trees of the Age of Twenty Years, or above, with the Roots, Germins, Bark and Loppings, be free from yielding of Tithe, yet of Acorns or Maſt ſevered from the Trees, Tithes are to be paid, (which are alſo predial Tithes) becauſe theſe renew yearly. *Lifford*'s Caſe, *Coke* 11, 49. 1 *Roll's Rep.* 100. *Trin. Jac. Reynold*'s Caſe, *Moor* 762. But then the Acorns muſt be gathered and ſold; for if they in the Seaſon drop from the Trees of themſelves, and the Owner's Hogs do eat them, no Tithe ſhall be paid thereof. *Trin.* 2 *Car. Hetley, p.* 27. *Littleton Rep.* 40.

Tithe of Acorns, *&c.* gathered.

And as of Acorns and Maſt Tithes are to be paid, ſo of the Fruits of all other Trees, whereof Profit may be made, the Tithe is to be paid; as of Apples, Pears, Cherries, *&c.* which Fruits if they be ſtolen, and not gathered by the Owner, the Parſon as well as the Owner ſhall bear the Loſs; but if the Owner doth ſuffer a Stranger to pull or take his Fruits, the Tithe ſhall be anſwered; and ſo it is, if he ſuffer them to hang too long by Negligence, and after that Time they be imbeziled. *Trin.* 4 *Car. B. R. Anonymus, Hetley* 100. If the Soil of the Orchard be ſown with any Kind of Grain, the Payment of the Tithes of the Fruit of the Trees ſhall be no Diſcharge for the Tithes of the Grain, for that they be of ſeveral and diſtinct Kinds. 2 *Inſt.* 652. But if a Man doth pay Tithes for the Fruit of the Trees, and afterwards doth cut the ſame Trees, and make them into Billets or Faggots, and ſell them, he ſhall not pay Tithes for the Billets or Faggots, for that is not a new Increaſe. 2 *Inſt.* 651, 622. Alſo of all Garden-Herbs, as Mint, Parſly, Annis, Rue, Sage, Cabbage, Turneps, *&c.* Tithes are to be paid, and they are Minute Tithes, *Palmer* 222; but in many Places by Cuſtom, ſome ſmall Rate, as Four-pence, *&c.* is paid for the Tithe of an Orchard, or Garden, and if in a Place where ſuch Preſcription is, a new Orchard be planted, the Owner thereof ſhall be Tithe-free of it, paying the accuſtomary Rate as for the old Orchards. *Paſch.* 4 *Car. B. Wolmerſton*'s Caſe, *Hetley* 85.

Tithe of Fruit Trees.

If Orchards be ſown with Grain.

New Orchards planted, *&c.*

Predial Tithes.

Antient Garden inlarged.

Yet *Hutton* ſaid, that if a Man had an antient Garden, for which he paid a Penny yearly, and that is inlarged, of that Inlargement Tithes ought to be paid in *Specie*. *Paſch.* 4 *Car. C. B. Thornill's* Caſe, *Hetley* 94. But the Reaſon of this Caſe is, (I ſuppoſe) becauſe the Preſcription was particular for that Garden only. But if the Cuſtom of the Pariſh had been, to have paid yearly a Penny for each Garden in the Pariſh, the Addition, or Inlargement of a Garden would not make any Tithes due in *Specie*.

Rape-Seed, Saffron, &c. Minute Tithes.

Alſo Tithes ſhall be paid of Rape-Seed, Saffron, Hops, Flax, Woad, Hemp, Weld, and of the like Fruits yielded by the Earth, and theſe are not to be accounted Predial, but Minute Tithes. *Palmer* 222. *Udal* and *Tindal's* Caſe, *Hutton* 77, ſame Caſe, 1 *Croke* 28, and *Bendlow's* 139, 159. And as to Hops, the Owner is not bound to dry them before the Tithe be ſet forth. 1 *Roll's Abr.* 644. But how the Tithe of Hops ſhall be ſet forth, whether by the Tenth Pole, or by Meaſure, is not agreed, as is ſaid by *Twiſden* Juſtice in the Caſe of *Ledgar* v. *Langley*, *Paſch.* 18 *Car.* 2. *B. R.* 1 *Sid.* 283, 443, and there cannot be a Preſcription of a *Modus* for Tithe Hops, becauſe the Court will take Notice that Hops have not been Antient, but uſed in Beer of late Time only; yet a Preſcription to pay ſo much in Lieu of all ſmall Tithes may be good for Hops, and ſuch other ſmall Things of new Invention. *Hill.* 21 & 22 *Car.* 2. *Crouch* v. *Riſden*, 1 *Sid.* 443. 1 *Vent.* 61. 2 *Keb.* 612.

Clover-ſeed is in it's Nature a ſmall Tithe; reſolved in the *Exchequer*. *Hill.* 12 *Geo.* 2. *Wallis* v. *Paine* and *Underhill*, *Comyns* 633, &c.

Motion for a Prohibition, to be directed to the Conſiſtory Court of *The Biſhop of Worceſter*, to ſtay Proceedings in a Suit there for Tithes of Hops, upon Suggeſtion of a *Modus* Time whereof, &c. there uſed, that if a Parſon ſend a Servant, &c. to pull *aliquam partem lupularum*, he ſhall have the Tithes of them, &c. upon which a Rule was made, to ſhew cauſe why a Prohibition ſhould not be granted: And now it was ſhewed for Cauſe againſt the Prohibition. 1. The Cuſtom is void for Uncertainty, for it does not appear, how much Hops ought to be pulled, &c. 2. That it is an ill Cuſtom, becauſe it is no Benefit at all to the Parſon, but drives him to more Pains than the Law requires, to intitle him to that, which by Law he ought to have, in the ſame Manner without ſuch Pains; of which Opinion was the whole Court, and therefore the Rule was diſcharged. 1 *Ld. Raym.* 504, 505. *Stedman* v. *Lye*.

Honey and Wax of Bees.

Honey and Wax of Bees, being Predial Tithes, ſhall here alſo be ſpoken of; as to which, the Tithe of Honey, and Wax of Bees in an Hive, &c. ought to be paid in Kind *de Jure*, as was adjudged in a Prohibition upon a Demurrer. *Mich.* 15 *Car. B. R. Barefoot* and *Norton's* Caſe, 1 *Roll's Abr.* 635, ſame Caſe, *Jones* 447, and *Croke* 559. *F. N. B.* 41. *a.* But when one preſcribed to be diſcharged of the Tithe of the Tenth Swarm of Bees, in Conſideration that he paid the Tithe of the Honey and Wax, and fed them in Winter, and found them Hives, and (for that they were *Feræ Naturæ*) took great Care, and ſpent much Labour to preſerve them when they ſwarmed, a Prohibition was granted upon theſe Surmiſes. *Paſch.* 11 *Car. B. R. Anonymus*, 1 *Croke* 404. But ſome of the Judges held, that the *Modus* is not good, for that Conſideration is no more than the Duty that the Law requires. But they agreed, that no Tithes were due of the Tenth Swarm, for that Bees be *Feræ Naturæ*. *Paſch.* 1 *Car. B. R. Landford's* Caſe, 1 *Roll's Abr.* 651.

A Queſtion was, whether the Tithe of Flax be a great or ſmall Tithe. *Holt* C. J. was of Opinion, that they are great Tithes which are ſown in the common Field; and they are ſmall Tithes which are ſown in a Garden,

Garden, or Orchard: *Dolben* and *Eyre* Juſtices held, Tithes ſhall be determined according to the Nature of the Thing titheable, and not according to the Place where they grow; and at another Day, *Holt* being abſent, *Dolben*, *Gregory* and *Eyre* adjudged that they were ſmall Tithes; twenty-ſix Acres only in a Pariſh, which conſiſts of 1200, being ſown by ſeveral Perſons with Flax. But poſſibly it may be adjudged a great Tithe, if the greater Part of the Pariſh be ſown with it. *Wharton* v. *Liſle*, *Skin.* 341, 356. Predial Tithes.

And for the better Aſcertaining the Tithes of Hemp and Flax, it hath been enacted, **That all Perſons that ſhall ſow, or cauſe to be ſown, any Hemp or Flax, in any Pariſh or Place in the Kingdom of** England, **Dominion of** Wales, **and Town of** Berwick **upon** Tweed, **ſhall pay or cauſe to be paid to every Parſon, Vicar or Impropriator of any ſuch Pariſh or Place, yearly and every Year for each Acre of Hemp and Flax ſo Sown, Pulled or Drawn, a conſtant annual Sum of Money not exceeding four Shillings, before the ſame be carried off the Ground, and ſo proportionably for more or leſs Ground ſo Sown, and Pulled or Drawn as aforeſaid; For the Recovery of which Sum or Sums of Money, the Parſon, Vicar or Impropriator ſhall have the common and uſual Remedy allowed of by the Laws of** England. Hemp and Flax, 3 & 4 *W. & M. c.* 3. Not exceeding 4*s. per* Acre; *ſed vide poſt.*

Provided that this Act, or any Thing therein contained, ſhall not extend to charge any Lands diſcharged by any Modus Decimandi, **antient Compoſition, or otherwiſe diſcharged of Tithes by Law.** Proviſo for a *Modus.*

Provided that this Law ſhall continue for ſeven Years, and to the End of the next Seſſion of Parliament after the ſaid ſeven Years are expired. Stat. 3 & 4 W. & M. c. 3.

Whereas an Act made in the Third Year of the Reign of his Majeſty and late Queen, Intitled, An Act for the better Aſcertaining the Tithes of Hemp and Flax, **was made to continue but for ſeven Years, and to the End of the next Seſſion of Parliament after ſuch Term ended, and is now expired: And whereas the ſaid Act hath by Experience been found very uſeful and neceſſary, Be it therefore Enacted by the King's moſt Excellent Majeſty, by and with the Advice and Conſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament Aſſembled, and by the Authority of the ſame, That from and after the Five and twentieth Day of** March, **which ſhall be in the Year of our Lord One thouſand ſeven hundred, all and every Perſon or Perſons, who ſhall Sow or cauſe to be Sown, any Hemp or Flax in any Pariſh or Place in the Kingdom of** England, **Dominion of** Wales, **and Town of** Berwick **upon** Tweed, **ſhall pay or cauſe to be paid to every Parſon, Vicar and Impropriator of any ſuch Pariſh or Place, yearly and every Year, the Sum of five Shillings, and no more, for each Acre of Hemp or Flax ſo ſown, before the ſame be carried off the Ground, and ſo proportionably for more or leſs Ground ſo ſown: For the Recovery of which Sum or Sums of Money, the Parſon, Vicar or Impropriator ſhall have the common and uſual Remedy allowed of by the Laws of the Land.** This Act continued. Five Shillings *per* Acre.

Provided, That this Act, or any Thing therein contained, ſhall not extend to charge any Lands diſcharged by any Modus Decimandi, **antient Compoſition, or otherwiſe diſcharged of Tithes by Law.** *Modus.*

Provided always, That nothing herein contained ſhall extend, or be conſtrued to extend, to make any Alteration in the Right or Proviſo for Ground formerly ſown.

Manner

Predial Tithes.

Manner of Payment of Tithes of Flax and Hemp to any Eccleſiaſtical Perſon, Incumbent of any Parſonage, Vicarage or Curacy, or to any Impropriator, or Body Corporate, having or holding any Impropriation, for ſuch Ground as hath at any Time ſince the Second Day of February One thouſand ſix hundred and eighty-four, and before the Second Day of February One thouſand ſix hundred ninety-one, been ſown with Flax or Hemp, and paid Tithe in Kind to ſuch Incumbent, Impropriator or Body Corporate reſpectively, but that the ſame ſhall continue and be payable and paid, as fully and in ſuch Manner as formerly; any Thing in this Act to the contrary notwithſtanding.

This Act continued.

Provided, That this Law ſhall continue in Force for ſeven Years, to be accounted from the ſaid Five and twentieth Day of March, and from thence to the End of the next Seſſions of Parliament, and no longer. Stat. 11 & 12 W. 3. c. 16. continued by 6 Ann. ch. 28. for ſeven Years; and by 1 Geo. 1. ſeſſ. 2. c. 26. made perpetual.

CHAP. L.

Mixt Tithes, as of Cattle, Fowls Agiſtment, &c. *when, and in what manner Payable, and what* Modus, &c. *good to diſcharge ſuch Tithes.*

Mixt Tithes, as Horſes, Oxen, *&c.* and their Young.

HAVING ſpoken of Predial Tithes of all Sorts, mixt Tithes are next to be conſidered, which are, the Tithes of the ſeveral Creatures nouriſhed by the Fruits of the Earth. And firſt, of ſuch with which the Farmer is wont to ſtock or paſture his Lands, as Horſes, Oxen, Cows, Sheep, Goats, to which may be added, Hogs, *&c.* and the Young of each, which may yield their Tithes in Kind: Therefore if a Man hath ten Colts, Calves, Lambs, Kids or Pigs, in one Year, one of them ſhall be to the Parſon or Vicar, *&c.* But if he hath a leſs Number of any Sort, the Parſon can have no Tithes in Kind of them that Year, without a ſpecial Cuſtom for it, but muſt have his Tithes *pro Rata*, either in Money the ſame Year, as the Cuſtom doth direct, or in Kind the next Year, reckoning both Years together; but by Cuſtom, the Parſon may have one of the Young, if there be but Seven, and if there be a leſs Number in one Year, to pay an Half-penny for each of them; this is a good Cuſtom; but when the Cuſtom is alſo, that he ſhall have one of Seven, as of Calves, Pigs, *&c.* there he ſhall not account the Young in two Years, and ſo the ſecond Year have one in Kind, but have an Half-penny for each of them in both Years. *Anonymus, Latch* 254. If a Man hath but one or more Calves, Colts, or Lambs, *&c.* and doth ſell them, by the Cuſtom in many Pariſhes, he ſhall pay to the Parſon the Tenth Penny of the Price, but Cuſtom in theſe Caſes is generally to direct, and to be obſerved. It is ſaid to be a good *Modus* for the

If Calves, *&c.* be ſold.

Tithe of Calves to pay one Calf for the Tithe, if the Owner hath Seven in one Year, and if he hath under Seven, to pay one Half-penny for each of them, and that if he ſell any Calf, ſhall pay the Tenth of the Price for which he ſold it. *Mich.* 14 *Jac. B. R. Lee* and *Collin*'s Caſe, 1 *Roll's Abr.* 640. Mixt Tithes.

But if a Man preſcribe to pay one Half-penny for every Lamb that he ſhall ſell before the firſt Day of *May*, without other Tithe of them, and he by Fraud, to deceive the Parſon, ſells his Lambs but one Day before *May*, this is no Diſcharge by the Cuſtom of the Tithes. *Mich.* 17 *Jac. per Cur.* 1 *Roll's Abr.* 652. And as the Parſon is to have the Tithes of the Young and Increaſe of theſe Cattle, ſo he on his Part is to obſerve the Cuſtom of the Place for the better propagating that Increaſe, elſe any Pariſhioner grieved may have his Action of the Caſe againſt him; for ſo an Action of the Caſe was brought againſt a Parſon, declaring, that within the Pariſh there is a Cuſtom, that the Parſon at all Times of the Year had uſed to keep a common Bull, and a Boar, for the common Uſe of the Kine and Sows of the Pariſhioners, for the Increaſe of Calves and Pigs within the Pariſh, and that the Defendant being Parſon there, had neglected to keep them; by reaſon whereof, the Plaintiff being an Inhabitant, had loſt the Increaſe, *&c.* The Court were of Opinion that this was a reaſonable Cuſtom, and that every Inhabitant prejudiced by not keeping the Bull and Boar, might maintain his Action. *Trin.* 39 *Eliz. Yielding* v. *Fay*, 3 *Croke* 569, and *Moor* 355. Fraudulent ſelling. If the Parſon keep not a Common Bull, *&c.*

Of common Right young Cattle are titheable when they are weanable, that is, can live without the Dam on ſuch Food with which the Dam is nouriſhed; and the Tithe of theſe is to be apportioned with Reſpect to the Places where they are ingendered, brought forth and nouriſhed. When titheable.

Cattle that yield other Profit to the Owner than their Young, the Tithe thereof is alſo to be paid to the Parſon; as of the Milk of Cows, *Mich.* 9 *Car. Baxter* v. *Hopes*, *Brownl.* and *Gouldſb.* 2 *Part* 30; and ſo I ſuppoſe of Goats and Sheep, when their Milk is preſerved by the Owner; but by Cuſtom a certain Number of Cheeſes may be paid in Diſcharge of the Tithe of Milk. *Trin.* 21 *Jac. B. R. Wiſeman* and *Dennyſe*'s Caſe, *Godbolt.* Or by Cuſtom to pay the Tenth Cheeſe made from the firſt of *May* to the firſt of *Auguſt*, in Recompence of all Tithe-Milk for the whole Year, is a good Diſcharge, for that comes by Labour, and is not due of itſelf. So to pay the Tenth Quart of Milk at the Parſonage-Houſe, or other certain Place, is good enough. *Paſch.* 40 *Eliz. B. R. Auſtin* v. *Lucas*, 3 *Croke* 609, ſame Caſe, *Moor* 909. And when one ſurmiſed, that the Cuſtom of the Country where he lived was, not to pay any Tithes of the Milk of Ewes, Prohibition was granted *per Cur. Sewell* and *Bicknar*'s Caſe, 1 *Roll's Abr.* 654. And note, that when the Tithe of Milk is paid, no Tithe of Cheeſe is due; ſo when Tithe-Cheeſe is paid, no Tithe-Milk is to be required; and that when Cows yielding Milk are ſold, or otherwiſe removed into another Pariſh, the Tithe of Milk for the Time is to be paid to the Parſon of the Pariſh where they are depaſtured. Tithe of Milk. If Tithe-Milk, no Tithe-Cheeſe, *&c.*

In a Suit for ſmall Tithes by *Engliſh* Bill, and amongſt the reſt for Tithe-Milk, upon the hearing of the Cauſe, a Queſtion aroſe, whether the Defendant ſhall pay every Tenth Part of the Milk every Meal, or only pay every Tenth Meal? It was decreed, that he ſhould pay every Tenth Meal intire. The next Queſtion was, Whether *de Jure* the Pariſhioners ought to ſend the Tithe-Milk to the Parſonage-Houſe, or If Tithe-Milk every Meal, *&c.*

Mixt Tithes.

Where to be delivered.

that the Parſon ought to fetch it from the Pariſhioners? It was agreed by the whole Court, that the Tithe-Milk ought to be carried by the Pariſhioners; and by the Chief Baron, and two other Barons, to be delivered in the Church-Porch, becauſe the neighbouring Pariſhes did ſo. But by *Raymond*, it ſhould be delivered at the Parſonage-Houſe, becauſe where there is no Cuſtom, the Common Law prevails. *Dod* v. *Engleton*, *Paſch.* 13 *Car.* 2. in *Scaccar.* *Raym.* 277. But *Quære* of this Caſe, how the Tithe of Milk becomes different from other Tithes, which generally are to be ſet out and rendered in the Place where they ariſe, and the Pariſhioner not compellable to carry and deliver them at the Parſonage-Houſe, Church-Porch, or any other Place. *Vide poſt.* in this Chapter, *Scoles* v. *Lowther.*

Tithe of Lambs, and Wool.

Not only the Tithe of the Lambs, but alſo of the Wool of Sheep, is to be paid to the Parſon or Vicar, or other Proprietor of the Tithes, *viz.* proportionably for the Time that they are in the Pariſh, 2 *Keb.* 293, as thus; the Parſon ſhall have eight Pounds of Wool in Eighty, of Forty Sheep in the Pariſh a whole Year; four Pounds of Wool, if they were there but half the Year; two Pounds of Wool, if they were but three Months; and but the Tithe or Tenth of the Twelfth Part of the Wool, if they lay and feed but one Month in the Pariſh. And this is due *de Jure* at the Time when it is clipped; but by Preſcription it may be ſet out altogether at another Time; and if the Spiritual Court will not allow of ſuch Preſcription, they are to be prohibited. *Mich.* 41 *Eliz.* *B. R.* *Green* v. *Hun*, 3 *Croke* 702, vouched, *Paſch.* 41 *Eliz.* in *Awberrie*'s Caſe, *Moor* 910. And *Jones* ſaid, that if the Pariſhioner ſell his Sheep, the Parſon ſhall have Allowance for the Tithes of them after their Shearing. *Anonymus*, *Latch*, *p.* 254. Yet when the Owner of the Sheep had depaſtured them in the Pariſh from *Michaelmas* to our *Lady-day*, and then ſold them, and a Suit was in the Spiritual Court for a Tenth Part of the Bargain, and the Owner to have a Prohibition ſurmiſed, that he would pay the Tenth of the Wool of them according to the Cuſtom of the Pariſh; a Prohibition was denied; for, as *Dodderidge* Juſtice ſaid, by this Way the Parſon ſhall be defrauded of all, if he ſhall not now have his Recompence, for that it was not the Time of Shearing when they were ſold, and the Sheep are gone into another Pariſh; and *Whitlock* ſaid,

De Animalibus inutilibus, &c.

that *de Animalibus inutilibus* the Parſon ſhall have the Tenth Part of the Bargain for depaſturing them, as Horſes, Oxen, *&c.* But *de Animalibus utilibus* he ſhall have the Tithe in Specie, as Cows, Sheep, *&c.* *Mich.* 2 *Car.* *B. R.* *Popham* 197. So if a Man pay Tithe of Lamb at *Markſtide*, and at *Midſummer* following doth ſhear the Reſidue of his Lambs, *viz.* the nine Parts, he ought to pay Tithes alſo of their Wool, although that there is not above two Months betwixt the Time of the Payment of the Tithes of the Lamb, which were tithed with their Fleeces, and the Shearing of the Reſidue, for this is a new Increaſe, and a Prohibition was denied accordingly. *Paſch.* 16 *Jac.* *B. R.* *Nicholls* and *Hooper*'s Caſe, 1 *Roll's Abr.* 642.

Tithe of Neck-Wool, *&c.*

And not only is the Tithe of the Wool upon the Bodies of the Sheep or Lambs due and payable, but alſo of the Head and Neck, though this be cut off before Shearing-time, if what is cut be converted to the Owner's Uſe, or Profit, for that the Neck-wool is often fraudulently taken off to the Spoiling of the Fleece; and when it was urged, that if ſuch Abuſe was in the Cutting of the Neck-Fleeces, this ought to come on the other Side to ſhew it to be ſo, as in the Caſe of *Rakings*; the Court was againſt this, and at that Time refuſed to grant a Prohibition. But at another Day

the Suggeſtion appearing to be, that they uſed to wind up the other Fleeces at their own Charges; for this Cauſe a Prohibition was granted. *Mich.* 14 *Jac. B. R. Foſſe* v. *Parker*, &c. 3 *Bulſt.* 242. 1 *Roll's Abr.* 645, and 646. *Litt. Rep.* 31. But when one preſcribed, that he paid the Tenth Fleece of Wool in Satisfaction of all Locks and Tithes due for Wool, it was moved, that the Preſcription was not good, becauſe it is but to have the ſame Thing of the ſame Nature in Recompence; the Court held, that the Subſtance of the Preſcription was good, and that the Locks being but of ſmall Value, were free. *Mich.* 36 & 37 *Eliz. B. R. Jeſop* v. *Payn*, 3 *Croke* 363. But a Preſcription to be diſcharged of the Locks of Wool, ought to be ſhewed of Locks caſually loſt. *Mich.* 37 & 38 *Eliz. Moor* 911. And if a Pariſhioner doth cut off the dirty Locks from his Sheep before the Time of Shearing, the better to preſerve them from Vermin, and this be done without Fraud, no Tithes ſhall be paid thereof; *per Curiam*, *Paſch.* 14 *Car. B. R. Dent* and *Salvin*'s Caſe, 1 *Roll's Abr.* 646, eſpecially if that the Pariſhioner can preſcribe for it, in Conſideration that he is to wind up the Parſon's Tithe-Fleeces, &c. *Mich.* 14 *Car. B. R. Williams* and *Wilock*'s Caſe, *Roll's Abr.* 646.

Mixt Tithes.

Locks of Wool.

Dirty Locks cut off.

If Sheep be ſhorn and die of the Rot, or other Diſeaſe before the *Eaſter* following, the Wool is not titheable, unleſs the Parſon can preſcribe to have it. *F. N. B. Conſultation* 51. Yet by *Dodderidge* and *Jones*, the Tithe of ſuch Wool ought to be paid to the Parſon. *Anonymus*, *Latch*, *p.* 254. However, if a Man doth kill his Sheep, he ſhall pay Tithe for their Wool, but not for their Skins, *Paſch.* 14 *Car. C. B. Dent* and *Salvin*'s Caſe, *per Curiam*, 1 *Roll's Abr.* 646; but for the Bodies fed on his Land in the Pariſh, and eaten in his Houſe, no Tithe ſhall be paid. *Mich.* 7 *Car. Facy* and *Long*'s Caſe, *per Curiam.* 1 *Roll's Abr.* 647, ſame Caſe, 1 *Croke* 237. And *Williams* ſaid, that if a Man keep Sheep in one Pariſh until Shearing-time, and then ſell them into another Pariſh, in this Caſe the Vendee ſhall pay the Tithe-wool to the Pariſh where they were depaſtured in the greater Part of the Time of the growing of the Wool. But if there be a Preſcription, that the Owner of the Sheep ſhall pay one Half-penny for the Wool of Sheep ſold after Shearing, and before *Michaelmas*, this is good, and the Vendee ſhall be diſcharged. *Mich.* 37 & 38 *Eliz. Moor* 911.

Sheep dying after Shearing, &c.

The Owner having paid Tithes of the Wool of Sheep, he ſhall not pay any Tithe for their Herbage, for then he ſhould pay Tithes twice of one Increaſe, *Trin.* 12 *Jac. B. R. Maſcal* and *Price*'s Caſe, 1 *Roll's Abr.* 642, and 1 *Roll's Rep.* 62; and therefore, if he doth buy Weathers, and after doth ſell them, for that theſe ſhall pay Tithe of their Wool, no Tithes ſhall be paid of their Paſture. *Mich.* 7 *Car. C. B. Facy* and *Long*'s Caſe, *per Curiam*, 1 *Roll's Abr.* 647.

Herbage.

If a Preſcription be, that if the Owner hath under the Number of ten Fleeces of Wool, that he ſhall pay a Penny to the Parſon for the Tithe of each of them, and that if he hath more, then he ſhall deliver to the Parſon the Tenth Part of the Wool, upon his Conſcience, without Fraud and Covin, *ſine viſu vel tactu* of the Parſon of the Ninth Parts, this is not a good *Modus*, for that it is unreaſonable, and as if it was to give the Parſon what the Pariſhioner pleaſed. *Mich.* 12 *Jac. B. R. Wilſon* and *The Biſhop of Carliſle*'s Caſe, *per Curiam*, 1 *Roll's Abr.* 648.

To deliver a Tenth Part, *ſine viſu vel tactu*, &c.

So if a Preſcription be, to pay every Tenth Pound of Wool for the Tithes of the Wool, and it be not ſhewed what he is to pay, if the Wool doth not amount to ten Pounds, this is not good, for that it is a Preſcription in *Non Decimando*, if it be under ten Pounds, and the Tenth is due

To pay every Tenth Pound of Wool.

Mixt Tithes.

due of common Right. *Mich.* 7 *Jac. Delman* and *Barton*'s Caſe, *per Curiam*, 1 *Roll's Abr.* 648. Neither is it a good Preſcription, that one hath paid the Tenth of the Wool of all Sheep that he had before *Lady-Day*, and ſheared or ſold, or put into another Pariſh, or the Value of the Tenth thereof at that Time, and this in full Satisfaction, as well of all Wool of ſuch Sheep, as of all other Sheep brought into the Pariſh after our *Lady-Day*; for it is not reaſonable, that the Tithes that one Man pays ſhall be a Diſcharge for all the other Pariſhioners; but this was intended to be a Diſcharge of all the Sheep of the Party himſelf brought into the Pariſh after our *Lady-Day*, though not ſo expreſſed, and then the Preſcription had been good. *Mich.* 9 *Car. B. R. Market* and *Knight*'s Caſe, and ſo adjudged in another Caſe the ſame Term, upon a Trial at Bar. 1 *Roll's Abr.* 649.

So if the Pariſhioner can preſcribe, that in Conſideration that he had, Time whereof, *&c.* paid Tithe-Wool of all Sheep that he ſheared, *viz.* as well of thoſe that he bought but two Days before the Shearing, as of others that he had kept all the Year, he had uſed to be diſcharged of the Tithe-Wool of all Sheep that he ſold two Days before Shearing; this is a good Preſcription, becauſe by the Spiritual Law the whole Tithe-Wool of the Sheep nouriſhed in another Pariſh, and ſo lately bought before that Shearing, is not due to ſuch Parſon. *Mich.* 14 *Jac. B. R.* adjudged, 1 *Roll's Abr.* 648. But a Cuſtom to pay Tithes in Kind for Sheep, if they continue in the Pariſh all the Year, and if they be ſold before ſhearing Time, but an Half-penny for every one ſo ſold, was held to be an unreaſonable Cuſtom, for by ſuch Means the Parſon may be defeated of his Tithes. *Weeden* v. *Harden*, *Paſch.* 17 *Car. March*, *Caſe* 128.

Of Sheep fold two Days before Shearing, *&c.*

Tithe was decreed in the Exchequer for the depaſturing of Sheep on Turnips remaining on the Ground unſevered. The Defendant had paid Tithe-Wool, and after ſhearing Time fed his Sheep with Turnips, by which they were bettered 5*s. per* Sheep. *Gilb.* 231. *Coleman* Impropriator of *Thompſon* in *Norfolk* v. *Barker*; for the Plaintiff were cited *Nicholas* v. *Hooper*, 1 *Roll. Abr.* 642. *pl.* 7. *Eaſtmond* v. *Sandys*, *Show. Parl. Ca.* 192. and *Dummer* and *Wingfield*, in *Scacc. Hill.* 1 *W. & M.*

Barren Stock depaſtured and ſold.

Not only the Tithes of ſuch Cattle which yield a Tithe in Kind are to be paid, but alſo for ſuch as are Barren Stock, as for Horſes, Oxen, *&c.* depaſtured, to be ſold in the Pariſh where they be depaſtured. *Trin.* 4 *Car. C. B. Norton*'s Caſe, *Hetley* 100. *Trin.* 4 *Car. C. B. Anonymus*, *Hetley* 100. *Sherrington* and *Fleetwood*'s Caſe, 3 *Cro.* 475. Therefore, after a Man hath paid the Tenth Colt, Calf, and Lamb, if he doth rear any of the reſt, and ſell them before they yield Profit to the Parſon, or be uſed for the Plow, he ſhall pay a Tithe of them. *Trin.* 38 *Eliz. Sherrington* and *Fleetwood*, *Moor* 909, ſame Caſe, 3 *Croke* 475. *Paſch.* 4 *Car. Wolmerſton*'s Caſe, *Hetley* 85. So if after Milch Cows grow old, they be kept dry, and depaſtured as other dry Cattle, though but for one Month, a Tithe ſhall be paid for them; and ſo it is, if they be fatted and ſold. *Trin.* 4 *Car. C. B. Anonymus*, *Hetley* 100. And if a Man doth buy Cattle and feeds and ſells them, he ſhall pay a Tithe for them, for that they cannot render any other Tithe; but otherwiſe it is of Sheep, for that the Tithe is to be paid of the Wool. So if a Man doth buy, or breed Beaſts, and doth feed, and ſpend them in his Houſe, he ſhall not pay any Tithe for them. *Mich.* 7 *Car. Harvy* and *Long*'s Caſe, and *Trin.* 38 *Eliz. B. R. Sherrington* and *Fleetwood*'s Caſe, *per Curiam*, 1 *Roll's Abr.* 647, ſame Caſe, *Moor* 909, and *Gouldſb.* 174. *Mich.*

38 & 39 *Eliz. Greſham* v. *Lucas*, *Moor* 911, ſame Caſe, 3 *Croke* 446. So if he having paid Tithes of his Colts, or Calves, doth rear any of the reſt, or buy others, for to till Land in the ſame Pariſh, or doth rear Cow-Calves for to bear Calves, and for the Dairy, no Tithes ſhall be paid for the Paſture that they eat in the mean Time. *Paſch.* 4 *Car. C. B. Wolmerſton*'s Caſe, *Hetley* 85. *Mich.* 14 *Jac. B. R. Watley* and *Hanberry*'s Caſe, and *Mich.* 14 *Jac. B. R. Joyce* and *Parker*'s Caſe, and *Mich.* 14 *Jac. B. R.* Dr. *Beſt* and *William*'s Caſe, *Hill.* 14 *Jac. B. R. Kneebin* and *Woodrett*'s Caſe, *Trin.* 12 *Jac. B. R. Maſcal* and *Price*'s Caſe, 1 *Roll's Abr.* 846. *Trin.* 12 *Jac. B. R. Price* v. *Maſcal*, 2 *Bulſt.* 238, ſame Caſe, 1 *Roll's Rep.* 38. *Trin.* 30 *Eliz. Sherrington* v. *Fleetwood*, *Moor* 909. *Mich.* 41 *Eliz. B. R. Green* v. *Hun*, 3 *Croke* 702. *Mich.* 9 *Jac. Baxter* v. *Hope*, *Brownl.* and *Gouldsb.* 2 *Part* 30.

Mixt Tithes.

Beaſts reared to till Land, &c.

Nor ſhall Tithes be paid for the Paſture of Oxen uſed to till the Land in the ſame Pariſh, or for the Beaſts of the Pail, at ſuch Time when they are put to that Uſe. *Mich.* 9 *Jac. Baxter* and *Hope*'s Caſe, *per Curiam.* 1 *Roll's Abr.* 646. Nor ſhall he pay for the Paſture of Horſes, when put to the ſame Uſe. *Trin.* 15 *Jac. B. R. Bell* and *Tard*'s Caſe, 1 *Roll's Abr.* 646. Or if a Parſon doth keep an Horſe within a Pariſh only for his Saddle, no Tithes ſhall be paid for his Graſs. *Trin.* 9 *Jac. B. R. Pothall* v. *May*, 1 *Bulſt.* 171. *Paſch.* 4 *Car. C. B. Thornhill*'s Caſe, *Hetley* 94. 1 *Vent.* 236. And if Oxen have been uſed to the Plough, and afterwards fatted in order for Sale, Tithes ſhall be paid for the Agiſtment of ſuch Oxen, during the Time they were grazed and fatted in order to be ſold, notwithſtanding they had been formerly uſed to the Plough; for the Reaſon of their Diſcharge now ceaſeth, they being become no way beneficial to the Parſon in any other Tithes. *Sandys* v. *Eaſtmond* and *Nayle* in *Scacc'*. For the Advantage the Parſon is ſuppoſed to have by the Labour, *&c.* of ſuch Cattle, whereby his Tithes are to be increaſed, is the Reaſon of the Diſcharge of the Tithes of ſuch Cattle; therefore, I conceive, that if one breed up Cattle for the Plow, *&c.* but hath not any arable Land within the ſame Pariſh whereupon to imploy thoſe Cattle, but doth imploy them in another Pariſh, theſe Cattle ſhall pay Tithes to the Parſon of the Pariſh wherein they are depaſtured. See *Holbeech* v. *Whadcoke*, *Paſch.* 13 *Car.* 2. in *Scaccar. Hardres's Rep.* 184. The Opinion here of the Author is well eſtabliſhed by the latter Part of the following Caſe: *Lowther* was Parſon of the Pariſh of *Swillington*, and Mr. *Scoles* lived in *Kippax* the next adjoining Pariſh, and occupied a large Parcel of arable Land there, and had forty Acres of Meadow and Paſture in *Swillington*, and four Acres of arable Land. *Lowther* libelled in the Spiritual Court of *York* againſt *Scoles*, for Tithes of the Cattle depaſtured in *Swillington*; *Scoles* upon a Suggeſtion, that barren Cattle kept for plowing the Land, and Cattle for the Pail for the Uſe of the Houſe, ought not by Law to pay Tithes, and that theſe Cattle, for the Tithes whereof *Lowther* libelled, are ſuch, moved for a Prohibition. And it was granted to him, *niſi*, *&c.* And now Serjeant *Pemberton*, upon Affidavit, that *Scoles* carried the Milk of theſe Cattle to his Houſe in *Kippax*, and uſed it there, and that he made uſe of the dry Cattle for plowing his Land in *Kippax*, moved that the Rule might be diſcharged. And it was reſolved by the whole Court, that the Defendant *Lowther* ſhould have Tithes of the Milk. For though *Wright* Serjeant objected, that if a Man have arable Land without a Houſe, he is intitled to be diſcharged of the Tithes of the Milk, which maintains the Servants who plow the Land, as well as if he had had a Houſe

Oxen to till the Land, &c.

Saddle-Horſe.

Mixt Tithes.

in which the Milk were ſpent; yet the Court anſwered, 1. That the Law was otherwiſe, for it is of the ſame Nature with Wood which is burnt in the Houſe, which is exempt from the Payment of Tithes, only ſo long as it is burnt in the Houſe. So the Law is in the Caſe of Milk, which is only diſcharged of Tithes becauſe it is uſed in the Houſe. And *per Curiam*, of common Right Tithe-Milk is payable at the Parſonage or Vicarage-houſe. 2. As for the Tithes for the Agiſtment of the barren Cattle, the Court ſaid, that if in this Caſe there had not been any arable Land in *Swillington*, it is without doubt that the Parſon ought to have had Tithes. For the Reaſon why Cattle of the Plough are excuſed from the Payment of Tithes is, becauſe they are imployed for the Improvement of the arable Land in the ſame Pariſh, by which the Parſon has better Tithes of the arable Land; but here that Reaſon fails, for the Parſon of *Swillington* has no Tithes of the Land in *Kippax*. In the ſame Manner where a Man has Wood in one Pariſh, and arable Land in another; if he makes Uſe of this Wood in making Fences for his arable Land, yet he ſhall pay Tithes to the Parſon where the Wood grows: But it had been otherwiſe if it had been the ſame Pariſh. The ſame Law, where the Wood grows in one Pariſh, and is ſpent in the Owner's Houſe in another Pariſh. Now then the Queſtion here will be, whether the Plowing of theſe four Acres of Land in *Swillington* will excuſe theſe Cattle from the Payment of Tithes? And *per Curiam*, it will excuſe only thoſe Cattle which plow that Land of the four Acres, and not thoſe which plow any Land in *Kippax*; for the Parſon ought to have ſomething in lieu of the Loſs of thoſe Tithes, which can only be of the four Acres in *Swillington*. Then *Powell* Juſtice took Exception to the Suggeſtion, where the Plaintiff ſuggeſts, that the barren Cattle plow the Land, *&c.* but does not ſay, *per quod* the Parſon had *uberiores decimas* in another Place. And (by him) *uberiores decimas* does not ſignify only, that the Parſon will have better Tithes out of the arable Land, than he would have had if the Cattle had not plowed it; but it ſignifies, that he will have ſo much more Tithes (than otherwiſe he would have had) as will fully recompence the Loſs of the Tithes of the Cattle; or it will (as he expreſſed it) overweigh that Loſs. But as to this Signification of *uberiores*, *Treby* Juſtice doubted much; but in the Principal Caſe a Prohibition was granted *quoad* theſe Cattle which only plowed the Land in *Swillington*; and as to the reſt, *Lowther* had Liberty to proceed below. 1 *Ld. Raym.* 129, 130. *Scoles* v. *Lowther*.

Horſe to carry Coals, *&c.*

So it hath been held, that if an Horſe be kept to carry Coals, Tithes ſhall be paid for his Paſture: And if when the Caſe is ſo, the Owner doth ſurmiſe, that he is kept for the Uſe of Huſbandry, the other may alledge that he is kept to carry Coals, and the Allegation is traverſable; ſo if the Owner alledge that dry Cattle are kept for the Plow, the other may alledge that they are kept for Sale, without that, that he keeps them for the Plough. *Paſch.* 4 *Car. B. R.* *Thornhill's* Caſe, *Hetley* 93, 94.

If Tithes paid in Kind can be in Satisfaction for Tithes of other Things.

When upon a Suit for Tithes of dry Cattle, to have a Prohibition the Surmiſe was, that one uſed to pay the Tenth Sheaf of Corn, the Tenth Cock of Hay, the Tenth Fleece of Wool, the Seventh Calf, and the Parſon to pay three Half-pence, and the Eighth Calf if he had Eight, and the Parſon to pay one Penny, and ſo to Ten, and if he had under the Number of Seven, to pay only a Half-penny for every one, and after theſe Rates for Lambs and Colts, and that it was in Satisfaction for the Tithes of dry Cattle, and for all other Tithes of Corn, Hay and Cattle. The Opinion of the whole Court was, that this Surmiſe is not

ſufficient; for that which he uſed to pay is but the Tithes in Kind, therefore cannot be in Satisfaction for the Tithes of other Things than themſelves: But if it had been only for dry Cattle for Plough and Pail, it had been good. *Mich.* 42 *Eliz. B. R. Ingolsby* againſt *Johnſon*, 3 *Croke* 786. So when a Surmiſe was of an Uſage to pay a Penny yearly for every Milch Cow, and an Half-penny for every other Cow, and a Half-penny for every Mare, in Satisfaction for the Tithes of all Cows, Horſes, Steers, and other Cattle; and adjudged inſufficient for the ſame Reaſon. *Mich.* 38 & 39 *Eliz. Greſham* v. *Lucas*, *Moor* 911. The like Caſes were, *Trin.* 38 *Eliz. Sherrington* v. *Fleetwood*, *Moor* 909. *Mich.* 3 *Jac. B. R.* 1 *Roll's Abr.* 651. *Mich.* 37 & 38 *Eliz. Griſman* v. *Lewis*, 3 *Croke* 446. *Trin.* 38 *Eliz. Monday* v. *Lovace*, *Moor* 454. But if the Uſage hath been, that they that have Milch Kine in the Pariſh have paid Nine Cheeſes yearly at a Day in Diſcharge of Tithe-Milk and Fatting Cattle; this may ſerve for a good Surmiſe, becauſe the Cheeſes are made by Labour, and are thereby become Things of another Nature than the Milk. *Mich.* 12 *Jac. B. R. Maſcal* and *Price*, 1 *Roll's Rep.* 62, ſame Caſe, *Bulſt.* 2 *Part* 238. A Prohibition was granted to a Suit for Tithes of Cows, Calves, Herbage, and Paſture, upon Suggeſtion of a Cuſtom, that every Pariſhioner from the Time whereof, *&c.* had uſed to pay for every Cow having a Calf one Penny, for every Cow not having a Calf three Half-pence, as far as five Cows; and for five Cows one Shilling and three Pence, and for ſix Cows two Shillings and Six-pence, and for ten Cows two Shillings and Eight-pence, *in plena ſatisfactione omnium decimarum vaccarum et vitulorum, et herbagii, et paſturæ.* The Plaintiff declared in Attachment upon this Prohibition, and upon traverſe of the Cuſtom, a Verdict was found for the Plaintiff in the Prohibition; upon which *Lutwyche* Serjeant moved in Arreſt of Judgment in *Eaſter*-Term laſt paſt, 1. That this Cuſtom was void, for it is laid to be a Diſcharge of Tithes of all Cows, which it is not, for nothing is laid for the Tithe of the ſeventh, eighth, and ninth Cows, and Payment for the ſixth cannot be Payment for the ſeventh, *&c.* 2. This cannot be a Diſcharge of the Tithes of Herbage and Agiſtment, for Tithes of one Thing cannot be a Diſcharge of Tithes of another, and Tithes are payable of both; then ſince the Cuſtom is laid intire, it is void in the whole. 3 *Cro.* 446, 475. And of this Opinion was the whole Court; and therefore Judgment was arreſted and a Conſultation granted, unleſs Cauſe ſhould be ſhewn this *Trinity*-Term. At which Time Serjeant *Levinz* moved, that the Prohibition ſhould ſtand, becauſe it appears here that there is a Cuſtom, and then the Spiritual Court has no Juriſdiction to proceed; and therefore Variance in Caſe of a *Modus* will not hurt, but the Prohibition ſhall ſtand, becauſe it appears that the Spiritual Court has not Juriſdiction; and when they have not Juriſdiction the Common Pleas cannot allow them to proceed; *ſed non allocatur.* For *per Curiam* the Queſtion is here, whether the *Modus* be good or void; if the *Modus* is void, the Spiritual Court has Juriſdiction, and the *Modus* is void for the Reaſons given before. Then *Levinz* moved, that though the Cuſtom was void for Part, yet it was good for one, two, three, four, and five Cows; and therefore he prayed, that the Conſultation ſhould be granted only for that Part which is void, and that the Prohibition ſhould ſtand for the Reſidue. And by this he ſaid, that a Man might have a *Modus* for five Cows, and then for the Reſidue he ſhall pay Tithes in *Specie.* And the Court agreed the Caſe put by him, but ſaid, that in the principal Caſe the Cuſtom was intire for all Cows, and therefore if it was ill in Part it was ill

Mixt Tithes.

Cheeſes in Diſcharge of Milk, *&c.*

Mixt Tithes.

ill in the whole; and a Conſultation was granted as to all. In this Caſe *Treby* C. J. ſaid, that Tithes are not payable for After-mowth *de jure*, and therefore 'tis but Form to lay a Cuſtom to be diſcharged of Tithes of After-mowth, in Conſideration of making the former Mowing into Hay; for Tithes are payable only of Things *ſemel in anno renovantibus*. See *contra* 1 *Roll. Abr.* 640. *pl.* 11. *Parſon of Stanfield*'s Caſe, 1 *Ld. Raym.* 242, 243. *Norton* v. *Brigs*.

A Cuſtom was ſuggeſted, that every Inhabitant in the Pariſh who kept Cows there, had uſed Time out of Mind to ſet out the whole Meal of Milk upon the ninth Day of *May* at night, and upon the tenth Day of *May* in the Morning, and ſo upon each ninth Day then next following, until one Lamb yeaned in the next Year following ſhould be heard to bleat there; and that the Vicar for the Time being, had uſed to ſend a Servant to bring to him the Milk ſet out in ſuch Manner. By the whole Court of *B. R.* the Cuſtom is ill, and it is a plain *Non Decimando*. *Hill* v. *Vaux*, 1 *Ld. Raym.* 358, 359.

A *Modus* was ſuggeſted, that in Conſideration that they uſed to pay the tenth Lamb of all the Lambs dropped in their Pariſh, they uſed to be diſcharged of the Tithes of all the Lambs fed there, *&c.* By *Holt* C. J. the tenth Lamb is due of common Right; this Cuſtom is no ground for a Prohibition. It is not a *Modus in non decimando*; it is no *Modus* at all. Rule for Prohibition was diſcharged. *Selby* v. *Clarke*, 1 *Ld. Raym.* 677.

Cattle depaſtured on large Commons, *&c.*

For the aſcertaining the Payment of Tithes of Cattle fed or depaſtured upon large Waſtes and Commons, where the Limits and Bounds of Pariſhes are not well known, and which Waſtes and Commons may lie within ſeveral Pariſhes, the Stat. 2 & 3 *E.* 6. *cap.* 13, hath provided as followeth: **And be it further enacted, That all and every Perſon, which hath or ſhall have any Beaſts, or other Cattle titheable, going, feeding, or depaſturing in any Waſte or Common Ground whereof the Pariſh is not certainly known, ſhall pay their Tithes for the Increaſe of the ſaid Cattle, ſo going in the ſaid Waſte or Common, to the Parſon, Vicar, Proprietory, Portionary, Owner, or other their Fermors or Deputies of the Pariſh, Hamlet, Town, or other Place, where the Owner of the ſaid Cattle inhabiteth or dwelleth.** But notwithſtanding this Statute, if by Preſcription Time out of Mind, *&c.* the Tithes of Cattle depaſtured and kept upon any ſuch Waſte or Common, where it is not known within what Pariſh the ſaid Waſte or Common lies, hath been paid to the Parſon of any Pariſh, *&c.* ſuch Cuſtom or Preſcription ſhall not be taken away by this Clauſe in this Statute, but the Tithes ſhall be paid to ſuch Parſon, *&c.* according to ſuch Preſcription. *Savil, Caſe* 131. *fol.* 60.

If Cattle for Plow, Pail and Saddle, be accounted Tithe-free without a Surmiſe of ſome Cuſtom.

But the great Doubt is, Whether Cattle for the Plow, Pail and Saddle, ſhall be accounted Tithe-free without the Surmiſe of ſome Cuſtom? *Richardſon* ſaid, That a Surmiſe ought to be made, and that he had ſearched the Books, and the *Book of Entries*, and found, that ever ſome Surmiſe is made. But *Croke* replied, That in the King's Bench he had Twenty Times ſeen Prohibitions granted in ſuch Caſes without any Surmiſe, that is, to Suits in the Spiritual Court for Tithe for Horſes and young Cattle kept for Plow and Pail. *Paſch.* 4 *Car. C. B. Thornhill*'s Caſe, *Hetley* 94. And it is ſaid by the Lord Chief Baron *Hale*, That of common Right Tithes are not due for Cattle bred for the Plow and the Pail, to be uſed in the ſame Pariſh; but if they belong to another Pariſh, Tithes are due for them: And of that Opinion was the whole Court.

Paſch. 13 *Car.* 2. in *Scaccar.* *Holbeech* v. *Whadcock*, *Hardres* 184. But whether the aforeſaid Cattle be free or not, without a Preſcription upon Conſideration of ſome Benefit to the Parſon, yet if the Parſon can preſcribe to have Tithe for young Cattle whilſt rearing for the Plow or Pail, as to have yearly One Penny, or the like for each of them, this is good, but not without a Cuſtom for it; by *Hutton* and *Yelverton* only preſent. *Paſch.* 4 *Car.* C. B. *Wolmerſton*'s Caſe, *Hetley* 85. Mixt Tithes.

The Tithe of barren Stock tithable is to be yielded (where no Cuſtom is) when they be fatted or ſold; for 'tis not Reaſon that the Parſon ſhould have Profit of them from the Owner before the Owner hath received any, *Paſch.* 2 *Car.* C. B. *Thornhill*'s Caſe, *Hetley* 93, and if kept in divers Pariſhes after bought, or in Breeding, the Tenth of the Grains if bought, or Value if reared, is to be to the Parſons proportionably. *Mich.* 2 *Car.* *Popham* 197. Tithe of barren Stock when to be yielded.

The Occupier of Land is not only to pay for his own Stock depaſtured upon his Land, but alſo for the Stock of other Perſons thereon maintained. *Sherrington* v. *Fleetwood*, 3 *Croke* 475. And therefore, if an Inn-Keeper doth agiſt the Horſes of Travellers or Strangers on his Lands, he ſhall pay Tithes for them, otherwiſe the Owner of the Land ſhall make a Profit of his Land, and defeat the Parſon of all Tithe thereof. *Hill.* 1655, in *Scaccar.* *Guilbert* v. *Everſly*, *Hardres* 35. Yet if a Parſon, having Lands in a Pariſh, doth rent out his Land, reſerving the Running of his Saddle Horſe therein, no Tithes ſhall be paid for the Graſs he eats; by *Montague*, *Croke* and *Dodderidge* v. *Haughton*, who held, that for all barren Beaſts Tithes ſhall be paid, except for ſuch as be for Huſbandry. *Trin.* 15 *Jac.* B. R. *Laurkin* and *Wild*'s Caſe, 1 *Roll's Abr.* 641. But then it muſt be averred and proved, that the Horſe is uſed for Labour, for if an Horſe be kept for Sale, Tithes ſhall be paid for him. *Trin.* 15 *Jac.* *Hampton* v. *Wild*, 2 *Croke* 430, ſame Caſe, 1 *Roll's Abr.* 647. *Trin.* 15 *Jac.* *Laurkin* and *Wild*'s Caſe, *Popham* 126. And it hath been lately held *per Curiam*, that Tithes for Agiſtment of Cattle are payable by the Owner of the Cattle, for the Cattle take the Profits and Herbage of the Soil: So in the Caſe of Commoners, and it cannot be ſaid that the Profits are taken by the Owner of the Soil; and the Lord Chief Baron *Hale* ſaid, the Owner of the Soil might pay them, but clearly the Agiſter is compellable to pay them. *Paſch.* 13 *Car.* 2. in *Scaccar.* *Pory* v. *Wright*, *&* *al.* *Hardres* 184. See *Guilbert* v. *Everſly*, *Hardres* 35, and *Face* and *Cauge*'s Caſe there cited; where it was held, that Tithes for Agiſtment of Cattle ſhall be paid by the Occupier of the Lands. Inn-keeper agiſting Horſes of Travellers, &c.

If it be aſked, How the Tithes for Agiſtment are to be paid? The Anſwer is, That if there be any Cuſtom in the Place, that is to be obſerved to direct it; if not, the Tenth Part of the Money to be received for the Agiſtment is to be to the Parſon. *Mich.* 2 *Car.* B. R. *Popham* 197. Tithes for Agiſtment, how to be paid.

And by *Hale* Chief Baron, Tithes of barren Cattle are due *de Communi Jure*, according to the Value of the Land, after the Rate of Two Shillings *per* Pound, for that they cannot be otherwiſe valued or accounted for, becauſe the Profits of the Lands for which they are paid, are perceived by the Mouths of Beaſts: But by Cuſtom or Preſcription ſuch Tithes may be paid in other Manner, as by the Acre, and for all Manner of Cattle barren, and for the Plow and Pail. *Paſch.* 13 *Car.* 2. in *Scaccar.* *Holbeech* v. *Whadcock*, *Hardres* 184. So in an *Engliſh* Bill in the Exchequer-Chamber againſt an Inn-Keeper, who depaſtured Travellers Horſes, for which there was no cuſtomary Payment, and the Of barren Cattle 2 *s. per* Pound, yearly Value of the Land.

Mixt Tithes.

Value of the Land depaſtured was proved to be 30 *l. per Aunum*, the Court was in Doubt what Decree to make for a certain Rate to the Parſon, it not being aſcertained by Cuſtom; but conceived, that they ought to have Regard to the Value of the Land, and allow 2 *s.* in the Pound: But agreed clearly, that Tithes are payable for ſuch Herbage eaten by the Mouths of Travellers Horſes. *Hill.* 1655, in *Scaccar. Guilbert* v. *Everſly*, *Hardres* 35.

In Attachment upon Prohibition the Plaintiff declared, that there is, and Time out of Mind, *&c.* hath been a Cuſtom within the Hundred of *Huntſpittle* in the Pariſh of *Huntsbrich* in *Somerſetſhire*, that every Occupier of Land within the Hundred ſhould be diſcharged of Tithes of Agiſtment of barren Cattle, not imployed in the Pough, nor for the Pail, that the Plaintiff was an Inhabitant for five Years paſſed, and yet is within the Hundred, and occupies Land there, and was and yet is poſſeſſed of divers barren Cattle, for the Tithes of which (notwithſtanding the ſaid Cuſtom) the Defendant libelled againſt the Plaintiff in the Spiritual Court, *&c.* and he declares alſo upon two *Modus's* for Tithes of Lambs, *&c.* and that the Defendant ſued for Tithes of them, *&c.* The Defendant traverſed the *Modus's* and the Cuſtom, and Verdict for all was given for the Plaintiff. And upon Motion in Arreſt of Judgment by Serjeant *Gould*, that this Cuſtom was void, the Queſtion was, whether a Hundred may preſcribe generally in *Non Decimando*, as in this Caſe, to be free from the Payment of Tithes for Herbage or Agiſtment of Cattle. And after ſeveral Arguments at the Bar it was reſolved; 1. That in Things titheable by Cuſtom only, and not *de jure*, a County or Hundred might preſcribe in *Non Decimando* generally; for in that Caſe the County, *&c.* is diſcharged without a Cuſtom to the contrary; ſo that it is but to inſiſt upon the old Right, againſt which the Cuſtom has not prevailed. See 13 *Co.* 12. 1 *Roll. Abr.* 653, 654. 1 *Roll. Rep.* 22. 2 *Bulſt.* 185. *March* 25. But for Things which are titheable *de jure*, a County or Hundred could not preſcribe in *Non Decimando*, no more than a particular Perſon; for it would be abſurd to ſay, that a Hundred ſhall preſcribe in *Non Decimando*, where the particular Perſons of which it conſiſts, could not: 2. They reſolved, that Wood is not *de jure* titheable, becauſe it does not renew annually, *Selden* 237. 13 *Co.* 13, where it is ſaid, that in Libels in the Spiritual Court for Tithes of Wood they alledge a Cuſtom. (But note, the Practice of the Spiritual Court was affirmed at this Day to be otherwiſe; but the Court did not regard that, for *Holt* Chief Juſtice ſaid, that they made Stones, Gravel, and all Things titheable.) And therefore the Caſe in *March* 25. 1 *Roll. Abr.* 643-4, may be good Law, for the Caſe there is of Wood: But this principal Caſe is of Agiſtment of Cattle, which is *de jure* titheable, as being recompenced by the Graſs, Hay, *&c.* which otherwiſe would yield Tithes, and therefore the Cuſtom is void. And the Court did not only arreſt the Judgment, but cauſed this Entry to be made, *quia apparet curiæ domini regis, &c. quod cuſtuma prædicta, &c. nullius eſt vigoris, ideo conſultatio, &c.* 1 *Ld. Raym.* 137, 138. *Hicks* v. *Woodſon.* For the Defendant theſe Books were cited in this Caſe, *Bro. Diſmes* 13. *Doct. & Stud. lib.* 2. *c.* 55. *Plowd.* 645. 1 *Roll. Abr.* 653. *pl.* 8. *Hob.* 297. 2 *Co.* 44. 8 *Hen.* 7. 1. *b.* 1 *Sid.* 447. For the Plaintiff, 1 *Sid.* 321. 13 *Co.* 12. *Dyer* 363. 2 *Bulſt.* 285. *March* 25. 2 *Saund.* 145.

Not for Agiſtment of After-graſs, *&c.*

When it is ſaid, that Tithes muſt be paid for Agiſtment, this is not to be underſtood for Cattle agiſted in the After-graſs of a Meadow that hath paid Tithe-Hay, 2 *H.* 4. *Rotulo Parliamenti* 93. 1 *Roll's Abr.*

641; therefore where an Inn-Keeper hath paid the Tithe-Hay of certain Lands, and for the Reſidue of the ſame Year hath depaſtured thereon the Horſes of Gueſts, no Tithes ſhall be paid for the ſame. *Trin.* 16 *Jac. B. R. Richardſon* and *Cable*'s Caſe, *per Cur.* 1 *Roll's Abr.* 641. And if an Inn-Keeper preſcribe, that in Conſideration that he, and all others whoſe Eſtate he hath, *&c.* have paid Tithes of Hay and Grain growing upon the Land appertaining to his Inn, and have paid Tithes of all their own Beaſts depaſtured upon the ſame Lands, that they have been, Time whereof, *&c.* diſcharged of the Tithes of the Horſes of their Gueſts agiſted in the ſaid Lands; this is ſaid to be a good Preſcription; for by ſome 'tis held to be only a perſonal Tithe, and by others, that no Tithes are due by the Common Law for ſuch Agiſtment without a Cuſtom. *Gabel* and *Richardſon*'s Caſe, 1 *Roll's Abr.* 650. But I take this Caſe not to be Law, as to ſuch of the Lands, which yielded not to the Parſon either Tithe Corn or Hay; for here is no more alledged to be paid, than ought to be paid of common Right; nor are the Reaſons of the Caſe true, *viz.* that this is but a perſonal Tithe, or that no Tithes are due in ſuch Caſe *de Jure* without a Cuſtom. And when upon a Suit for Agiſtment the Defendant in the Spiritual Court did plead, that he had always paid Twelve-Pence by the Year for every Milch Cow going on ſuch a Paſture, and that for this Payment he had been diſcharged of the Payment of Tithes for all Agiſtments in that Land; this Payment of Money for Milch Beaſts ſhall not diſcharge from the Payment of Tithes for other Beaſts; by *Popham. Hill.* 43 *Eliz. Sherrington* v. *Fleetwood*, *Gouldsb.* 147. But if he had preſcribed that he had paid One Penny for all Cows and Beaſts agiſted, that peradventure had been good, *per Cur.* ſame Caſe, 3 *Croke* 475. 1 *Roll's Abr.* 651. A Bill was brought in Chancery to eſtabliſh a *Modus* in favour of the Inhabitants of the Pariſh of *Sturton* in *Nottinghamſhire*; the *Modus* was, in Conſideration that after the Graſs was cut, the Pariſhioner at his own Coſts and Charges did make the Tithe-Graſs into Hay, by ſtrewing the Graſs upon the Ground, (which is called Tedding of it) and afterwards gathering it into Week and Windrows; therefore the Perſons that inhabited within this Pariſh (which Pariſh appeared to be the greateſt Part thereof Meadow Land) were to pay no Tithes for the Herbage of dry and unprofitable Cattle.

Mixt Tithes.

If Payment for Milch Beaſts ſhall diſcharge for other Beaſts.

But tho' it was proved in the Cauſe that the Pariſhioners had not Time out of Mind paid Tithes for the Herbage of dry and unprofitable Cattle, yet there was no Evidence that this Excuſe for not paying of Tithes of Herbage, was in Conſideration of the Pariſhioners making Tithe-Graſs into Hay. On the other Hand it was proved, that Foreigners, thoſe who lived out of the Town, made the Tithe-Graſs into Hay, as well as the Inhabitants, and yet paid Tithe Herbage. Alſo it was proved by the Plaintiffs, that the Graſs was tedded and ſpread, and not divided into Heaps or Cocks, until the ſame was made into Hay; that in this Pariſh there was a Vicar indowed with the ſmall Tithes, the Rectory an Impropriation, and that the Vicar had 40 *l. per Annum* out of it.

Lord Chancellor: 1ſt, This may be a good Cuſtom or *Modus*, to excuſe the Occupier of the ſame Land wherein the Pariſhioner made Graſs into Hay from paying Tithes for the After-Herbage; but it can be no good *Modus* to excuſe the Herbage Tithe of other Land, for at that Rate a Man might mow and make into Hay only a ſmall Parcel of Ground containing about a Quarter or Half an Acre of Land, and by this Means be excuſed from the Tithe-Herbage of 100 Head of Cattle.

2*dly*,

Mixt Tithes.

2*dly*, It ſeems to me a material Objection againſt the Cuſtom, that Foreigners living out of the Pariſh, though they have no Privilege of being Tithe-free as to their Herbage, yet have made the Tithe-Graſs into Hay, which looks as if it was the Uſage of that Pariſh for the Pariſhioners to make their Graſs into Hay of Courſe.

3*dly*, It ſeems material that ſome of the Witneſſes have proved, that in this Pariſh the Pariſhioners when they cut down the Graſs, did not divide it into ten Parts, until ſuch Time as they had made it into Hay; for of conſequence the Parſon could not have any Opportunity of making his Tithe-Graſs into Hay himſelf.

But 4*thly*, It being objected, that the Conſideration of making the Tithe-Graſs into Hay for the Benefit of the Rector, could be no Conſideration as to the Vicar who was intitled to the ſmall Tithes of Herbage.

Lord Chancellor: That (*a*) is nothing, for originally and of common Right the Parſon was intitled to all the Tithes, as well ſmall as great, and the *Modus* (ſuppoſing it to be a good one) muſt have been Time out of Mind, and conſequently muſt have begun while the Parſon was ſeiſed of the ſmall, as well as of the great Tithes; and when afterwards the Vicarage was derived out of the Parſonage, and the Parſon by Conſent of the Patron and Ordinary indowed the Vicar with theſe ſmall Tithes, this ſhall not prejudice the Pariſhioners, or deprive them of the Benefit of injoying their *Modus* which they before were intitled to.

(*a*) See for this in *Yelv.* 86. *Cro. Jac.* 116. *Green* v. *Auſtin*; but ſee alſo 3 *Bulſt.* 220. *Wintall* v. *Child*, and 2 *Keb.* 212. *Brown* v. *Haywood*, *contra*.

5*thly*, It was objected, that the Pariſhioners *de jure* ought to make the Tithe-Graſs into Hay.

But *Lord Chancellor* declared the Law to be otherwiſe, and interrupted the Counſel when they began to ſpeak to this, ſaying that all that the Pariſhioners were bound to do was, to cut down the Graſs and divide it into ten Parts, after which the (*b*) Parſon was to make into Hay: And that this had been ſo reſolved in a *Devonſhire* Cauſe (the Caſe of one *Reynolds*;) however, in regard Foreigners having Meadow Land in this Pariſh made their Tithe-Graſs into Hay as well as the Pariſhioners, and yet paid Tithe of the Herbage; and by Reaſon of the other Objections above-mentioned, it would be too much in a Court of Equity to eſtabliſh this *Modus*, eſpecially where it was inſiſted upon (as in this Caſe) that the Pariſhioners making Tithe-Graſs into Hay did not only excuſe the Herbage of that Ground from Tithe-Herbage, but alſo all the Tithe-Herbage that the Pariſhioner was to pay for any Land he depaſtured within the Pariſh, tho' it might be a great Parcel of Paſture Land, and tho' the ſame might be fed all the Year.

(*b*) See 1 *Roll. Abr.* 644. *accord'*. But ſee alſo 1 *Roll. Rep.* 172. *contra*; and note, the Tithes are called the Tithe of Hay and not of Graſs.

Diſmiſs the Bill with Coſts, but without Prejudice as to any Litigation, that may be made touching the ſame at Law. 2 *Wms.* 520 to 523, *Fox & al'* v. *Ayde & al'*.

2 & 3 *Ed.* 6. *cap.* 13.

No Tithe of Marriage Goods within *Wales*, &c.

And here note, that it hath been enacted as followeth: **Where heretofore ſuch a Cuſtom hath been in many Parts of** Wales, **that of ſuch Cattle and other Goods, as hath been given with the Marriage of any Perſon, their Tithes have been exacted and levied by the Parſons and Curates in thoſe Parts; which Cuſtom being diſſonant from any Part of this Realm, as it ſeemed when the ſaid Country of** Wales **was through civil Diſſention unculted, for want of other ſufficient Profits that might otherwiſe grow to the Curates and Miniſters there, to have been for that Time tolerable: So now the Country being well manured and husbanded, and the Tithe is duly paid there of Corn, Hay, Wool, and Cheeſe, and of other Increaſe**

of all Manner of Cattle, as it is commonly in all other Parts of this Realm, the ſame Cuſtom ſeems to be grievous and unreaſonable, eſpecially where the Benefices are elſe ſufficient for the finding of the ſaid Miniſters and Curates: That it be therefore enacted by the Authority aforeſaid, That from and after the Firſt Day of May next coming, no ſuch Tithes of Marriage Goods be exacted or required of any Perſon within the ſaid Dominion of Wales, or Marches of the ſame; any Thing in this Act contained, or any other Act, Cuſtom, or Preſcription, had or made to the contrary hereof notwithſtanding. Stat. 2 & 3 Ed. 6. cap. 13. Mixt Tithes.

There are other Beaſts, beſides the Domeſticks before ſpoken of, fed upon Lands, and which may take of the Paſture thereof, and be a Profit to the Owner, as Deer and Conies: As to Deer, no Tithes are to be paid of them, becauſe they are *feræ naturæ*. *Mich.* 5 *Car. C. B. Flower* v. *Vaughan*, *Hetley* 147. And as for Conies, theſe being alſo, as is ſaid, *feræ naturæ*, no Tithes *de Jure* are to be paid for them without a Cuſtom for it. *Trin.* 8 *Car. B. R. Worden* and *Bennet*'s Caſe, and *Paſch.* 13 *Car. B. R.* Sir *John Beven* and Dr. *Bradiſh*, *per Curiam*. *Hill.* 13 *Car. B. R. Vincent* v. *Tutt*, *Mich.* 14 *Car. B. R. Williams* v. *Wilcox*, and *Mich.* 15 *Car. Damport* and *Onge*'s Caſe, 1 *Roll's Abr.* 635. *Paſch.* 22 *Jac. Haie*'s Caſe, *Bendloe* 144. *Flower* v. *Vaughan*, *Mich.* 5 *Car. Hetley* 147, and *Randal* v. *Head*, *& al'*. *Paſch.* 13 *Car.* 2, *in Scaccar. Hardres* 188. *Mich.* 15 *Car.* 2. *Towerſon* v. *Wiggel*, 1 *Keb.* 602. But this ſeems to be very hard on the Parſon's Side, for that theſe Beaſts may take away the whole Profit of great Parcels of Land, and yield an anſwerable Benefit to the Owner; and ſometimes arable Lands are turned into Conygrees and Parks, which is not only grievouſly hurtful to the Parſons in whoſe Pariſhes they be, but alſo to the Commonwealth, and therefore deſerve no Favour. No Tithes of Deer or Conies without a Cuſtom.

As of many of the Beaſts of Profit, ſo of Fowls, are Tithes to be paid; and firſt of Domeſtick Fowls, as of Hens, Geeſe, Ducks: And I ſhould have added Turkies, but that I find them liſted amongſt the Fowls that are ſaid to be *feræ naturæ*, and therefore affirmed to be Tithe-free. *Mich.* 37 & 38 *Eliz. Hugton* v. *Prince*, *Moor* 599. But *Quære*. Turkies held titheable, *ante*, *ch.* 47. And of theſe Fowls either the Tenth Egg, or the Tenth of the Young, is to be paid; and where the Tithe of Eggs is paid which comes of any Fowl, no Tithe of the Young is to be paid; and where Tithe of the Young is paid, no Tithe of the Eggs is due. *Hill.* 15 *Jac. B. R.* Reſolved, 1 *Roll's Abr.* 642. And it is ſaid to be a good *Modus* for Eggs, to pay thirty Eggs in *Lent* for all Tithes of Eggs. *Mich.* 14 *Jac. B. R. Lee* and *Collin*'s Caſe, 1 *Roll's Abr.* 648. So when a Prohibition was prayed to a Suit for the Feathers of old Geeſe ſheered, and alſo of the Young, ſuggeſting a *Modus* of a young Gooſe with the Feathers, paid the Firſt Day of *Auguſt* yearly, in full of Tithes of Geeſe and Feathers: And a Prohibition was granted, becauſe it is more than the Pariſhioner was otherwiſe bound to do, to keep a Gooſe feathered till the Firſt of *Auguſt*. *Mich.* 28 *Car.* 2. *Huit* v. *Hill*, 3 *Keb.* 705. Tithes of Domeſtick Fowls.

But no Tithes are to be paid either of the Eggs or Young of Pheaſants, whether they go at large, or be taken, clipped and kept in a Place incloſed, becauſe they be *feræ naturæ*, and ſtill remain ſo, tho' under Reſtraint. *Mich.* 11 *Car. C. B. Winbrooke* v. *Evans*, 1 *Roll's Abr.* 636. And 'tis ſaid, that if Pheaſants or Partridges be made tame, yet no Tithes ſhall be paid for them upon the Reaſon that they are *feræ Naturæ*. *Mich.* 37 & 38 *Eliz. Hugton* v. *Prince*, Fowls *feræ naturæ*, Pheaſants, Partridges, &c. not titheable.

Perſonal Tithes.

Moor 599. Yet it hath been reſolved, that Tithes ſhall be paid *de Jure* of young Pigeons. *Mich.* 14 *Jac. B. R. Whatley* v. *Hanbury*, and *Hill.* 15 *Jac. Gaſtrell*'s Caſe, 1 *Roll's Abr.* 635. But in *Stoutfil*'s Caſe, *Paſch.* 28 *Car.* 2. *C. B.* it is ſaid, that Tithes ſhall not be paid for Pigeons, unleſs it be by ſpecial Cuſtom, 2 *Mod. Rep.* 77, (and they ſeem to be *feræ naturæ*, though it is made Felony to take them out of a Dove-cote,) eſpecially if the Pigeons be ſpent in the Owner's Houſe no Tithe ſhall be paid, for that they are for the Maintenance of them who labour in other Things whereof the Parſon hath Tithes of them. *Mich.* 5 *Car. C. B. Flower* v. *Vaughan*, *Hetley* 147. *Mich.* 14 *Car. B. R. Whatley* v. *Hanbury*, 1 *Roll's Abr.* 644. *Trin.* 3 *Car. C. B. Hetley*, *p.* 27. So if a Man doth maintain a Family, and hath Pigeon-holes about his Houſe, where are bred young Pigeons, no Tithes ſhall be paid of thoſe that are ſpent in his Houſe, *&c. Hill. Car. B. R. Vincent* v. *Tutt*, 1 *Roll's Abr.* 644, yet by Cuſtom Tithes ſhall be paid of Pigeons ſpent in an Houſe, though not of common Right. *Mich.* 14 *Jac. B. R. Whatley* and *Hanbury*'s Caſe, 1 *Roll's Abr.* 644.

CHAP. LI.

Perſonal Tithes, what; by whom, and in what Manner payable.

Perſonal Tithes ariſing by Man's Labour and Art, as Buying, Selling, *&c.*

HAving ſpoken of ſuch Tithes as are accounted Predial and Mix'd, *Perſonal Tithes* are next to be conſidered. Of which (as hath been ſaid) is the Tenth Part of the clear Profits which ariſe by the honeſt Labour and Induſtry of Man, imploying himſelf in ſome Perſonal Work, Artifice or Negotiation, as by Buying, Selling, Merchandizing, Fiſhing, Fowling, Hunting, following any Trade, as of Carpenter, Smith, Maſon, Butcher, *&c.* 2 *Inſt.* 621, 657, 649. *Mich.* 14 *Jac. B. R.* by *Dodderidge*, 1 *Roll's Abr.* 656. And for the Payment of theſe Tithes it hath been

2 & 3 *Ed.* 6. *cap.* 13. enacted, **That every Perſon exerciſing Merchandizes, Bargaining and Selling, Clothing, Handicraft, or other Art or Faculty, being ſuch Kind of Perſons, and in ſuch Places as heretofore, within theſe Forty Years, have been accuſtomably uſed to pay ſuch Perſonal Tythes, or of Right ought to pay (other than ſuch as been commonly Day-Labourers) ſhall yearly at or before the Feaſt of** Eaſter, **pay for his Perſonal Tythes the Tenth Part of his clear Gains, his Charges and Expences, according to his Eſtate, Condition, or Degree, to be therein abated, allowed and deducted.**

Provided, That in all ſuch Places where Handicrafts-Men have uſed to pay their Tithes within theſe Forty Years, the ſame Cuſtom of Payment of Tithes to be obſerved, and to continue; any Thing in this Act to the contrary notwithſtanding. Stat. 2 & 3 Ed. 6. cap. 13.

Not by Day-Labourers, or Servants of the Plow.

By which Statute it appears, that only ſuch Perſons are to pay perſonal Tithes which have accuſtomably paid them, and that they ſhall notwithſtanding pay other Tithes, and that from common Day-Labourers no Perſonal Tithe is due; and ſo it hath been adjudged, that Servants of the

Plow ſhall not pay any Tithe of their Wages, and a Prohibition granted accordingly, although that the Libel was only for a Third Part of their Wages, leaving the Reſidue free; for it was ſaid, that by the ſame Reaſon that the Beaſts of the Plow ſhall be free from Tithes, the Servants that attend the Plow ſhall be alſo free. *Paſch.* 14 *Jac. B. R. Ellis* and *Drake*'s Caſe, 1 *Roll's Abr.* 646. So a Parſon libelled in the Spiritual Court againſt an Inn-keeper to have the Tithes of the Profits by him made of his Kitchin, Stable and Cellar, and laid particularly that he made great Gain in ſelling of his Beer, having bought it for 500 *l.* and ſold the ſame for 1000 *l.* and that *negotiando & traficando* he had gained 300 *l.* of which he ought to have Tithe: But, upon Motion, a Prohibition was granted. *Mich.* 11 *Jac. Dolley* v. *Davis*, 2 *Bulſtrode* 141. Perſonal Tithes.

The Tithe that may be had for Fiſh taken in the Sea, is held to be a Perſonal Tithe; therefore if the Owner of a Ship doth lend it to Mariners to go to an Iſland for Fiſh, for a certain Quantity of Fiſh to be paid to him upon their Return, no Tithes ſhall be paid by the Mariners unto the Parſon, out of the Fiſh that the Owner ſhall have for the Hire of his Ship, for that it is a Perſonal Tithe, therefore ought to be paid but of the clear Gain. *Mich.* 14 *Jac. B. R.* by *Dodderidge*, in *Goſling* and *Harding*'s Caſe, 1 *Roll's Abr.* 656; and *Hill.* 14 *Car. B. R.* Juſtice *Jones* ſaid, upon an Appeal out of *Ireland* to the Delegates in the Lord *Deſmond*'s Caſe, it was agreed, that for ſuch Fiſh ſo taken, only Perſonal Tithes are due. 1 *Roll's Abr.* 636. See 2 *Inſt.* 621. And when upon a Suit in the Spiritual Court for the Tithe of Fiſh taken in the Sea, a Prohibition was prayed. *Firſt*, Becauſe Fiſh in the Sea or great Rivers are *feræ naturæ*. *Secondly*, Becauſe the Sea is not within any Pariſh, ſo that as no Parſon can ſay, that the Part thereof where the Fiſh are taken is within his Pariſh, the Prohibition was denied; for as *Jones* affirmed, Tithes of Fiſh are uſually paid in *Ireland*: And it was ſaid, that in *Cornwal* they pay Tithes for fiſhing in the Sea to the Parſon of the Pariſh where they are landed; and that it is a Cuſtom in *Yarmouth*, that Tithes ſhall be paid for Herrings. *Trin.* 8 *Car. B. R.* 1 *Croke* 264. But no Tithes ſhall be paid in Kind of Fiſh taken in the High Sea out of any Pariſh, without a Cuſtom for it. *Hill.* 14 *Car. B. R. Long* v. *Dircel*, *per Curiam*, 1 *Roll's Abr.* 636. *Holland* v. *Heale*, *Noy* 108. For Sea-Fiſh out of the clear Gain.

Alſo the Tithe of Fiſh taken in a common River is but a Perſonal Tithe, therefore not the whole Tenth is due *de Jure* without a Cuſtom, but the Expences in taking them are to be deducted; and this holds, although that they be taken by him who hath a ſeveral Piſcary, and the Place where they are taken be within the Pariſh of the Parſon that claims them; the Reaſon given is, for that they are *feræ Naturæ*. *Paſch.* 15 *Car. B. R. Gould* and *Arthur*'s Caſe, and *Mich.* 15 *Car. B. R. Wiſlake* and *Arthur*, &c. 1 *Roll's Abr.* 636. *Hill.* 9 *Car. B. R. Anonymus*, 1 *Croke* 339. Fiſh taken in a common River *feræ naturæ*.

And as to the Tithe of Fiſh, it hath been enacted, **That this Act, or any Thing therein contained,** (viz. with Reſpect to Perſonal Tithes) **ſhall not extend to any Pariſh which ſtands upon and towards the Sea-coaſts, the Commodities and Occupying whereof conſiſteth chiefly in Fiſhing, and have by Reaſon thereof uſed to ſatisfy their Tithes by Fiſh; but that all and every ſuch Pariſh and Pariſhes ſhall hereafter pay their Tythes according to the laudable Cuſtoms, as they have heretofore of ancient Time within theſe Forty Years uſed and accuſtomed, and ſhall pay their Offerings as is aforeſaid.** Stat. 2 & 3 Ed. 6. 13. And accordingly, when one libelled in the Spiritual Court for the Tithes of Pilchards taken in the Sea, a Prohibition was granted upon the Pariſhes towards the Sea-coaſts.

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the Surmiſe of a Cuſtom there, that the Owner of the Fiſher-boat hath one Moiety of the Fiſhes, and the Fiſhermen the other Moiety, and that the Owner hath uſed to pay the Tenth of his Moiety for all; and this Surmiſe was held to be good and ſufficient. *Hill.* 1 *Jac. C. B. Holland* v. *Heale, Noy* 108. And ſo when a Surmiſe was, that all the Fiſh of a Ship ſhould be divided into Ten Doles, after the Owner's Part is ſeparated from them, for the Uſe of the Ship, and then the Tenth Dole is to be divided, and one Moiety is to be to the Parſon, and the other Moiety to the Town, *viz.* of *Yarmouth*, this was admitted to be good. *Mich.* 14 *Jac. B. R. Goſlin* v. *Harding*, 1 *Roll's Rep.* 419.

Fulling-Mills, Paper-Mills.

The Tithe alſo at leaſt of ſome Mills is ſaid to be perſonal, as of Fulling-Mills, Paper-Mills, *&c.* 2 *Inſtit.* 621. But *Coke* Chief Juſtice ſaid, that no perſonal Tithe by the Statute, *viz. Ed.* 6, is to be paid for Mills, but where by ſpecial Uſage the ſame hath been paid; to which the Court agreed. *Trin.* 14 *Jac. B. R. Jakes* v. *I. S.* 3 *Bulſtrode* 212, and ſame Caſe, 1 *Roll's Rep.* 405. And when a Prohibition was prayed to ſtop a Suit in the Eccleſiaſtical Court for Tithes of a Fulling-Mill, wherein it was ſuggeſted in the Spiritual Court, that the Defendant did full with his Mill weekly Forty Cloths, and did gain by every Cloth Two Shillings, whereof he demanded Tithes, and upon this Surmiſe only, that by the Law of the Land he ought not to demand Tithes of ſuch Mills, a Prohibition was granted, for that Tithes are not payable of ſuch Things whereof comes the Gain only by the Labour of Men, without a Cuſtom. *Hill.* 16 *Jac. B. R. Danderidge* v. *Johnſon*, 2 *Croke* 523. But reſolved it was afterwards, that Tithes by the Law are due of ſuch Mills, and a Prohibition denied. *Mich.* 11 *Car. B. R. Johnſon* v. *Danderidge*, 1 *Roll's Abr.* 641. But of a Corn-Mill, whether driven by Wind, Water, Horſe, or Hand only, as Iron Mills, the Tithes are ſaid not to be Perſonal, but Predial or Mix'd; and therefore according to the Cuſtom of the Realm the Miller ought to pay the Tenth Toll-diſh for Tithes. 1 *Roll's Abr.* 656. But this is not to be underſtood of old Corn-Mills, but of Mills more lately erected; for thus it hath been enacted: [See 2 *Inſt.* 621, 652. *contra*, and is payable to the Proprietor of the Tithes where the Mill is, and not where the Miller lives, which proves it to be a Predial Tithe, as was ſaid by the Chief Juſtice *Holt*, *Mich.* 3 *W. & M. B. R.* in *Gumley* and *Falkingham*'s Caſe, and ſo is *Linwood*, *tit. de Decimis c. quamquam* verb. *ſicut feni*; for Predial Tithes are payable where they ariſe, Perſonal Tithes where the Perſons *audiunt divina & recipiunt Eccleſiaſtica Sacramenta. Linwood, eod. tit. c. Sancta* v. *Eccleſiis.*]

Corn-Mills to pay Tenth Toll-diſh.

Alſo if any do erect in his Ground a Mill of new, and after the Parſon of the Place demanded Tythe for the ſame, the King's Prohibition doth iſſue in this Form: Quia de tali Molendino hactenus Decimæ non fuerunt ſolutæ, prohibemus, &c. Et ſententiam Excommunicationis, ſi quam hac occaſione promulgaveritis, revocetis omnino. The Anſwer: **In ſuch Caſe the King's Prohibition was never granted by the King's Aſſent, nor never ſhall, which hath decreed that it ſhall not hereafter lie in ſuch Caſes.** Stat. 9 Ed. 2. cap. 5. By which it appears, that all Corn-Mills, not erected before the Time of *Ed.* 2. are tithable in themſelves; but becauſe that many ſince erected may be to us antient, and their firſt Erection unknown, the Rule I concieve muſt be, that all Mills, whoſe firſt Building was before the Memory of any Man living, and is not otherwiſe known, not having been ſubject to this Day to the Payment of Tithes, ſhall be intended to be erected before the Sta-

The Rule how to be Tithe-free.

tute, and ſo to be Tithe-free. But as to Mills for which Tithes have been paid, and new Mills, Tithes muſt be paid as is aforeſaid; by *Coke. Trin.* 14 *Jac. B. R. Jake*'s Caſe, 1 *Roll's Rep.* 405. Therefore when Prohibitions are moved for to ſtay a Suit for Tithes in the Eccleſiaſtical Court for antient Mills, it muſt not be only ſuggeſted that the Mill is an antient Mill, but alſo that it hath never paid any Tithes; and the Courts of Common Law generally do require an Affidavit to be made of the Truth of ſuch Suggeſtion, *viz.* that the Mill is antient, and hath not paid any Tithes; and if a new Mill be erected upon Lands diſcharged of Tithes by the Statute of Monaſteries, 31 *H.* 8. 13. Tithes ſhall be paid thereof; by the whole Court, and a Prohibition denied, for the Rule is, *De Molendino de novo Erecto non jacet Prohibitio. Trin.* 15 *Jac. B. R. Anonymus*, 2 *Croke* 429. *Sed vide ante cap.* 47. that they are but a perſonal Tithe. Perſonal Tithes.

So if for Two Meſſuages, and two antient Water-Mills to grind Corn, the Owner hath uſed Time out of Memory to pay to the Parſon Twenty Shillings yearly in Lieu of all Tithes iſſuing out of the ſaid Meſſuages and Mills, and after the Owner of the Meſſuages and Mills doth erect Two new Corn-Mills within the ſaid Meſſuages, this *Modus* ſhall not diſcharge theſe new Mills from the Payment of Tithes, for that the Tithe of a Mill is not merely predial, but mix'd with the Perſonalty, and is more of the Perſonalty than of the Predialty; *per Cur. Mich.* 13 *Car. B. R. Goodwin* and *Smith*'s Caſe, 1 *Roll's Abr.* 652. But by the Chief Juſtice *Holt*, the Tithes of Mills are to be paid in the Pariſh where the Mill is, and not where the Miller lives, which proves it to be more a Predial Tithe. *Mich.* 3 *W. & M. B. R. Gumley* v. *Falkingham.* Yet it is ſaid to be held by the Court, that if a Man doth preſcribe to pay to the Parſon a certain Thing, as a *Modus Decimandi*, for all the Demeans of his Manor, and afterwards he doth erect a Wind-Mill upon Parcel of the ſaid Demeans, he ſhall not pay any Tithes for this Mill, but the *Modus* given for the Demeans ſhall go in Diſcharge of it alſo, being builded upon the Land diſcharged. *Trin.* 39 *Eliz. B. R. Ruſſel* and *Moor*, 1 *Roll's Abr.* 651. Tithe of a Mill not merely predial, &c.

So if a Man ſeiſed of Eight Acres of Paſture and Meadow, for the Tithes of which he hath uſed to pay Time out of Memory Five Shillings and Six-pence, and afterwards the Owner of it doth erect upon it one Corn-Mill, he ſhall pay no Tithes for the Corn-Mill, for that the Land was diſcharged by the *Modus Decimandi.* 1 *Roll's Abr.* 652. 2 *Inſt.* 490.

But theſe Caſes, though they differ in Circumſtance, yet the Reaſon of judging ſeems to be the ſame as to them all; if otherwiſe, I think the Caſe in *Croke*, and alſo *Goodwin* and *Smith*'s Caſe, to be more agreeable to Reaſon; they are alſo the latter; for every *Modus* is ſuppoſed to ariſe from an original Agreement upon giving a Recompence for the Tithes, which Agreement cannot be preſumed to be made for other than the Fruits of the Land, there being no other Thing then in Being, and not for the Tithes of that which is of a different Nature; therefore if a Man hath a Meadow, on which he hath alſo a Mill, and agrees with the Parſon for the Tithes of the Profits ariſing from the Land only, it will be hard to ſay, that this Agreement ſhall be extended to free the Mill alſo, though it was then in Being, becauſe the Profit of the Mill is another Thing different from the Profit of the Land. And *Coke* ſeems to be of Opinion, that the Tithe of a Corn-Mill is but a Perſonal Tithe. 2 *Inſt.* 621. If ſo, the Tithes of a Mill (if the Owner imploy'd it himſelf) is paid with reſpect to his Perſon, conſidered with his Imployment, and not with reſpect to the Land. And none ſure will affirm, that a Man who by his Imployment and Cuſtom of the Place is to pay a Perſonal Tithe, purchaſing If the Tithe of a Corn-Mill be a perſonal Tithe.

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chaſing Land Tithe-free, or for which a *Modus* is paid, is therefore free from paying a Perſonal Tithe; no not though he erects his Habitation upon ſuch Land; why then if he erects the Engine of his Art there, for ſuch are ſaid ſo to be? However, a Corn-Mill may be diſcharged of paying the Tenth of the Toll, by paying a *Modus* for it; and if the Owner in ſuch Caſe be ſued for the Tenth, a Prohibition lies. *Trin.* 14 *Jac. B. R. Jake's* Caſe, 1 *Roll's Rep.* 405. But if the Surmiſe be of a Cuſtom to pay a certain Rate for all Mills erected, and to be erected, the Cuſtom ſhall not go to any new Mill; and therefore in ſuch Caſe, by the Rule of the Court, a Conſultation was granted as to a new Mill, and for the antient Mill the *Modus* was allowed to be good. *Trin.* 14 *Jac. B. R. Jakes, Bulſt.* 3. *p.* 212. So if there be a Cuſtom in Two Hundreds, (though in ſeveral Counties,) that if any common Baker of Bread, inhabiting in either of the Hundreds, doth erect any Water-Mill, Wind-Mill, or Hand-Mill, within either of thoſe Two Hundreds to grind his Corn, to be imployed for making of Bread for himſelf in his Trade of a common Baker, for the Maintenance of his Family, and to ſell to his Cuſtomers inhabiting there, or near to the ſaid Hundreds, for their Suſtentation, by which the Parſons in the ſaid Hundreds have the greater Tithes, *viz.* of them who have Lands or Tenements, and of others, as of Manual Tradeſmen, by Way of Offerings, and ſuch like, and in reſpect thereof no Tithes have been paid in Time whereof, *&c.* for grinding of this Grain ſo imployed; this was held to be a good Cuſtom, and a ſufficient Diſcharge; and a Prohibition was granted, though the Baker did inhabit in one Hundred, and erected his Mill in another, for that Two Hundreds may preſcribe in *Non Decimando. Paſch.* 15 *Car. B. R. Kidden* and *Edward's* Caſe, 1 *Roll's Abr.* 654. But *Quære* of the Conſideration of this Cuſtom, for that the Matters ſuggeſted ſeem to be no Conſideration to the Parſon for the Tithes of the Toll of the Mills.

Of a Baker's Erecting a Mill.

CHAP. LII.

Mortuaries, Offerings, Oblations, and Obventions.

Mortuaries.

BEſides Lands, Glebe and Tithes, there are other ſmall Profits due and payable to the Incumbent of a Parſonage or Vicarage; as Mortuaries and Offerings, called alſo *Oblations* and *Obventions.* The Law as to Mortuaries is declared and ſettled by Act of Parliament in theſe Words:

By 21 *H.* 8. *cap.* 6.

Foraſmuch as Queſtion, Ambiguity and Doubt, is chanced and riſen upon the Order, Manner and Form of Demanding, Receiving and Claiming of Mortuaries, otherwiſe called Corſe-preſents, as well for the Greatneſs and Value of the ſame, which, as hath lately been taken, is thought over exceſſive to the poor People, and other Perſons of this Realm, as alſo for that ſuch Mortuaries or Corſe-preſents have been demanded and levied for ſuch as at the Time of their Death have had no Property in any Goods or Chat-

tels, and many Times for travelling and wayfaring Men, in the Places where they have fortuned to die: To the Intent that all Doubt, Contention and Incertainty herein may be removed, and as well the Generality of the King's People therein remedied, as also of the Parsons, Vicars, Parish-Priests, and other having Interest in such Mortuaries and Corse-presents, indifferently provided for; Mortuaries.

Be it therefore enacted, ordained and established by the King our Sovereign Lord, and the Lords Spiritual and Temporal, and the Commons of this Parliament assembled, and by Authority of the same, that from the First Day of April in the Year of our Lord God MDXXX no Parson, Vicar, Curate, nor Parish-Priest, ne any other Spiritual Person, nor their Fermors, Bailiffs, nor Lessees, shall take, receive or demand of any Person or Persons within this Realm, for any Person or Persons dying within the same, any manner Mortuary or Corse-present, ne any Sum or Sums of Money, ne any other Thing for the same, more than is hereafter mentioned: Ne also shall convent or call any Person or Persons before any Judge Spiritual for the Recovery of any such Mortuary or Corse-presents, or any other Thing for the same, more than is hereafter mentioned, upon Pain to forfeit for every Time so demanding, receiving, taking, or conventing, or calling any such Persons before any Spiritual Judge, so much in Value as they shall take above the Sum limited by this Act; and over that 40 s. to the Party grieved contrary to this Act; for which Forfeiture, the Party so grieved contrary to this Act shall have an Action of Debt, by Writ, Bill, Plaint, or Information in any of the King's Courts, wherein no Wager of Law, Essoin, nor Protection shall be allowed. Penalty for demanding more than this Act allows.

First, It is ordained, established and enacted, That no manner Mortuary shall be taken or demanded of any Person whatsoever he be, which at the Time of his Death hath in moveable Goods under the Value of Ten Marks. Also, that no Mortuary shall be given or demanded from henceforth of any manner Person, but only in such Place where heretofore Mortuaries have been used to be paid and given, and in those Places none otherwise but after the Rate and Form hereafter mentioned. Ne that any Person pay Mortuaries in more Places than one, that is to say, in the Places of their most Dwelling and Habitation, and there but one Mortuary. Nor no Parson, Vicar, Curate, Parish-Priest, or other, shall for any Person dying or dead, and being at the Time of his Death of the Value in moveable Goods of Ten Marks or more, clearly above his Debts paid, and under the Sum of 30 l. take for a Mortuary above 3 s. 4 d. in the whole; and for any Person dying or dead, being at the Time of his Death of the Value of 30 l. or above, clearly above his Debts paid, in moveable Goods, and under the Value of 40 l. there shall no more be taken or demanded for a Mortuary than 6 s. 8 d. in the whole; and for any Person dying or dead, having at the Time of his Death of the Value in moveable Goods of 40 l. or above, to any Sum, whatsoever it be, clearly above his Debts paid, there shall be no more taken, paid or demanded for a Mortuary, than 10 s. in the whole. Not for Goods under Ten Marks.

Provided alway, That for no Woman being Covert-Baron, nor Child, ne for any Person not keeping House, any manner Mortuary be paid, ne that any Parson, Vicar, Curate, Parish-Priest, or other, ask, demand or take for any such Woman, Child, or for any Person Wives, Children, and Travellers, &c.

Mortuaries.

son not keeping House, dying or dead, any manner Thing or Money, by Way of Mortuary, ne also for any Wayfaring Man, or other that dwelleth not, ne maketh residence in the Place where they shall happen to die, but that the Mortuary of such Wayfaring Persons be answerable in Places where Mortuaries be accustomed to be paid, and in Manner and Form, and after the Rate before mentioned, and none otherwise, in the Place or Places where such wayfaring Persons at the Time of their Death had their most Habitation, House and Dwelling-places, and no where else.

Proviso for Money, &c. bequeathed.

Provided alway, That it shall be lawful to all manner Parsons, Vicars, Curates, Parish-Priests, and other Spiritual Persons, to take and receive any manner Sum of Money, or other Thing, which by any Person dying shall fortune to be disposed, given or bequeathed unto them, or any of them, or to the high Altar of the Church; this Act or any thing mentioned notwithstanding.

Wales and *Berwick.*

And be it also enacted by the Authority aforesaid, That no Mortuaries nor Corse-presents, ne any Sum or Sums of Money, or other Thing, for any Mortuary or Corse-present, shall be demanded, taken, received or had in the Parts of Wales, nor in the Marches of the same, nor in the Towns of Calice or Berwick, nor in the Marches of the same, but only in such Parts and Places of Wales, Marches and Towns aforesaid, where Mortuaries have been accustomed to be taken and paid. And in those Parts and Places no Mortuaries nor Corse-presents, ne any other Thing for Mortuary or Corse-present from henceforth shall be demanded, taken, received or had, but only after the Form, Order and Manner above specified in this present Act, and none otherwise, ne of any other Person or Persons than is limited by this present Act, upon the Pain contained in this present Act.

Bishops in *Wales* to take of Priests *Mortuaries.* But Note, by a Statute made 12 *Annæ, sess.* 2. *c.* 6. *Mortuaries* are taken away in the said Dioceses of *Bangor, Landaff, St. Davids,* and *St. Asaph,* and Purpose, and

Provided also, That it shall be lawful to the Bishops of Bangor, Landaff, St. Davids and St. Asaph, and likewise to the Archdeacon of Chester, to take such Mortuaries of the Priests within their Diocese and Jurisdictions, as heretofore have been accustomed. Provided also, That in such Places where Mortuaries have been accustomed to be taken of less Value than is aforesaid, That no Person shall be compelled to pay in any such Place any other Mortuary, or more for any Mortuary than hath been accustomed, ne that any Mortuary in such Place shall be demanded, taken, received or had of any Person or Persons exempt by this Act, nor in any wise contrary to this Act, upon Pain afore limited. Stat. 21 H. 8. c. 6.

a Recompence given in lieu thereof to the Bishops of those Dioceses. See the said Act for this for annexing certain Prebends to the Mastership of *Pembro.* Coll. and Provostship of *Oriel* Coll. *&c.*

26 *H.* 8. *c.* 15. Archdeaconry of *Richmond.*

Forasmuch as divers and many the King our Soverign Lord's Subjects, inhabiting within the Archdeaconry of Richmond in the County of York, be, and of long Time have been sore and grievously exacted and impoverished by the Parsons, Vicars and others, such as have Benefices and Spiritual Promotions within the same, as by taking of every Person, when he dyeth, in the Name of a Pension or of a Portion, sometime the Ninth Part of all his Goods and Chattels, and sometime the Third Part, to the open and manifest Impoverishing of most of all the King's poor Subjects inhabited and deceasing within the same;

Where-

Offerings.

Wherefore be it ordained, enacted and eſtabliſhed by the King our Sovereign Lord, the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, that from the Feaſt of St. Mark the Evangeliſt next coming, no manner of Spiritual Perſon, or others, now having, or that from the ſaid Feaſt ſhall have any manner of Benefice, or other Spiritual Promotion within the ſaid Archdeaconry, ſhall in no wiſe aſk, levy, demand or take, after the Deceaſe of any Perſon or Perſons, any ſuch Portions or Penſions, nor any other Demand or Duty in the Name or Lieu of the ſame, upon Pain to incur ſuch Dangers, Forfeitures and Penalties, as be contained in the Statute of Proviſors, made the five and twentieth Year of the Reign of our moſt Noble Progenitor King Edward the Third: But that all and every the King's Subjects of the ſaid Archdeaconry, and their Executors and Adminiſtrators, from henceforth ſhall be ordered, intreated and uſed for their Goods and Chattels after their Deceaſe, in like Manner, Form, Order and Condition, as is contained in the Statute made in the One and twentieth Year of our moſt noble and victorious Reign, for Probate of Teſtaments, and none otherwiſe; any ſuch Cuſtom, Bull, Compoſition, Preſcription or Ordinance heretofore had, obtained or uſed to the contrary, within the aforeſaid Archdeaconry, in any wiſe notwithſtanding. Stat. 26 H. 8. cap. 15.

Penalty for acting contrary to this Act.

As to Offerings, Oblations or Obventions, which are all the ſame, it hath alſo been enacted, Provided always, and be it enacted by the Authority aforeſaid, That all and every Perſon and Perſons which by the Laws and Cuſtoms of this Realm ought to make or pay their Offerings, ſhall yearly from henceforth well and truly content and pay his or their Offerings, to the Parſon, Vicar, Proprietor, or their Deputies or Fermors of the Pariſh or Pariſhes where it ſhall fortune or happen him or them to dwell or abide: And that at ſuch four Offering-Days, as at any Time heretofore within the ſpace of four Years laſt paſt hath been uſed and accuſtomed for the Payment of the ſame, and in Default thereof to pay for the ſaid Offerings at Eaſter then next following. Stat. 2 & 3 Ed. 6. cap. 13.

Offerings, &c. how to be paid, by 2 & 3 *Ed.* 6. *c.* 13.

Under this Duty of Offerings are comprehended not only thoſe ſmall accuſtomary Sums commonly paid by every Perſon when he receives the Sacrament of the Lord's Supper at *Eaſter*, which in many Places is by Cuſtom two Pence from every Communicant, and in *London* a Groat an Houſe, but alſo the accuſtomary Payments for Marriages, Chriſtnings, Churches and Burials; theſe properly belong to the Parſon or Vicar of the Church where they are made, and are recoverable by Law in ſuch Places and Caſes only, where there is a Cuſtom for the Payment of certain Sums upon the Performance of theſe ſeveral Duties. By the Canon Law, and of common Right, no Parſon ought to take any thing for chriſtning of Children, Burials, *&c.* But by Cuſtom they are allowed to take ſomething; by *Holt* C. J. in the Caſe of the Biſhop of *St. David's* v. *Lucy*, 1 *Ld. Raym.* 450.

What Offerings may comprehend.

In a Prohibition granted to ſtay a Suit in the Spiritual Court by the Vicar of *Wakefield*, grounded upon a Cuſtom for a Due for Churching of Women, which was alledged to be this, *viz.* that every Inhabitant keeping an Houſe and having a Family in *Wakefield* in *Yorkſhire*, and having a Child or Children born in that Pariſh, at the Time of Churching the Mother of the Child, or at the uſual Time after her Delivery when ſhe ſhould be Churched, have Time out of Mind paid ten Pence to the Vicar

Penſions, &c.

of the Pariſh, for or in reſpect of ſuch Churching, or at the uſual Time when the Mother of ſuch Child ſhould be churched: Iſſue was taken upon the Cuſtom, and a Verdict was found for the Defendant, that there was ſuch a Cuſtom. And upon Motion made to the Court by Mr. *Filmer* for the Plaintiff, in Arreſt of Judgment, to prevent the granting a Conſultation, the Court being of Opinion, that it was a void Cuſtom. 1. Becauſe it was not alledged, what was the uſual Time the Women were to be churched, and therefore uncertain; 2. Becauſe it was unreaſonable, becauſe it obliged the Huſband to pay, if the Woman was not churched at all, or if ſhe went out of the Pariſh, or died before the Time of Churching; Judgment was arreſted; Mr. *Crowle* Counſel for the Defendant in the Prohibition. 2 *Ld. Raym. Naylor qui tam* v. *Scott.*

Portions, Corrodies, &c.

The Profits of ſome Churches alſo do conſiſt partly in Penſions or Annuities, Portions of Tithes, Corrodies, Indempnities, Synodies and Proxies due and payable from other Churches or Perſons in reſpect thereof; Remedy to recover which is given by the Statute following.

34 & 35 *H.* 8. *c.* 19. of Penſions and Portions to Archbiſhops, &c.

Where the Archbiſhops, Biſhops, Archdeacons, and the other Eccleſiaſtical Perſons, of both the Provinces of Canterbury and York, within this Realm of England, have heretofore in the Right of their Churches, had and received out of the late Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Religious and Eccleſiaſtical Houſes and Places now diſſolved, and out of the Manors, Lands, Tenements, and Hereditaments belonging to the ſame, divers Penſions, Portions, Corrodies, Indempnities, Synodies, Priories, and other Profits: And where alſo in the Parliament begun and holden at Weſtminſter the Eight and twentieth Day of April in the One and thirtieth Year of the Reign of our Sovereign Lord Henry the Eighth, by the Grace of GOD, King of England, France and Ireland, Defender of the Faith, and of the Church of England, and alſo of Ireland, in Earth the Supreme Head, It was ordained and enacted by the Authority of the Parliament, That as well the ſaid late Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Religious and Eccleſiaſtical Houſes and Places, with the Manors, Lands, Tenements, Hereditaments, and other Profits belonging unto the ſame late Monaſteries, Abbathies, Priories, and other Religious and Eccleſiaſtical Houſes and Places, as then were, or then hereafter ſhould come unto the King's Highneſs Hands, ſhould be veſted, deemed and adjudged in the actual and real Poſſeſſion and Seiſin of the King's Highneſs, his Heirs and Succeſſors:

Saving to Perſons, and Bodies, Politick, &c.

Saving to all and every Perſon and Perſons, and Bodies Politick, and their Heirs and Succeſſors, and the Heirs and Succeſſors of all and every of them, other then the late Abbots, Priors, Abbeſſes, Prioreſſes, and other Eccleſiaſtical Governors and Governeſſes of the ſaid late Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Religious and Eccleſiaſtical Houſes and Places, and their Succeſſors, and the Succeſſors of every of them, and ſuch as pretend to be Founders, Patrons or Donors of ſuch Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes of Fryars, and other Eccleſiaſtical Houſes and Places, or of any Manors, Meſſuages, Lands, Tenements, or other Hereditaments belonging to the ſame, or to any of them, their Heirs and Succeſſors, and the Heirs and Succeſſors of every ſuch Founder, Patron or Donor, and the then Abbots,

bots, Priors, Abbesses, Prioresses, and other Ecclesiastical Governors and Governesses of such Monasteries, Abbathies, Priories, Nunneries, Colleges, Hospitals, Houses of Fryars, and other Religious and Ecclesiastical Houses and Places, which then hereafter should happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or come to the King's Highness, and such as pretend to be Founders, Patrons, or Donors of such Monasteries, Abbathies, Priories, Nunneries, Colleges, Hospitals, Houses of Fryars, and other Ecclesiastical Houses and Places, or of any Manors, Messuages, Lands, Tenements or other Hereditaments to the same belonging, or to any of them, their Heirs and Successors and the Heirs and Successors of every of them, all such Right, Title, Claim, Interest, Possession, Rents, Charges, Annuities, Leases, Ferms, Offices, Fees, Liveries, Livings, Portions, Pensions, Corrodies, Commons, Synodies, Priories, and other Profits which they or any of them have, claim, ought, may or might have had in or to the Premisses, or to any other Part or Parcel thereof, in such like Manner, Form and Condition, to all Intents, Respects, Constructions and Purposes, as if the same Act had never been had ne made, (Rents-services, Rents-seck, and all other Services and Suits only except) as by the same Act among divers other Things therein contained more plainly is shewed, and may appear. Pensions, &c.

And yet notwithstanding the said general Saving contained in the said Act, the said Archbishops, Bishops, Archdeacons, and other Ecclesiastical Persons of both the said Provinces of Canterbury and York, be and sithin the making of the said Act have been disturbed and denied of the having, receiving and gathering of the said Pensions, Portions, Corrodies, Indemnities, Synodies and Priories, with other Profits belonging unto them, by divers of the Fermors and Occupiers of great Part and Parcel of the said Manors, Lands, Tenements and Hereditaments of the said late Monasteries, and other Ecclesiastical Houses and Places, or being Parcel of the Possessions of them, and have no direct mean to obtain, recover, or come to the same, not only to their great Hurt and Damage, but also like to grow, and be to the great Loss and Disherison of the King's Majesty, concerning his First-fruits and Tenths: Archbishops, &c. denied the said Pensions, &c.

For Reformation whereof, be it ordained, established and enacted by the King's Highness, with the Assent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the Authority of the same, That if any Person or Persons, being Fermor or Occupier of any Manors, Lands, Tenements, Parsonages, Benefices, or other Hereditaments of any of the said late Monasteries, or Ecclesiastical Houses or Places, or belonging to them, or any of them, by the King's Highness Gift, Grant, Sale, Exchange or otherwise, out of which Premisses any such Portions, Pensions, Corrodies, Indemnities, Synodies, Priories, or any other Profits, have been heretofore lawfully going out, answered or paid to any of the Archbishops, Bishops, Archdeacons and other Ecclesiastical Persons abovesaid, do at any Time after the first Day of April next coming, wilfully deny the Payment thereof, at the Days of Payment heretofore accustomed, of any of the said Pensions, Portions, Corrodies, Indemnities, Synodies, Priories, or any other Profits, whereof the said Archbishops, Bishops, Archdeacons, For Reformation, &c. enacted.

Penſions, &c.

Archbiſhop, &c. to make Proceſs againſt them.

cons, or other Eccleſiaſtical Perſons were in Poſſeſſion, at or within ten Years next before the Time of the Diſſolution of any ſuch Monaſteries, or other Eccleſiaſtical Houſes or Places; that then it ſhall be lawful for the ſame Archbiſhops, Biſhops, Archdeacons, or other Eccleſiaſtical Perſons aforeſaid, being ſo denied to be ſatisfied and paid thereof, and having Right to the ſame Thing in Demand, to make ſuch Proceſs as well againſt every ſuch Perſon and Perſons as ſhall ſo deny Payment of the ſame Penſion, Portions, Corrodies, Proxies, Indemnities, Synodies, or any other Profits, which of Right ought to be paid, as is aforeſaid, as againſt the Church or Churches charged with the ſame, as heretofore they have lawfully done, and as by, and according to the Laws and Statutes of this Realm they may now lawfully do, for the true Payment and Recovery thereof: And if the Party Defendant be lawfully Convict in any ſuch Suit, Cauſe or Matter, according to the Eccleſiaſtical Laws; then the Party Plaintiff ſhall have and recover againſt the Party Defendant the Thing in demand, and the Value thereof in Damages, with his Coſts for his Suit.

Proceſs at the Common Law.

And be it further ordained and enacted by the Authority aforeſaid, That if it fortune the Cauſe or Matter of Variance between any of the ſaid Parties be determinable at the Common Law, that then the Party grieved to ſue for his Recovery and Remedy therein at the Common Law: And if the Party Defendant fortune to be, by the Courſe of the Common Law, lawfully condemned to the Party Plaintiff; then the ſaid Party Plaintiff ſhall likewiſe have and recover againſt the Party Defendant the Thing in demand, and the Value thereof in Damages, with his Coſts for his Suit.

Proviſo upon the King's Gift or Sale for Lives or Years.

Provided alway, and be it enacted by the Authority aforeſaid, That all and ſingular ſuch of the ſaid Archbiſhops, Biſhops, Archdeacons, and other Eccleſiaſtical Perſons, which have Right or Title to claim, demand, or injoy any of the ſaid Penſions, Portions, Corrodies, Indemnities, Synodies or Proxies againſt any Perſon or Perſons, to whom the King hath made, or hereafter ſhall make in Writing under Seal, any Sale, Gift, Grant or Leaſe, for Term of Life or Lives, or Years, of any of the ſaid Manors, Lands, Tenements, Parſonages, Benefices, and other Hereditaments, charged, or chargeable to or with any of the ſaid Penſions, Portions, Corrodies, Indemnities, Synodies or Proxies, and alſo hath covenanted, granted, promiſed or agreed, or hereafter ſhall covenant, grant, promiſe or agree, by the ſaid Writing to acquit, diſcharge, or ſave harmleſs the ſame Perſon or Perſons, of all Penſions, Portions, Corrodies, Indemnities, Synodies and Proxies, going out of the Premiſſes or any Parcel thereof, as he or ſhall be mentioned in the ſame Writings or any of them, ſhall ſue for their Remedy and Recovery thereof in the Court of the Augmentations of the Revenues of the King's Crown, and not elſewhere: And that the Party Defendant having any ſuch Diſcharge, being convented, called or ſued to any other Court or Place, or before any other Judge, for any the Cauſes abovеſaid, ſhall be diſcharged and diſmiſſed out of the ſame Court or Place without any Thing paying for the ſame, by the only ſhewing forth any of the ſaid Writings, ſealed under any of the King's Seals, proving or declaring the King to have covenanted, promiſed or agreed to acquit, diſcharge or ſave harmleſs

harmleſs the ſaid Party Defendant thereof, as is aforeſaid; any thing contained in this Act to the contrary notwithſtanding. Stat. 34 & 35 H. 8. c. 19.

Suits for Church-Duties.

And in Caſes when any of theſe Duties were due from any Religious Houſe diſſolved, and the King did of new incorporate a Society, as Dean and Chapter, and give to them the whole Site of ſuch Religious Houſe, with all Manors, Lands, Tenements and Hereditaments Parcel thereof; ſuch Duties are due and payable from the new Corporation, and if a Corporation be ſurrendred or diſſolved by the Death of the Members, and the King doth incorporate them by a new Name, an Annuity before payable by the ſaid Corporation is not determined. *Trin.* 32 *Eliz. The Biſhop of Rocheſter*'s Caſe, 2 *And.* 106. Eſpecially theſe Duties remain by Virtue of the aforeſaid Statute, becauſe they were in *Eſſe* at the Time of the making thereof, and not extinguiſhed by the Surrender of the Religious Houſes; for their Corporations were not diſſolved by their Surrender, until all the Religious Perſons had relinquiſhed their Houſes and Habits. *Trin.* 2 *Jac.* in the Exchequer. The King and Dr. *Forth*'s Caſe, *Davis, p.* 1.

These Duties how payable from new Corporations.

CHAP. LIII.

Tithes, Mortuaries, Oblations and other Church-Duties, in what Courts to be ſued for.

I Am come now to ſpeak to the Second Queſtion with reſpect to the Profits belonging to an Eccleſiaſtical Benefice, *viz.* what Remedy the Law hath given the Owner for the Recovery of them, or Satisfaction for them, being detained.

What Remedy to recover theſe Profits, &c.

Theſe Profits do conſiſt of Tithes of all Sorts, or other Recompence for them, Penſions, Mortuaries, Offerings (called alſo Oblations and Obventions) under which are comprehended all cuſtomary Payments for Marriages, Chriſtnings, Churchings and Burials, and have been and yet are recoverable in the Eccleſiaſtical Court, as is notorious. Theſe Courts antiently were thought ſufficient to compel, by Church Cenſures, the Laity to render unto Churchmen their ſeveral Dues; but tho' ſuch Reverence then was given to the Cenſures of the Church, yet Ways were found out to vex the Incumbents by reaſon of their taking their Tithes, *&c. viz.* By *Scire Facias*, and Actions for Goods taken away, *&c.* Whereupon it was enacted, **Whereas Writs of** Scire Facias **have been granted to warn Prelates, Religious and other Clerks, to anſwer Diſmes in our Chancery, and to ſhew if they have any Thing, or can any Thing ſay, wherefore ſuch Diſmes ought not to be reſtored to the ſaid Demandants, and to anſwer as well to us as to the Party to ſuch Diſmes: That ſuch Writs from henceforth be not granted, and that the Proceſs hanging upon ſuch Writs be annulled and repealed, and that the Parties be diſmiſſed from the Secular Judges**

Of what they conſiſt.

Remedy by 18 *E.* 3. *c.* 7.

Suits for Church-Duties.

of such Manner of Pleas: Saving to us our Right, such as we and our Ancestors have had, and were wont to have of Reason. In Witness whereof, at the Request of the said Prelates, to these present Letters we have set our Seal. Dated at London, the 8th Day of July the Year of our Reign of England the 18th, and of France the 5th. Stat. 18 E. 3. c. 7.

Special Averment, &c. of Lay-Cattle. 1 *R.* 2. *c.* 14.

(And afterwards it was enacted thus:) It is accorded, that at what Time that any Person of the Holy Church be drawn in Plea in the Secular Court for his own Tithes taken, by the Name of Goods taken away, and he which is so drawn in Plea maketh an Exception, or alledgeth that the Substance and Suit of the Business is only upon Tithes due of Right and of Possession to his Church, or to another his Benefice: That in such Case the general Averment shall not be taken, without shewing specially how the same was his Lay-Cattle. 1 Rich. 2. c. 14.

After this, no Statute was made about the Profits of the Church, till

21 *H.* 8. *c.* 6. of Mortuaries.

Stat. 21 *H.* 8. *c.* 6. was made about Mortuaries, which is set down *c.* 51. But this Law was made to the Prejudice, rather than to the Advantage of the Church, and at a Time when divers other Laws were made for the lessening the Power and Interest of the Clergy, to the great Abatement of that Reverence which People had to the Clergy and Censures of the Church, so that it was thought necessary to enact as followeth.

27 *H.* 8. *c.* 20. against Substraction of Tithes.

Forasmuch as divers Numbers of evil disposed Persons inhabited in sundry Counties, Cities, Towns and Places of this Realm, having no Respect to their Duties to Almighty God, but against Right and good Conscience having attempted to substract and withhold in some Places the whole, and in some Places great part of their Tithes and Oblations, as well personal as predial, due unto God and Holy Church, and pursuing such their detestable Enormities and Injuries, have attempted in late Time past to disobey, contemn and despise the Process, Laws and Decrees of the Ecclesiastical Court of this Realm, in more temerous and large Manner than before this Time hath been seen: For Reformation of which said Injuries, and for Unity and Peace to be preserved amongst the King's Subjects of this Realm, our Sovereign Lord the King being supream Head on Earth, under God, of the Church of England, willing the Spiritual Rights and Duties of that Church to be preserved, continued and maintained, hath ordained and enacted by Authority of this present Parliament, That every of his Subjects of this Realm, England, Ireland, Wales and Caleis, and Marches of the same, according to the Ecclesiastical Laws and Ordinances of his Church of England, and after the laudable Uses and Customs of their Parish, or other Place where he dwelleth, or occupieth, shall yield and pay his Tithes and Offerings, and other Duties of Holy Church, and that for such Substractions of any of the said Tithes, Offerings, or other Duties, the Parson, Vicar, Curate, or other Party in that behalf grieved, may by due Process of the King's Ecclesiastical Laws of the Church of England convent the Person or Persons offending before his Ordinary, or other competent Judge of this Realm, having Authority to hear and determine the Right of Tithes, and also to compel the same Person or Persons offending, to do and yield their said Duties in that behalf; and in case the Ordinary of the Diocese, or his Commissary, or the Archdeacon or his Official, or any other competent Judge aforesaid, for any Contempt,

Contumacy, Diſobedience, or other Miſdemeanor of the Party Defendant, make Information and Requeſt to any of the King's moſt honourable Council, or to the Juſtices of the Peace of the Shire where ſuch Offender dwelleth, to aſſiſt and aid the ſame Ordinary, Commiſſary, Archdeacon, Official or Judge, to order or reform any ſuch Perſon in any Cauſe before rehearſed: That then he of the King's ſaid honourable Council, or ſuch two Juſtices of Peace, whereof the one to be of the Quorum, to whom ſuch Information or Requeſt ſhall be made, ſhall have full Power and Authority, by Vertue of this Act, to attach, or cauſe to be attached, the Perſon or Perſons againſt whom ſuch Information or Requeſt ſhall be made, and to commit the ſame Perſon or Perſons to ward, there to remain without Bail or Mainprize, till that he or they ſhall have found ſufficient Surety, to be bound by Recognizance, or otherwiſe, before the King's ſaid Chancellor, or Juſtice of Peace, or any other like Chancellor, or Juſtice of Peace, to the Uſe of our ſaid Sovereign Lord the King, to give due Obedience to the Proceſs, Proceedings, Decrees and Sentences of the Eccleſiaſtical Court of this Realm wherein ſuch Suit or Matter for the Premiſſes ſhall depend or be. And that every of the King's ſaid Counſellors, or two Juſtices of the Peace, whereof the one to be of the Quorum, as is aforeſaid, ſhall have full Power and Authority by Vertue of this Act, to take, receive and record Recognizances and Obligations in any of the Cauſes above written. Suits for Tithes, &c.

Provided alway, That this Act, or any Thing therein contained, ſhall not extend to any Inhabitant of the City of London, for or concerning any manner of Tythe, Offering, or other Eccleſiaſtical Duty, grown and due to be paid and yielded within the ſame City, becauſe there is another Order made for the Payment of Tythes and other Duties within the ſaid City. Proviſo for the City of *London*.

Provided alſo, That every Perſon and Perſons, being Party or Parties to any ſuch Suit, ſhall and may make and have his and their lawful Action, Demand or Proſecution, Appeals, Prohibitions, and all other their lawful Defences and Remedies in every ſuch Suit, according to the ſaid Eccleſiaſtical Laws, and Laws and Statutes of this Realm, in as ample and liberal Manner and Form as they or any of them might have had, if this Act had never been made: Any thing in this Act above written notwithſtanding. Proviſo for lawful Actions, Defences, Appeals, Prohibitions, &c.

Provided always, and be it enacted by Authority aforeſaid, That this Act for recovering of Tithes, ne any Thing therein contained, ſhall take Force and Effect but only until ſuch Time as the King's Highneſs, and ſuch other xxxii Perſons which his Highneſs ſhall name and appoint for the making and eſtabliſhing of ſuch Laws, as his Highneſs ſhall affirm and ratify, to be called the Eccleſiaſtical Laws of the Church of England: And after the ſaid Laws ſo ratified and confirmed as is aforeſaid, that then the ſaid Tithes to be paid to every Eccleſiaſtical Perſon, according to ſuch Laws, and none otherwiſe. Stat. 27 H. 8. cap. 20. Proviſo for further making Eccleſiaſtical Laws.

Note, That the aforeſaid Statute doth not only extend to Tithes, but alſo to Offerings, and all other Duties of the Church, and it is yet in Force, notwithſtanding the laſt Clauſe therein, for that the King, and Thirty-two Perſons by him appointed, never made and eſtabliſhed any Laws, to be called The King's Eccleſiaſtical Laws, and this Statute is confirmed by Stat. 2 *Ed.* 6. *cap.* 13. Which were not made.

After

Suits for Tithes, &c.

Relief for Tithes coming to Lay-People.

After the aforesaid Statute upon the Dissolution of Abbies, *&c.* Tithes, *&c.* came to the King, and from him to divers Lay-People, who by the Course of the Ecclesiastical Laws could not sue for them in the Ecclesiastical Courts; and having at that Time no Remedy for them in the Temporal Courts, the following Act was made for their Relief.

32 *H.* 8. *c.* 7. Preamble.

Whereas divers and many Persons inhabiting in sundry Countries and Places of this Realm, and other the King's Dominions, not regarding their Duties to Almighty God, and to the King our Sovereign Lord, but in few Years past more contemptuously and commonly presuming to offend and infringe the good and wholesome Laws of this Realm, and gracious Commandments of our said Sovereign Lord, than in Times past hath been seen or known, have not letted to substract and withdraw the lawful and accustomed Tithes of Corn, Hay, Pasturages, and other Sort of Tithes and Oblations commonly due to the Owners, Proprietaries and Possessors of the Parsonages, Vicarages, and other Ecclesiastical Places of and within the said Realm and Dominions, being the more incouraged thereto, for that divers of the King's Subjects, being Lay-persons having Parsonages, Vicarages and Tithes to them and their Heirs, or to them and to their Heirs of their Bodies lawfully begotten, or for Term of Life or Years, cannot by the Order and Course of the Ecclesiastical Laws of this Realm sue in any Ecclesiastical Court for the Wrongful withholding and detaining of the said Tithes or other Duties, nor cannot by the Order of the Common Laws of this Realm have any due Remedy against any Person or Persons, their Heirs or Assigns, that wrongfully detaineth or withholdeth the same: By Occasion whereof much Controversy, Suit, Variance and Discord is like to insurge and insue among the King's Subjects, to the great Detriment, Damage and Decay of many of them, if convenient and speedy Remedy therefore be not had and provided:

Enacted, that such Tithes be effectually set out.

Wherefore it is ordained and enacted by our said Sovereign Lord the King, with the Assent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the Authority of the same, that all and singular Persons of this his said Realm, or other his Dominions, of what Estate, Degree or Condition soever he or they be, shall fully, truly and effectually divide, set out, yield, or pay all and singular Tithes and Offerings aforesaid, according to the lawful Customs and Usages of the Parishes and Places where such Tithes or Duties shall grow, arise, come or be due. And in case that shall happen any Person or Persons of his or their ungodly or perverse Will and Mind, to detain and withhold any of the said Tithes or Offerings, or any Part or Parcel thereof, then the Person or Persons being Ecclesiastical or Lay-person, having Cause to demand or have the said Tithes or Offerings, being thereby wronged or grieved, shall and may convent the Persons or Person so offending before the Ordinary, his Commissary, or other competent Minister or lawful Judge of the Place where such Wrong shall be done, according to the Ecclesiastical Laws: And in every such Case or Matter of Suit, the same Ordinary, Commissary, or other competent Minister or lawful Judge, having the Parties or their lawful Procurators before him or them, shall and may by virtue of this Act proceed to the Examination, Hearing and Determination of every such Cause or Matter ordinarily or summarily, according

cording to the Course and Process of the said Ecclesiastical Laws, and thereupon may give Sentence accordingly.

Suits for Tithes, &c.

And in case that any of the Parties, for any Cause or Matter concerning that Suit, do appeal from the Sentence, Order and definitive Judgment of the said Ordinary or other competent Judge, as is aforesaid, then the same Judge, by virtue of this Act, forthwith upon such Appellation made, shall adjudge to the other Party the reasonable Costs of his Suit therein before expended, and shall compel the same Party Appellant to satisfy and pay the same Costs so adjudged by compulsory Process and Censures of the said Laws Ecclesiastical, taking Surety of the other Party to whom such Costs shall be adjudged and paid, to restore the same Costs to the Appellant, if after, the principal Cause of that Suit of Appeal shall be adjudged against the same Party, to whom the said Costs shall be yielden: And so every Ordinary or other competent Judge Ecclesiastical, by virtue of this Act, shall adjudge Costs to the Party upon every Appeal to be made in any Suit or Cause of Subtraction or Detention of any Tithes or Offerings, or in any other Suit to be made for or concerning the Duty of such Tithes or Offerings.

Costs secured, &c. upon an Appeal.

And further, be it enacted by the Authority aforesaid, That if any Person or Persons, after such Sentence definitive given against them, obstinately and wilfully refuse for to pay their Tithes, or such Sums of Money so adjudged, wherein they be condemned for the same, that then two Justices of the Peace for the same Shire, whereof one to be of the Quorum, shall have Authority by this Act, upon Information, Certificate or Complaint to them made by Writing by the said Ecclesiastical Judge that gave the same Sentence, to cause the same Party so refusing, to be attached, and committed to the next Gaol, and there to remain without Bail or Mainprise, till he or they shall have found sufficient Sureties to be bound by Recognizance or otherwise, before the same Justices, to the Use of our Sovereign Lord the King, to perform the said definitive Sentence and Judgment.

Power to two Justices to commit the Offender.

Provided always, and be it enacted by the Authority aforesaid, That no Person or Persons shall be sued or otherwise compelled to yield, give or pay any Manner of Tithes, for any Manors, Lands, Tenements or other Hereditaments, which by Laws or Statutes of this Realm are discharged or not chargeable with the Payment of any such Tithes.

Persons discharged.

Provided also, and be it enacted by the Authority aforesaid, That this Act nor any Thing therein contained shall in any wise bind the Inhabitants of the City of London and Suburbs of the same, for to pay their Tithes and Offerings within the same City and Suburbs otherwise than they ought or should have done before the making of this Act; any Thing in this Act contained to the contrary notwithstanding.

Proviso for Inhabitants in *London*.

And be it further enacted by the Authority aforesaid, That in all Cases, where any Person or Persons, which now have, or which hereafter shall have any Estate of Inheritance, Freehold, Term, Right or Interest, of, in or to, any Parsonage, Vicarage, Portion, Pension, Tithes, Oblations, or other Ecclesiastical or Spiritual Profit, which now be, or which hereafter shall be made Temporal, or admitted to be, abide and go to or in Temporal Hands and Lay Uses and Profits by the Law or Statutes of this Realm, shall hereafter

Remedy in the Temporal Courts for Persons disseised, &c.

Suits for Tithes, &c.

after fortune to be disseised, deforced, wronged, or otherwise kept or put from their lawful Inheritance, Estate, Seison, Possession, Occupation, Term, Right or Interest of, in or to the same, or of, in or to any Parcel thereof, by any other Person or Persons claiming or pretending to have Interest or Title in or to the same: That then in all and every such Case or Cases, the Person or Persons so disseised, deforced, or wrongfully kept or put from his or their Right, or Possession, as is afore rehearsed, their Heirs, Wives, and such other to whom such Injury and Wrong shall be done or committed, shall and may have their Remedy in the King's Temporal Courts, or other Temporal Courts, as the Case shall require, for the Recovery, getting or obtaining of such Inheritance, Estate, Freehold, Seison, Possession, Term, Right or Interest; by Writs original of Præc' quod reddat, Ass. of novel disseisin, Mortdanc', Quod ei deforceat, Writs of Dower or other Writs original, as the Case shall require, to be devised and granted in the King's Court of Chancery, of every such Parsonage, Vicarage, Portion, Pension, or other Profit called Ecclesiastical or Spiritual, so to be demanded according to the Nature and Cause of the Suit thereof, in like Manner and Form as they should, ought or might have had of or for Lands, Tenements, or other Hereditaments in such Manner to be demanded: And that Writs of Covenant and other Writs for Fines to be levied, and all other Assurances to be had, made or conveyed of any such Parsonage, Vicarage, Portion, Pension, or other Profit called Ecclesiastical or Spiritual, as is aforesaid, shall be hereafter devised and granted in the said Chancery, according as hath been used for Fines to be levied, and Assurance to be had or made, or conveyed, of Lands, Tenements or other Hereditaments: And that all Judgments to be given upon any of the said Writs original so to be devised or granted of or for any the Premisses, or any of them, and all Fines to be levied and acknowledged in any of the King's said Courts thereof, shall be of like Force and Effect in the Law, to all Intents and Purposes, as Judgments given and Fines levied of Lands, Tenements and Hereditaments in the same Courts, upon Writs Original therefore duly pursued and prosecuted, albeit no such Form of Writs Original out of the said Court of Chancery have heretofore proceeded or been awarded.

Remedy against Refusers of Tithes in the Spiritual Courts.

Provided always, That this last Act shall not extend nor be expounded to give any Remedy, Cause of Action or Suit in the Courts Temporal against any Person or Persons which shall refuse or deny to set out his or their Tithes, or which shall detain, withhold or refuse to pay his Tithes or Offerings, or any Parcel thereof: But that in all such Cases the Person or Party being Ecclesiastical or Lay Person, having cause to demand or have the said Tithes or Offerings, and thereby wronged or grieved, shall take and have their Remedy for their said Tithes or Offerings in every such Case in the Spiritual Courts, according to the Ordinance in the first Part of this Act mentioned, and not otherwise; any Thing herein expressed to the contrary thereof notwithstanding. Stat. 32 H. 8. c. 7.

To what Tithes the Statute extends.

Note, That this Statute doth only extend to Tithes and Offerings; under which are comprehended, as is said, all accustomary Payments for Marriages, Christnings, Churchings and Burials, but not to other Church Duties, as Mortuaries, Pensions, Corodies, Proxies, *&c.* therefore Lay-men have no Remedy for them in the Ecclesiastical Court by this

this Statute, nor are the Clergy advantaged by it, by Appeals or Sentences given, as in other Caſes, *viz.* Suits for Tithes and Offerings. But according to the Lord *Coke*'s Opinion, this Statute doth not only give Remedy in the Temporal Courts for Tithes, but for Penſions and other Eccleſiaſtical or Spiritual Profit, where the Owner is diſſeiſed, deforced, wronged or otherwiſe kept or put from the ſame, for that Tithes or other Eccleſiaſtical Duties that came to the Crown, by the Statutes of 27 *H.* 8. 31 *H.* 8. 37 *H.* 8. and 1 *Ed.* 6. are by thoſe Statutes, and this of 32 *H.* 8. and of 1 & 2 *Ph. & Mariæ*, in the Hands of Lay-men Temporal Inheritances, and ſhall be accounted Aſſets, and Huſbands ſhall be Tenants by Curteſy, and Wives indowed of them, and ſhall have other Incidents belonging to Temporal Inheritances, only that they retain this Eccleſiaſtical Quality, that the Owner of them may ſue for the Subſtraction of the ſame in the Eccleſiaſtical Court. 1 *Inſt.* 159. *a.*

Suits for Church Dues.

That it extends to Penſions, &c.

Note alſo, (though by this Statute the Appellant ſhall pay Coſts of Suit to the other Party) that it was ruled, that if Sentence be given in the Spiritual Court, and coſts taxed, and the Defendant brings an Appeal; yet if the Suit did not appertain originally, or properly to them, a Prohibition ſhall be awarded, as well to the Coſts as to the principal Suit; for that the Statute is to take Place only, when the Cauſe belongs properly to the Spiritual Court. *Paſch.* 7 *Jac. Noy* 137. Accordingly the Caſe was, that *A.* Parſon of *B.* ſued for Tithes in the Eccleſiaſtical Court, and *C.* Rector of *D.* came in *pro intereſſe ſuo* there, and ſaid, that the Lands for which Tithes are demanded were within his Pariſh, upon which they were at Iſſue; and this being found for him, Sentence was given for him. *A.* appeals, *&c.* and pending the Appeal, Coſts were aſſeſſed againſt him in the firſt Court according to this Statute, and Proceſs awarded againſt him. In this Caſe *A.* (becauſe the Iſſue was triable only at Common Law) brought a Prohibition to the firſt Court from which he had appealed. But becauſe no Suit was there depending, for that he had removed it thence by Appeal, a Conſultation was awarded; and held, that they might well proceed for the Coſts; but if he had not removed his Suit by Appeal, a Prohibition had been maintainable for him as to the Coſts, as well as the Principal, tho' he was Party to the Libel. *Paſch.* 32 *Eliz. B. R. Tranſam*'s Caſe, 3 *Croke* 178. 1 *Leon.* 130.

Where a Prohibition as to Coſts taxed.

If *A.* lives in the Dioceſe of *B.* and ſubſtracts Tithes in the Dioceſe of *C.* he ſhall be ſued in the Dioceſe of *C.* and not in the Dioceſe of *B.* where he lives; notwithſtanding *Stat.* 23 *H.* 8. *c.* 9. againſt citing out of the Dioceſe; for by Stat. 32 *H.* 8. *c.* 7. the Subſtraction of Tithes is made; for, by the Words of the Act, the Party offending ſhall and may be cited before the Eccleſiaſtical Judge of the Place, where ſuch Wrong ſhall be done. *Machin* v. *Moulton*, 1 *Ld. Raym.* 452, 453, 534, 535.

Tho' in the Recovery of Mortuaries, Penſions, Annuities, Proxies, *&c.* the Eccleſiaſtical Court is not aided by this Statute, as hath been noted, yet theſe as other Church-Duties are recoverable in the ſaid Court, which appears as to Mortuaries, by Stat. 21 *H.* 8. *c.* 6. made for the ſettling and ending Differences about Mortuaries, which ſee before in *Chap.* 52, but to the Prejudice rather than the Benefit of the Clergy. Dr. *Clagget* libelled (in the Conſiſtory Court of *Norwich*) as Archdeacon of *Sudbury*, in the Cathedral Church of the Holy Trinity in *Norwich* of the Foundation of King *Edw.* 6. againſt *Saunderſon* as Proprietor or Curate of the Appropriate Rectory of *Aſpal*, (which is within the Archdeaconry of *Sudbury*), alledging that the Archdeacon of *Sudbury* was of common Right, or by Indowment, or Cuſtom, intitled to the yearly Sum of 6 *s.* 8 *d.* for Procurations

Mortuaries.

Suit for Mortuaries, &c.

tions iſſuing out of the Appropriate Church of *Aſpal*; and that *Saunderſon* the Proprietor, or Curate, refuſed to pay it. *Saunderſon* applied to *B. R.* for a Prohibition, and ſuggeſted that this Rectory of *Aſpal* was Time out of Mind a Rectory impropriate, without any Vicar indowed; that all the Tithes and Profits within this Rectory, Time out of Mind belonged to the Proprietor thereof, who at his own Expence uſed to provide a Curate to celebrate Divine Service at the Pariſh Church of *Aſpal*. A Prohibition *niſi* having been obtained in *B. R.* the Matter was argued by Counſel; after which all the Court, *viz.* *Prat* C. J. *Powys*, *Eyre* and *Forteſcue* diſcharged the Rule for a Prohibition, and delivered their Opinions *ſeriatim*. 1. That this was an Eccleſiaſtical Duty, and therefore properly ſueable for in the Spiritual Court. 2. That it was claimed both by and from an Eccleſiaſtical Perſon; which made it the ſtronger. 3. That tho' there was an Impropriation in the Caſe, ſtill there muſt be a Curate to take care of the Souls of the Pariſh; and that Curates, as well as others, muſt ſtand in need of Biſhops or Archdeacons Inſtructions or Viſitations; conſequently; 4. That the Ordinary or Archdeacon ought to be allowed for his Procuration, what had been uſually paid. 5. That where a Thing is claimed by Cuſtom in the Spiritual Court, it muſt be intended according to their Conſtruction of a Cuſtom; and by their Law, forty Years make a Cuſtom or Preſcription. 6. That the Payment of 6*s.* 8*d.* for ſeventy or eighty Years was an Evidence of an immemorial Payment; but if it could not be ſtrictly immemorial, as taking the Archdeaconry to have been founded in *Ed.* 6. Time, ſtill ſince that Period, it might become due by Indowment, which might in this Diſtance of Time have been loſt. *Note*; The Maſter of the Rolls (Sir *Joſeph Jekyll*) on Motion had inclined to think Proxies due of common Right, and that Payment for ſeventy or eighty Years made it preſumable, that it was due *to ſome Perſon or other Time out of Mind*, and came by Indowment to the Archdeacon of *Sudbury*. 1 *Williams* 657, *&c.* *Saunderſon* v. *Clagget*.

Prohibition upon a Suit for a Mortuary, by Biſhop of *Cheſter*.

Antiently, *viz.* before the Stat. 21 *H.* 8. *c.* 6. was made, if Doubt did ariſe, whether there was a Cuſtom in a Place to have ſuch Things for a Mortuary, this was meerly triable in the Spiritual Court by the Statute of *Articuli Cleri*, which ſaith, **That where a Suit is for a Mortuary, Prohibition ſhall not be granted.** *Fitz. Nat. Brev.* 51 & 53. 10 *H.* 4. 2 & 13 *R.* 2. *Juriſd.* 20. *Kelleway*, *fol.* 110. And when a Prohibition was granted, becauſe the Biſhop of *Cheſter* ſued in the Conſiſtory of *Cheſter* before the Commiſſary there, after the Death of a Prieſt of the ſaid Dioceſe, ſurmiſing, that by Cuſtom there, he ought to have for a Mortuary, after the Death of every Prieſt dying within the Archdeaconry of *Cheſter*, his beſt Horſe, or Mare, Bridle, Saddle, Spurs, his beſt Gown or Cloak, his beſt Hat, his beſt upper Garment under his Gown, his Tippet, his Signet or Ring, as due to him the ſaid Biſhop, and recites the Statute 21 *H.* 8. concerning Mortuaries. And the Plaintiff averred that there is no ſuch Cuſtom there, and that ſhe had paid a Mortuary to the Parſon of *Bumbery*. *Jones* and *Whitlock* were of Opinion, that a Prohibition ought not to be granted, and that it is not now grantable upon the Statute 21 *H.* 8. by reaſon that by the Proviſo therein, Mortuaries ſhall be paid in the Archdeaconry of *Cheſter* as before they have been accuſtomed, and ſo is out of the Statute, therefore the Cuſtom is triable in the Court Chriſtian; yet becauſe *Richardſon* and *Croke* held the contrary, *viz.* that the Surmiſe to have a Prohibition was good, *viz.* that there is no ſuch Cuſtom, and that it may be well tried at Common Law, for that the Statute appoints now what Mortuaries ſhall be paid, and that in the

Archdeaconry of *Cheſter*, &c. ſuch Mortuaries ſhall be paid as have been accuſtomed, which they ſaid is iſſuable and triable at Common Law; eſpecially as this Caſe is; the Plaintiff ſurmiſing, that ſhe paid the Mortuary to the Parſon of the Pariſh, and that there is no ſuch Cuſtom that ſhe ſhould pay it to the Defendant; therefore it was appointed that the Defendant ſhould plead or demur, and then the Court would give Judgment upon the Record before them. *Mich.* 7 *Car. B. R. Margaret Hind* and *Epiſcopus Ceſtriæ*, 1 *Croke* 237. So if any one be drawn into the Spiritual Court for any Matter contrary to the ſaid Statute, a Prohibition lies, as was reſolved in 16 *Eliz. Mich.* 31 & 32 *Eliz. B. R. White's* Caſe, 3 *Croke* 151.

Suit for Mortuaries, &c.

Motion for a Prohibition to be directed to the Spiritual Court, to ſtay a Suit there for a Mortuary, upon a Suggeſtion of 21 *Hen.* 8. *cap.* 6. and that there was no Cuſtom here for the Payment of it: And he urged, that no Mortuary was due, but by Cuſtom; and therefore the Cuſtom here being denied, they ought not to proceed in the Spiritual Court. And he cited *Cro. Car.* 237,8. *Hinde* and *The Biſhop of Cheſter*; againſt which it was argued, that the Stat. of *H.* 8. has ſaved the Juriſdiction to the Spiritual Court, where Mortuaries have been uſually paid. Beſides, that they ought to plead, that there was not any ſuch Cuſtom in the Spiritual Court, and then upon Refuſal there to admit the Plea, to move the King's Bench, before ſuch Refuſal; but here they have not pleaded this Matter in the Spiritual Court. And *per Holt* Chief Juſtice a Prohibition cannot be granted, without a Denying of the Cuſtom in the Spiritual Court, which is not done here; and the whole Court ſeemed to be againſt the Prohibition, and a Rule was made to hear Counſel on both Sides; and afterwards the Rule was diſcharged by *Turton* and *Gould* Juſtices, *abſente Holt* Chief Juſtice. 1 *Ld. Raym.* 609. *Johnſon* v. *Oldham.*

What Mortuaries were taken away by the Statute.

So a Prohibition was moved for, where a Vicar ſued one in the Spiritual Court for a Mortuary, ſuggeſting that it was not due by Cuſtom to the Vicar, but to the Impropriator, and that he had paid it to the Impropriator, and that the Statute 21 *H.* 8. had taken away all Mortuaries, but only where they were payable by Cuſtom, and that Cuſtom is to be tried at the Common Law, not in the Eccleſiaſtical Court. But the Court refuſed to grant a Prohibition, and ſaid, that the Spiritual Court may hold Plea of Mortuaries, notwithſtanding this Statute; for the Statute only takes away ſuch as were not due by Cuſtom; but here 'tis agreed that it is due by Cuſtom; but they differ only in the Perſon to whom it ſhall be paid; and by *Keeling* and *Windham* Juſtices, the Statute enacts nothing *de Novo*, but leaves Mortuaries to be paid as formerly; and they being originally ſuable in the Spiritual Court, the incident Queſtion here of Property, ſhall not alter the Juriſdiction; and they ſaid, that a Mortuary was due of common Right at Common Law, without any Cuſtom, and that a Mortuary at Common Law was *Secundum melius animal*, after the Lord's Heriot paid. *Trin.* 17 *Car.* 2. *B. R. Mark* v. *Guilbert*, 1 *Sid.* 263, ſame Caſe, 1 *Keb.* 919. Alſo a Prohibition was prayed to the Arches in a Suit there by Appeal, but begun in *Landaff*, where a Vicar libelled, that after Debts and Legacies paid he ought to have a Mortuary, but did not lay any Cuſtom, becauſe *Wales* and *Cheſter* are excepted out of the Statute, and the Suggeſtion to have the Prohibition was, that no Mortuary hath been uſed to be paid there, which Plea was refuſed by the Spiritual Court; but it appears not what was done in this Caſe, only 'tis ſaid, that the Court inclined, that no Suit can be in *Wales* on the Statute. *Mich.* 24 *Car.* 2. *B. R. John* and *Loid*, 3 *Keb.* 75. And it is ſaid,

Suit for Mortuaries, &c.

If a Suit may be in *Wales* on the Statute.

that if a Suit be commenced for a Mortuary in the Spiritual Court, no Prohibition ſhall be granted to ſtay their Proceedings, unleſs they proceed contrary to the Statute. *Parſon's Counſellor* 359. But the Court granted a Prohibition *Niſi*, upon Suggeſtion that there was no ſuch Cuſtom, and that the Court below had refuſed that Plea. *Mich.* 23 *Car.* 2. *B. R.* 2 *Keb.* 835. So the Cuſtom for paying any Mortuary being denied, and that Matter ſuggeſted to the Court in order to obtain a Prohibition, it was ſaid by the Court, that Prohibitions have been granted, and alſo denied upon the like Suggeſtions, and therefore ordered that the Defendant ſhould take a Declaration in a Prohibition as to a Mortuary, and to try the Cuſtom at Law. *Mich.* 1 *W. & M. B. R. Proud* v. *Piper*, 3 *Mod. Rep.* 268.

If a Mortuary is due by Law without a Cuſtom.

By the Opinion of the Lord *Coke*, no Mortuary is due by Law, but only by Cuſtom, which he ſays is proved by the Words of the Statute of *Circumſpecte agatis*, which are, *ubi Mortuarium dare conſuevit, &c.* 2 *Inſt.* 491; the conſtant Courſe of Pleading in caſe of Mortuaries, claiming them always to be due by Cuſtom, ſhews it always to be ſo. 10 *H.* 4. 1. 7 *H.* 6. 26. 16 *H.* 7. 5. And this Opinion ſeems to be ſtill further confirmed by *Linwood* in his Gloſs upon the Canon made by *Simon Langham*, which Canon is only a Confirmation and Explanation of one before made by *Robert Winchelſey*, where by the ſaid Canon the Reaſon of the Payment of Mortuaries is declared to be, as a Recompence to the Pariſh Church for the perſonal Tithes and Oblations not duly paid by the deceaſed Party in his Life-time: Therefore *Linwood* ſays, where no Perſonal Tithes and Oblations have been ſubſtracted, but duly paid, the Second beſt Beaſt, (being the Mortuary directed to be paid by Canon) is not due by that Canon, but the Cuſtom of the Place in ſuch Caſe is to be reſpected; by which Words he ſeems to refer the Payment of Mortuaries, not within the Reaſon of the Canon, to Cuſtom only. *Linw. de Conſuetudine, c. Statutam* v. *Subtractionis.* Mr. *Selden* tells us, that the Uſage antiently was (according to the Canons) to bring the Mortuary along with the Corps, when it came to be buried, and to offer it to the Church as a Satisfaction for the ſuppoſed Negligence and Omiſſion the Defunct had been guilty of in not paying his perſonal Tithes; and from thence it was called a Corſe-preſent. *Selden Hiſtory of Tithes* 287.

If an Action of Debt will lie for the Money.

It hath been alſo held, that ſuch a Right was veſted in the Parſon to have the Second beſt Beaſt for a Mortuary, (where by Cuſtom it was due) that he might ſeize it where-ever he could find it. 7 *H.* 6. 26. 16 *H.* 7. 5. And it is ſaid by ſome, that ſince the Statute 21 *H.* 8. *c.* 6, whereby Mortuaries are reduced to a Certainty to be paid in Money, that an Action of Debt will lie upon the ſaid Statute in the Courts of Common Law, for Recovery of the Sum due for a Mortuary, although before that Statute Mortuaries were only recoverable in the Spiritual Courts; for although the Statute be only in the Negative, yet it implies an Affirmative, that thoſe Rates ſet down in the Statute may be taken where by Cuſtom Mortuaries are due, ſo that the Statute has made it a Duty fixed in the Party, and then by conſequence the Law will give a proper Remedy for the Recovery of it. See *Parſon's Councellor* 359. But as I have never heard of any ſuch Action of Debt brought for a Mortuary, ſo I very much doubt whether ſuch Action is maintainable, and rather think that it is not, but that it ſtill remains as a Matter ſuable for only in the Spiritual Court. See 5 *Coke, de Jure Regis Eccleſiaſtico, fol.* 40. If any Parſon, Vicar, *&c.* ſhall demand and take for a Mortuary more than is allowed by the Statute, or ſhall convent any Perſon before any Eccleſiaſtical

Judge to recover the ſame, he ſhall forfeit ſo much in Value as he ſhall take more than is by the Statute limited, and Forty Shillings more to the Party grieved, which ſhall be recovered by Action of Debt. See *Coke's Entries* 164, ſuch an Action brought. Suit for Penſions, &c.

As to Penſions, Portions, Synodals, *&c.* though the Court Chriſtian is not aided by the aforeſaid Statute of the 32 *H.* 8. yet as to ſuch of them which were ſaved to Eccleſiaſticks by the the Stat. 31 *H.* 8. *c.* 13. *viz.* from the King and Lay Poſſeſſors, the ſaid Court is aided by the Stat. 34 *&* 35 *H.* 8. *c.* 19. Aid as to Penſions, Portions, *&c.*

Note, That though the Portions, Penſions, *&c.* belonging to Eccleſiaſticks, were ſaved to them by a Saving in Stat. 31 *H.* 8. yet there was no Remedy for them in the Spiritual Court until this Statute, which recites the Miſchief, and gave Juriſdiction to the Ordinary, as 'tis ſaid in *Roper* and *Balbroke*'s Caſe. *Paſch.* 7 *Jac. C. B. Noy* 149. And if a Perſon aided by this Statute libels in the Eccleſiaſtical Court for a Penſion, *&c.* which was never demanded by him, although the Statute ſaith, that where it is wilfully denied, the Party ſhall be ſued in the Eccleſiaſtical Court, yet no Prohibition ſhall be granted for that Cauſe, for that the Suit appertains originally to that Court. *Hill.* 6 *Jac. B. R.* between *Bulbroke* and *Bridges*, *per Cur.* 2 *Roll's Abr.* 300. *Nu.* 8. Upon a Libel for a Penſion which was never demanded.

Note, That this Statute gives Remedy only for Penſions, and other Dues that did ariſe out of Lands, *&c.* which came to the Crown by the Statute of Diſſolutions; and therefore Damages and Coſts are not to be had by the Aid thereof, upon Suits for other Penſions, *&c.* And it gives Relief only for ſuch Payments, of which Biſhops and other Spiritual Perſons were in Poſſeſſion, at or within Ten Years next before the Diſſolution of the Houſe to which the Thing belonged, by reaſon of which the Duty is demanded; wherefore, ſuch Duties which have not been uſually paid within Memory, are not now recoverable, unleſs by the general Saving in Stat. 31 *H.* 8. *c.* 17, by *Engliſh* Bill in the Exchequer, or Chancery; (*Quære.*) But if they have been uſually paid, it will then be preſumed, that they were due and paid at the Time of the Diſſolution, and ſo are recoverable with Coſts and Damages by this Statute; whence it follows, that Biſhops, *&c.* are not relieved by the Statute upon a Title ſhewed by Deed only, without Preſcription. For what Penſions, *&c.* the Statute gives Remedy.

And for other Penſions, and ſuch like Duties not ſaved by this Statute, but due commonly from Eccleſiaſtical Perſons, they are alſo recoverable in the Spiritual Court: And though the Libel ſhews, how that *Tam per realem compoſitionem quam per antiquam & laudabilem conſuetudinem, ipſe & predeceſſores ſui habuerunt & habere conſueverunt annualem penſionem*, *&c.* and ſo, as was urged, the Penſion is demanded upon Temporal Grounds, *&c.* Preſcription and real Compoſition; yet *Coke* and the reſt of the Juſtices held, that a Prohibition ought not to be granted, for that the Party had Election to ſue for the ſame in the Spiritual Court, or at the Common Law, both the Parties being Spiritual Perſons. But they further ſaid, that if the Party ſueth once at Common Law for a Penſion, and ſhall after ſue in the Spiritual Court for the ſame, a Prohibition lies, becauſe by the firſt Suit he hath determined his Election. *Trin.* 10 *Jac. C. B. Sprat* and *Nicholſon*, *Godbolt. Trin.* 41 *Eliz. B. R. Collier*'s Caſe, 3 *Croke* 675. And *Popham* and *Fenner* ſaid, that there would be a Difference where the Ordinary ordains a Payment as Judge, as in the Indowment of a Vicar; there ſhall the Suit be in the Spiritual Court; and where the Patron and Ordinary make a Grant in the Time of Vacation, for there they charge as an Intereſt; and *Gaudy* ſaid, that for ſuch a Penſion, Penſions, *&c.* not ſaved by the Stat'.

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sion, Suit may be either in the Temporal or Spiritual Court. *Trin.* 41 *Eliz. B. R. Collier's* Caſe, 3 *Croke* 675. 20 *H.* 6. *fol.* 17. 19 *E.* 3. *Juriſdict.* 28. See more of this Matter in *Chap.* 57.

When againſt the Occupier or Tenant.

If a Suit be to be brought for a Penſion, or other Thing due out of a Parſonage, *&c.* it ſeems the Occupier, though a Tenant, ought to be ſued; and if Part of the Rectory be in the Hand of the Owner, and Part in the Occupation of a Tenant, the Suit is to be againſt them both. *Mich.* 25 *&* 26 *Eliz. C. B. Sutton* and *Bowſet's* Caſe, 1 *Leon.* 11.

Upon Motion for a Prohibition to ſtay a Suit in the Biſhop's Court, upon Suggeſtion that the Party lived within a peculiar Archdeaconry; Reſolved *per Curiam*, where the Archdeacon has a peculiar Juriſdiction, he is totally exempt from the Power of the Biſhop, and the Biſhop cannot enter there and hold Court: And in ſuch Caſe if the Party who lives within the Peculiar be ſued in the Biſhop's Court, a Prohibition ſhall be granted; for the Statute intends, that no Suit ſhall be *per Saltum*; but if the Archdeacon is not a Peculiar, then the Biſhop and he have concurrent Juriſdiction, and the Party may commence his Suit either in the Archdeacon's Court or the Biſhop's, and he has Election to chooſe which he pleaſes. And if he commences in the Biſhop's Court, no Prohibition ſhall be granted; for if it ſhould, it would confine the Biſhop's Court to determine nothing but Appeals, and render it incapable of having any Cauſes originally commenced there. 1 *Ld. Raym.* 123. *Robinſon* v. *Godſalve.*

CHAP. LIV.

Statute 32 H. 8. *and* 2 & 3 Ed. 6. *for the Payment of Tithes: What ſhall be a ſufficient ſetting forth of Tithes: Double or treble Value for not ſetting forth Tithes, in what Courts to be ſued for.*

Vide Chap. 58.

2 & 3 *Ed.* 6. *c.* 13. further to inforce Payment of Church Duties, *&c.*

THE Statutes mentioned in the former Chapter not being thought ſufficient to inforce the Payment of Church Duties, and to ſupport the Eccleſiaſtical Courts in the Recovery of them, it was further enacted; Where in the Parliament holden at Weſtminſter the Fourth Day of February in the Twenty-ſeventh Year of the Reign of the late King of moſt famous Memory, King Henry the Eighth, there was an Act made concerning Payment of Tithes Predial and Perſonal: And alſo in another Parliament holden at Weſtminſter the Four and twentieth Day of July in the Two and thirtieth Year of the Reign of the ſaid King Henry the Eighth, another Act made concerning true Payment of Tithes and Offerings; in which ſeveral Acts many and divers Things be omitted and left out, which were convenient and very neceſſary to be added to the ſame: In Conſideration whereof, and to the Intent the ſaid Tithes may be hereafter truly paid,

according to the Mind of the Makers of the said Acts, be it ordained and enacted by the King our Sovereign Lord, with the Assent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the Authority of the same, That not only the said Acts, made in the said Seven and twentieth and Two and thirtieth Years of the Reign of the said King Henry the Eighth, concerning true Payment of Tithes, and every Article and Branch therein contained, shall abide and stand in their full Strength and Virtue; but also be it further enacted by the Authority of this present Parliament, That every of the King's Subjects shall from henceforth truly and justly, without fraud or Guile, divide, set out, yield and pay all Manner of their Predial Tithes in their proper Kind, as they rise and happen, in such Manner and Form as hath of Right been yielded and paid within Forty Years next before the making of this Act, or of Right or Custom ought to have been paid: And that no Person shall from henceforth take or carry away any such or like Tithes, which have been yielded or paid within the said Forty Years, or of Right ought to have been paid, in the Place or Places titheable of the same, before he hath justly divided or set forth for the Tithe thereof the Tenth Part of the same, or otherwise agreed for the same Tithes with the Parson, Vicar, or other Owner, Proprietor or Farmor of the same Tithes, under the Pain of Forfeiture of treble Value of the Tithes so taken and carried away.

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And be it also enacted by the Authority aforesaid, That at all Times whensoever, and as often as the said Predial Tithes shall be due at the Tithing-time of the same, it be lawful to every Party to whom any of the Tithes ought to be paid, or his Deputy or Servant, to view and see their said Tithes to be justly and truly set forth and severed from the Nine Parts, and the same quietly to take and carry away; and if any Person carry away his Corn or Hay, or his other Predial Tithes, before the Tithe thereof be set forth, or willingly withdraw his Tithes of the same, or of such other Things whereof Predial Tithes ought to be paid; or do stop or let the Parson, Vicar, Proprietor, Owner, or other their Deputies or Farmors, to view, take, and carry away their Tithes as is aforesaid, by reason whereof the said Tithe or Tenth is lost, impaired or hurt, that then upon due Proof thereof made before the Spiritual Judge, or any other Judge to whom heretofore he might have made Complaint, the Party so carrying away, withdrawing, letting or stopping, shall pay the double Value of the Tenths or Tithe so taken, lost, withdrawn or carried away, over and besides the Costs, Charges and Expences of the Suit in the same: The same to be recovered before the Ecclesiastical Judge, according to the King's Ecclesiastical Laws. Stat. 2 & 3 Ed. 6. c. 13.

Liberty to set the Tithes set out.

As to this Statute of the 2 & 3 *Ed.* 6. in general, this is to be noted, That it hath been usually misrecited, *viz.* thus, That on the 4th of *November* 2 *Ed.* 6. it was enacted, Whereas the Parliament commenced 1 *Ed.* 6. and continued by Prorogation until the 4th of *November* 2 *Ed.* 6. But this Mistake and Variance being moved in Arrest of Judgment, it was not allowed, for that the Precedents were all in the same Manner, and in respect of the continual Use in the same Form, as the Plaintiff had declared; the Court said, they would not alter it, for that was to disturb all the Judgments that were ever given upon it in that Court. *Pasch.* 6 *Jac.*

This Statute often misrecited, yet allowed.

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Oliver v. *Collins*, *Brownl.* and *Gouldſb.* 1. *p.* 100. *Mich.* 1 & 2 *Eliz. B. R. Delles* v. *Sanderſon*, *Dyer* 171. *Paſch.* 18 *Car.* 2. *B. R. Owen* v. *Evans*, 2 *Keb.* 327, yet where the Plaintiff by his Declaration recited this Statute to be made 2d *November Anno* 2 & 3 *Ed.* 6. after the Verdict the Judgment was arreſted, becauſe the ſame Day could not be in Two Years of the ſaid King. *Mich.* 33 & 34 *Eliz.* *Langley* v. *Haines*, *Moor* 302.

It extends only to Predial Tithes.

Secondly note, That the Two Clauſes of this Statute before mentioned do only extend to predial Tithes, not to mixed Tithes, as Wool, Lamb, &c. or ſmall Tithes. 1 *Brownl.* and *Gouldsb.* 31. Therefore when a Plaintiff declared for Predial Tithes (for which he might well bring his Action) and for other Tithes alſo, as of Wool and Lamb (for which no Action did lie,) and upon Trial, the Jury found for all for the Plaintiff, *viz.* as well for thoſe for which the Action was well brought, as for thoſe for which no Action would lie on this Statute; and after Verdict this Exception was taken, and the Judgment thereupon arreſted. *Trin.* 8 *Jac.* *Pain* v. *Nicholls*, 1 *Brownl.* and *Gouldsb.* 65, and what Tithes are held to be predial hath been already ſhewed, *Chap.* 49.

It extends alſo to the Laity.

Thirdly note, That it hath been held, that this Statute gives Remedy, as well to the Laity as Clergy, by the Equity thereof, though not expreſly, and to the Farmers of both. *Paſch.* 3 *Jac. C. B.* *Dag* and *Kent* v. *Penkeron*, 2 *Croke* 70. *Hill.* 14 *Eliz.* *Moor*, *p.* 710. *Trin.* 44 *Eliz.* *Day* v. *Peckvell*, *Moor* 915. Note alſo, that this Statute obligeth every one to ſet forth his Predial Tithes; therefore if a Parſon hath appointed one to collect his Tithes, and he doth Licence a Pariſhioner to carry away his Corn without ſetting forth the Tithe, this Licence is void, and will not ſerve to juſtify the Neglect of ſetting the Tithe forth; *per Curiam*, *Trin.* 7 *Jac. B. R.* *Brickindon* v. *Denwood*, *Noy* 134. But if ſeveral Perſons have Right to the Tithes of a Pariſh, to be divided amongſt them, the Pariſhioners by this Statute are only bound to ſet forth the Tenth as is uſual, and not to divide the Tenth again in Two or more Parts, according to the Right of the ſeveral Owners; and ſo it was adjudged, when Five Perſons joined in an Action of Debt upon this Statute. *Stileman* v. *Cromer*, *Latch* 228. So though a Pariſhioner be bound *de Jure* to reap or cut his Corn, Hay, &c. and further by this Statute to ſet forth the Tithes; yet having duly ſet them forth, he is not bound to watch or guard them from being ſtolen or eaten; but the Parſon is bound to carry them away in convenient Time; and if through his Neglect to carry them away, the Tithes be loſt or eaten with Cattle, he ſhall not have Tithes again; and if that he ſues the Pariſhioners (who ſet them forth once duly) in the Spiritual Court, and he doth offer that Matter by Way of Plea there, and they in the ſaid Court will not allow thereof, a Prohibition lies. *Trin.* 30 *Eliz. B. R.* *Bennet* and *Shortwright*'s Caſe, 2 *Leon.* 101. *Hill.* 15 *Jac. C. B.* *Bridgman*'s Caſe, *Noy* 31. Note alſo, that this Statute of 2 *Ed.* 6. is an Act of Addition, as by the Words thereof appear. 2 *Inſt.* 648. Alſo theſe Words, (**as hath been of Right yielded,**] are to be intended of Tithes to be yielded in Specie within Forty Years, and the Senſe of the Words [**or of Right or Cuſtom**] is, or by rightful Cuſtom *de modo Decimandi* ought to have been paid. 2 *Inſt.* 650.

Owner of the Tithes may be preſent.

By the Words of this Statute, every of the King's Subjects ſhall truly and juſtly, without Fraud or Guile, divide, ſet out, yield, and pay, &c. his Tithes; ſo that the Owner of the Land, not the Owner of the Tithes, by Law is bound to ſet the Tithes out, yet it is lawful for the

Owner of the Tithes (by Force of this Statute) to be preſent to ſee that his Tithes be duly ſet out.

Of ſetting out Tithes.

If one ſets forth his Tithes, and takes them away again after he hath ſet them forth, an Action lies againſt him for treble Damages; for ſuch fraudulent ſetting forth, is as no ſetting forth within the Intent and Meaning of this Statute, although that the Clauſe for treble Damages ſpeak nothing of Fraud. *Hill.* 7 *Jac. B. R. Ford* v. *Pomroy*, *Noy* 126, ſame Caſe, 2 *Brownl.* and *Gouldſb.* 9. *Hill.* 5 *Jac. C. B. Rocheſter* v. *Porter*, *Noy* 152. *Trin.* 30 *Eliz. Bennet* and *Shortwright*'s Caſe, 2 *Leon.* 101. *Hele* and *Fretendon*'s Caſe, *Brownl.* and *Goulsb.* 1. *p.* 34. 2 *Inſt.* 649. So if he ſells his Grain on the Land, and after by Command of the Vendee takes away the Corn, being ſevered, without ſetting forth the Tithe, the Parſon may ſue him upon the Statute, and ſhall not be compelled to ſue the Vendee, who may be unknown, and becauſe 'twas done to defraud. 44 *Eliz. B. R. Baker*'s Caſe, vouched in *Rocheſter* and *Porter*'s Caſe, *Noy* 152. *Hele* and *Fretendon*'s Caſe, *Brownl.* and *Gouldsb.* 34, and in *Sprat* and *Heale*'s Caſe, 13 *Coke* 23. 2 *Inſt.* 649.

Tithes fraudulently ſet forth, &c.

So when a Pariſhioner ſet forth his Tithes, and hindred the Parſon from carrying them away, and the Parſon libelled for the Tithes in the Spiritual Court upon this Statute; and the Defendant ſurmiſed, that he did not hinder him from having of his Tithes, but that he did hinder him from coming for them one Way (which was the uſual Way), but that he might come for them another Way; it was agreed, that this Hindring of the Parſon to carry away his Tithes made the Setting of them forth fraudulent, and no good and ſufficient Setting of them forth according to the Statute, by which it ought to be effectual; and the whole Court held, that his Surmiſe made as to the Way was not material. 1 *Bulſt.* 108. And if the Parſon's Way in ſuch Caſe be ſtopped, he may ſue thereupon in the Spiritual Court for the Tithes upon the Statute, or only for ſtopping the Way; and if the Queſtion be, Whether the Way was ſtopped or not? And the Spiritual Court will not allow the Defendant's Proof, he ought to appeal, and not to have a Prohibition thereupon. *Trin.* 43 *Eliz. C. B. Blackwell*'s Caſe, 3 *Croke* 843. But *Quære*, as to the Denying of the Proofs in ſuch Caſe by the Spiritual Court; for although it is to be admitted that where the Spiritual Court hath a proper Juriſdiction of the principal Matter, and another collateral Matter depending thereupon of Temporal Cognizance, is alſo neceſſary to be determined in adjudging upon ſuch principal Matter, there the Spiritual Court ſhall determine ſuch incident temporal Matter, as a Thing without which the other cannot effectually be determined; yet in ſuch Caſe, the Spiritual Court ought to try ſuch temporal Matter according to the Rules of the Common Law to which it doth properly belong, and not by the Rules of the Canon or Civil Law, elſe they ſhall be prohibited: So in this Caſe, though the Spiritual Court might try whether the Way was ſtopped or not, yet Stoppage of Ways being Matter properly triable at Common Law, and only allowed to the Spiritual Court in this Caſe to be tried, as a Thing depending upon, and neceſſary to the Parſon's having and carrying away his Tithes, yet I conceive they ought to proceed in Trial thereof, according to the Rules of Common Law, and to allow of ſuch Proofs as by that Law are allowable, elſe they ſhall be prohibited: See for this Matter, *Trin.* 4 *Jac. B. R. Armiger Brown* v. *Wentworth*, *Yelv.* 92. *Mich.* 16 *Jac. Wats* v. *Conisby*, *Hob.* 247. *Hill.* 27 *Car.* 2. *Richardſon* v. *Disborough*, 3 *Keb.* 570. *Trin.* 2 *W. & M. B. R. Shorter* v. *Friend & Uxor'*, 3 *Mod. Rep.* 283. See more concerning this Matter, *Chap.* 27.

Tithes ſet forth, but Parſon hindred to carry them away.

If

Of ſetting out Tithes.

If a Queſtion be concerning Ways.

If the Queſtion be, Which of Two Ways is the uſual and cuſtomary Way? This ſhall be tried in the Court Chriſtian, who have Cognizance of Ways for carrying of Tithes, *Hill.* 6 *Car. B. R. Halſey* v. *Halſey*, *Jones* 230. *Mich.* 14 *Jac. B. R. Reynold* and *Newbery*, 1 *Roll's Rep.* 420, in which Caſe both of them are to be ſued for in the ſame Action, if the Tithes be not ſet forth. And when it was objected, that when the Owner of the Corn divides the Tithes from the Nine Parts, they become Lay-Chattels, and that for the taking thereof an Action at the Common Law lies by Treſpaſs or Detinue; and therefore that there is not any Cauſe of Suit for them upon this Statute in the Spiritual Court, and that a Prohibition lies, if there be. *Gawdy* and *Popham* ſaid, that a Suit is well maintainable in the ſaid Court againſt the Party himſelf that ſet forth the Tithes, if he detains them, although the Parſon, if he would, might have his Remedy at Common Law, and that the Statute of 32 *H.* 8. *c.* 7. proves it, for the Words thereof be, [**If any do not ſet out, or do detain or withhold his Tithes,**] (which is to be intended after they be ſet out) he ſhall be ſued in the Court Chriſtian; for otherwiſe Miſchief would inſue to the Parſon, in that the Owner might ſecretly ſet forth his Tithes, ſo that the Parſon ſhould not know thereof, and afterwards carry them away. *Paſch.* 40 *Eliz. B. R. Leigh* v. *Wood*, 3 *Croke* 607. ſame Caſe, *Moor* 912. *Trin.* 44 *Eliz. B. R. Sprat* and *Heals*'s Caſe, 13 *Coke* 23. *Trin.* 43 *Eliz. C. B. Blackwell*'s Caſe, 3 *Croke* 843. Not only the Owner of the Corn may be ſued in the Spiritual Court, if he carries away the Corn before the Tithes be ſet forth, but alſo if a Stranger carry it away before the Tithes ſevered, and that upon this Statute, *Mich.* 11 *Jac. B. R. Kipping* v. *Swain*, 2 *Croke* 324, ſame Caſe, 1 *Brownl.* 123, and ſo it was at the Common Law before the Statute of 32 *H.* 8. For if Tithes were ſet out, and after carried away by the Owner of the Land, the Rector might either ſue in the Spiritual Court for the Tithes, or bring an Action of Treſpaſs at Common Law. 10 *H.* 4. 2.

If he that ſets forth the Tithes detain them, *&c.*

If after the Tithes be ſevered.

But after the Tithes be duly ſet forth by the Owner, *viz.* ſevered from the Nine Parts, if a Stranger takes them away, the Parſon (who in ſuch Caſe may not ſue the Owner) may ſue the Stranger at the Common Law only, *Paſch.* 43 *Eliz. B. R. Web* v. *Pets*, *Noy* 44, and not in the Spiritual Court. *Mich.* 30 *&* 40 *Eliz. B. R. Leigh* v. *Wood*, *Moor* 912, ſame Caſe, 3 *Croke* 607. 4 *Leon.* 7. *Cliff* v. *Dudney*, 2 *Keb.* 846. And at the Common Law, in this Caſe (though he may not ſue for treble Damages upon the Statute) he may have his Action of Treſpaſs, for that the Tithes immediately upon the ſetting forth are in the Poſſeſſion of the Parſon; and by the Statute of 31 *H.* 8. *c.* 7, he may have an *Ejectione firmæ*, which Action of *Ejectione firmæ* will (I ſuppoſe) lie for ſmall Tithes as well as for great Tithes; but an Action of Account will not lie in this Caſe. *Mich.* 14 *&* 15 *Eliz. Totenham* v. *Beddingfield*, *Owen* 35. *Mich.* 14 *Car.* 2. *Berry* v. *Wheeler*, 1 *Sid.* 92. But all this

If a Stranger ſet forth the Tithes.

is to be underſtood in caſe the Tithes be ſet forth by the Owner of the Corn; for if the Tithes be ſet forth by a meer Stranger, this doth not ſettle any Property in the Parſon, ſo that he may have his Action of Treſpaſs, *&c.* for taking of them away; and I conceive he may ſue the Owner for the Tithe in ſuch Caſe upon this Statute, either in the Temporal or Spiritual Court, for that a Stranger ſetting forth the Tithe, is as no Setting forth of the Tithe in Law. But if one, who hath no Colour of Title, ſows the Land, and ſets forth the Tithes, by this he is a Diſſeiſor, yet this is a good Setting forth of the Tithes for the Parſon, and puts the Parſon in Poſſeſſion of them; and if ſuch Perſon that ſo ſets them forth

carries them away, he may be ſued for them upon the Statute; and if the true Owner of the Land, or other Stranger, carries them away after they are ſet out, an Action of Treſpaſs lies againſt them. *Hill.* 1 *Car. Mountford* v. *Sedley*, *Jones* 89, the ſame in 9 *Bulſt.* 336. And ſo it is ſaid by *Jones* Juſtice to have been adjudged, that if one cuts the Corn, and another carries it away, an Action of Treſpaſs lieth againſt either of them, and ſo againſt a Servant. *Paſch.* 15 *Car. March* 22.

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If the Tithes be ſet forth by the Owner of the Land, and another Parſon or Vicar that hath no Right to have them, carries them away, claiming them in the Right of his Church, the Parſon or Vicar that ſuppoſeth himſelf to be injured, may ſue the Parſon or Vicar, who carried them away in the Spiritual Court, and no Prohibition ſhall be granted; for that the Suit is proper there, when the Right of the Tithes comes in Queſtion betwixt Spiritual Perſons, by the Statute of *Circumſpecte agatis*, made 13 *E.* 1. *c.* 1. and if Treſpaſs be brought in ſuch Caſe, the Defendant, as is ſaid by ſome Books, may plead to the Juriſdiction of the Court. 38 *E.* 3. 6. 6 *E.* 4. 3. 23 *E.* 4. 23, 24. *Paſch.* 29 *C. B. The Parſon of Tackman*'s Caſe, 1 *Leon.* 58. 35 *H.* 6. 39. *Bro.* Tit. *Juriſd.* 3. *Mich.* 11 *Jac. B. R.* 2 *Bulſt.* 157. *Mich.* 5 *Jac.* 2 *Roll's Abr.* 310. *nu.* 1. *Trin.* 11 *Jac. B. R. per Cur. ibid. nu.* 2. *& Mich.* 14 *Jac. Adams* and Sir *John Vavaſor* v. *Hubertſon*, *ibid. nu.* 4. *Mich.* 28 *&* 29 *Eliz.* between the Vicar of *Pancridge* and *Buſſey*, *ibid. nu.* 6. and *Godbolt. Trin.* 31 *Eliz. Botham* v. *Cooper*, 3 *Croke* 136. *Mich.* 29 *&* 30 *Eliz. B. R. Sawel* v. *Wood*, 3 *Croke* 71, and 1 *Leon.* 94. *Trin.* 30 *Eliz. B. R. Gatehouſe* and *Penn*'s Caſe, 1 *Leon.* 128. *Paſch.* 2 *Jac. C. B. Randal* againſt *Knolls*, *Noy* 147. And if the Leſſee or Farmer of one Parſon takes away the Tithes, being ſevered from the Nine Parts, ſuppoſed to belong to another Spiritual Perſon, and Treſpaſs be brought, though it hath been a Queſtion, whether he may juſtify by a Leaſe of the Tithes made to him by another Parſon, and the Court ſhall be ouſted of the Juriſdiction, the Farmer being a Lay-man, 20 *H.* 6. 17. *Bro. Juriſdict.* 86. *Trin. Jac. B. R. per Cur.* 2 *Roll's Abr.* 310. *nu.* 2, yet this Doubt hath been reſolved in the Affirmative, *Hill.* 43 *Eliz. Benefield* and *Feek*, *Gouldsb.* 149. 2 *Roll's Abr.* 310. *nu.* 5. And the Law is the ſame, if the Tithe ſet forth be taken away by the Servant of another Parſon; by *Richardſon*, *Mich.* 3 *Car. C. B. Comin*'s Caſe, *Hetley* 60. 31 *H.* 6. 11. And the Law in this Caſe holds not only between Parſons and Vicars that have Cure of Souls actually, but alſo to other Spiritual Perſons, as between Appropriators that have it only habitually, or between an Appropriator, and one that hath a Benefice with Cure, and with their Farmers and Servants. *Hill.* 43 *Eliz. Benefield* and *Feek*, *Gouldsb.* 149.

If a Parſon having no Right carries them away.

And it ſeems, this holds alſo between an Impropriator and another Parſon or Vicar, though the Tithes belonging to ſuch are a Lay-Fee, and the Impropriator a Lay-Man; for if the Bounds of a Pariſh come in Queſtion in the Spiritual Court, in a Suit between the Parſon Impropriate and the Vicar of the ſame Pariſh, as if the Vicar claims all the Tithes within the Hamlet of *D.* within a Pariſh, and the Parſon all the Tithes within the Reſidue of the Pariſh; and the Queſtion betwixt them is, Whether certain Lands whereof the Vicar claims the Tithes, be within the Hamlet of *D.* or not? Yet becauſe this is between Spiritual Perſons, *viz.* between the Parſon and Vicar, although that the Parſon be a Lay-Man, and the Parſonage appropriate a Lay-Fee, yet this ſhall be tried in the Spiritual Court, and no Prohibition granted. *Hill.* 15 *Car. B. R.* be-

Between parſon and Vicar, where the Parſon is a Lay-Man, and the Parſonage appropriate a Lay-Fee.

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tween *Ives* and *Wright*, *per Cur.* 2 *Roll's Abr.* 312. *nu.* 7. *Hill.* 43 *Eliz. Benefild* and *Feek*, *Gouldsb.* 142. 2 *Roll's Abr.* 310. *nu.* 5. Yet an Action of Treſpaſs was brought by a Parſon againſt his Vicar for taking of Tithes; and on the general Iſſue, the Jury gave a ſpecial Verdict, and 'twas adjudged for the Vicar. *Trin.* 36 *Eliz. C. B. Kigham* v. *Beaſt*, *Owen* 58.

Action for not carrying away Tithes. *Vide cap.* 49. the ſame Point.

After the Tithes are duly ſet forth, he to whom they belong is bound in convenient Time to carry them away, otherwiſe the Owner of the Land may have his Action of the Caſe againſt him for ſuch Neglect. *Hill.* 15 *Car. C. B.* Doctor *Bridgman*'s Caſe, *Noy* 31. *Hill.* 1 *Car. Mounford* v. *Sedley*, 3 *Bulſt.* 336. *Trin.* 21 *Jac. B. R. Wiſeman* and *Denham*'s Caſe, *Godbolt* 329. But then the Plaintiff to maintain ſuch Action ought to give the Owner of the Tithes Notice that the Tithes were ſet forth. *Mich.* 13 *Car. Chaſe* v. *Ware*, 1 *Roll's Abr.* 643. - *Mich.* 1652. *B. R. Liniſton* and *Maurice*, *Stile* 342, (though only the Canon, not Temporal Law obliges to give Notice, *Spencer*'s Caſe, *Noy* 19.) But Notice of ſetting out of Tithes is needful to be given only in ſuch Caſe, to intitle the Party to have his Action, if they be not carried away in convenient Time. *Trin.* 1 *W. & M. C. B. Anonymus*, 2 *Vent.* 48. If after the Tithes are ſet out, and Notice thereof given to the Parſon, he ſends his Servant for them, but the Pariſhioner threatens the Servant, and will not ſuffer him to carry them away, and after that the Parſon leaves them a long Time to remain upon the Ground, whereby the Pariſhioner's Graſs is damnified, yet no Action lies againſt the Parſon in this Caſe until a new Requeſt made to him to carry his Tithes away. *Trin.* 15 *Car. Lee* v. *Ruſſel*, 1 *Roll's Abr.* 109. But though the Action lies for not carrying away predial Tithes, as Corn or Hay, yet 'twas doubted whether it lay for not taking away of Tithe-Cheeſe, or other mixed Tithes. *Trin.* 21 *Jac. B. R. Wiſeman* and *Denham*'s Caſe, *Godbolt* 329, the ſame Caſe, 2 *Roll's Rep.* 128. And it ſeems to be, that if Tithes ſet forth remain too long upon the Land, *&c.* the Owner of the Soil may take them Damage-Feaſant; but then being ſued for them, he to juſtify muſt ſet forth how long they had remained before he took them; and when they ſhall be ſaid to remain too long, 'tis triable by the Jury. *Hill.* 1 *Car. B. R. Mountford* v. *Sidley*, 3 *Bulſt.* 336. *Hill.* 1 *Car. B. R. Stillman* v. *Chanor*, *Latch* 8.

Concerning treble Value forfeited.

Predial Tithes not being ſet forth duly and effectually, as aforeſaid, or agreed for, by the former of the before-mentioned Clauſes in the Statute 2 & 3 *E.* 6. the treble Value thereof is forfeited. Concerning which treble Value, Two Queſtions have been: *Firſt*, To whom in ſuch Caſe the ſaid Penalty is given. *Secondly*, In what Court it may be recovered. As to the firſt, ſome have thought that the treble Value was given to the King, it not being by expreſs Words in the Statute limited to any one. *Savil* 63. But the contrary hath been adjudged, that this Penalty is given to the Party grieved. 2 *Inſt.* 650. *Mich.* 11 *Jac. C. B. The Dean and Canons of Windſor* v. *Web*, *Godbolt*. *Mich.* 39 & 40 *Eliz. B. R. Bedle* and *Sherman*'s Caſe, 3 *Croke* 608. 13 *Coke* 48. *Coke's Entries* 162. *Moor* 710. *Paſch.* 3 *Jac. B. R. Dag* and *Kent* v. *Penkevon*, 2 *Croke* 70. And the Reaſon of theſe Judgments ſeems to be, that though all Forfeitures at Common Law, as alſo Forfeitures given by Act of Parliament by Reaſon of any Offence committed againſt the publick Juſtice of the Nation, and not appointed to any particular Perſon, ſhall be to the King as the Head and Fountain of Juſtice, and thereby ſuppoſed to be the Perſon offended and injured by ſuch Offence; yet when

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a Forfeiture given by Act of Parliament appears not to be intended meerly as a Puniſhment for the Offence committed, but as a Recompence to ſome particular Perſon injured, for the Damage he hath thereby ſuſtained; in ſuch Caſe, though no particular Perſon be by ſuch Statute expreſſed to have the Penalty and Forfeiture, yet the Party damnified ſhall have it as Recompence and Satisfaction for the Damage he hath ſuſtained by the Offence; and the Forfeiture and Penalty given by this Statute hath been expounded to be as a Satisfaction intended for the Tithes ſubſtracted, therefore to belong to the Perſon whoſe Right it is to have ſuch Tithes. *Paſch.* 29 *Eliz.* *Moor* 238, Doctor *Bonham*'s Caſe, 8 *Co.* 119. *b.* *Hill.* 40 *Eliz.* *Moor* 710. But the Statute being prohibitory, the Party not ſetting forth his Tithes, may be fined to the King, upon an Information or Indictment, as was ſaid. *Mich.* 40 & 41 *Eliz.* *Moor* 911. *Paſch.* 26 *Eliz.* *Savil* 62.

In what Court the treble Value recoverable.

The next Doubt hath been, in what Court the treble Value is recoverable. As to which, Two Points have been reſolved: *Firſt*, That the Owner or Tenant of the Tithes may ſue for the treble Value in the King's Temporal Courts by Action of Debt. *Paſch.* 3 *Jac. C. B.* *Dag* and *Kent* v. *Penkevon*, 2 *Croke* 70. *Paſch.* 39, or *Hill.* 40 *Eliz.* *Bedle* v. *Sherman*, 3 *Croke* 608. *Hill.* 7 *Jac. B. R.* *Ford* v. *Pomroy*, 126. *Secondly*, That a Suit for treble Value may not be brought in the Spiritual Court. *Trin.* 44 *Eliz. B. R.* *Sprat* and *Heale*'s Caſe, 13 *Coke* 23, and *Bedle* and *Sherman*'s Caſe, 13 *Coke* 47. And if the Owner of the Tithes doth demand the treble Value by Suit in the Spiritual Court, a Prohibition lies. *Mich.* 11 *Jac. C. B.* *The Dean and Canons of Windſor* v. *Web*, *Godbolt*. *Mich.* 8 *Jac. C. B.* *Parker*'s Caſe, *Brownl.* and *Gouldſt.* 7. And when a Sentence definitive was given in the Eccleſiaſtical Court for the treble Value, and a Prohibition was thereupon prayed, though the Court doubted whether a general or ſpecial Prohibition ought to iſſue, and whether the Court Chriſtian after a definitive Sentence could divide their Sentence, or the Execution of it; yet at length it was reſolved, that the Prohibition ſhould be, that they ſhould not proceed to the Execution of their Sentence, as to the treble Value. *Hill.* 11 *Jac.* *Gerey*'s Caſe, *Moor* 873. And though in the Spiritual Court, upon a Libel grounded upon this Statute, the Sentence be, that the Plaintiff ſhould recover the ſingle Damages, and the ſame be ſet in certain, *& ulterius quod recuperet duplicem valorem*, which is alſo by the ſame Sentence ſet in certain, yet a Prohibition will be granted, becauſe the Damages to be given in that Court are exceeded in ſuch Sentence; for though in ſuch Sentence it be not expreſly ſaid that treble Damages ſhall be recovered, yet it doth amount to as much, if the Words of the Sentence be joined together: Wherefore in ſuch Caſe it was directed, that a ſpecial Prohibition, in which the Statute and the whole Matter was to be mentioned, ſhould be awarded. *Hill.* 11 *Jac. C. B.* *Baldwin* and *Gerey*'s Caſe, *Godbolt* 341. And thus, by the Expoſition of this Clauſe giving treble Damages, the Common Law Courts have the Trials of Cauſes of Tithes originally, to the great Grief of the Civilians, and no leſs Benefit and Advantage of the Clergy, and other Proprietors of Tithes.

However, the treble Value for Tithes not duly ſet forth is not recoverable by Bill in the Exchequer-Chamber; for when a Bill was exhibited there upon this Statute for the treble Value, it was clearly holden by the Court, that the Bill did not lie upon the Matter, for that there ſhall be no Suit or Proceedings, according to the Order of the Exchequer-Chamber, in Caſes of Conſcience upon any Penal Statute; but the ſame may be ſued for

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for in the Court of Pleas in the Exchequer. *Trin.* 30 *Eliz.* in the Exchequer, 3 *Leon.* 204. *Mich.* 33 & 34 *Eliz.* *Langley* v. *Haines*, *Moor* 302. Yet it is ſaid by *Keeling*, that the treble Value given by this Statute is a Duty trebled by the Statute, and not a bare Penalty only. *Paſch.* 21 *Car.* 2. *Moreton* v. *Hopkins*, 2 *Keb.* 502. And a Bill being brought in the Exchequer, and a Demurrer to it, for that the Plaintiff had not thereby demanded the ſingle Value, it being a Bill of Diſcovery only to enable the Plaintiff to ſue for and recover the treble Value, the Court overruled the Demurrer, for that Tithes were ſuable for in this Court before the Statute: But a *Quære* is made of this Caſe by the Reporter, becauſe, as he ſays, it is contrary to the common Practice and Uſage of the Court, to have ſuch a Bill without alledging that the Plaintiff is contented to receive the ſingle Value only. *Paſch.* 13 *Car.* 2. in *Scaccar.* *Driver* v. *Man*, *Hardres* 190. And in an *Engliſh* Bill in this Court, the Plaintiff need not to ſet forth particularly his Title to the Tithes, no more than in Action of Debt upon the Statute; as if a Vicar be Plaintiff, he need not ſet forth whether he claims the Tithes by Preſcription or Indowment, but eſpecially if the Defendant admit the Plaintiff's Right to have the Tithes, and inſiſts upon ſome other Matter, as Payment, *&c.* that will ſupply the Defects of the Bill, though 'tis ſaid to have been often ruled contrary. *Hill.* 14 & 15 *Car.* 2. in *Scaccar.* *Stone* v. *Ludlow & al'*, *Hardres* 321. *Mich. Anno Dom.* 1658. in *Scaccar.* *Burton* v. *Honey*, *Hardres* 130. And the Plaintiff ought to make Proof of the Value of the Tithes, as what Cattle had been depaſtured in the Place where, *&c.* *Trin.* 1655. in *Scaccar.* *The Attorney General* v. *Straite*, *Hardres* 4. If the Executor of a Parſon brings a Bill for Tithes, he need not offer to accept the ſingle Value, he not being intitled by the Statute of *Edw.* 6. to the treble Value. 1 *Vern.* 60. *Anonymus.*

Not in all Caſes in the Exchequer.

Nor may a Recompence, according to the ſingle Value of the Tithes ſubſtracted, be recovered in all Caſes in the Court of the Exchequer; for when the Queſtion was moved there, Whether an Impropriator that is to pay an annual Rent to the King for his Impropriation in the Name of a Tenth, ſhall have the Privilege of the Exchequer to ſue for Tithes there as the King's Debtor, *viz.* for the ſingle Value thereof? the Barons were of Opinion, that he ſhould not; for upon the ſame Reaſon (ſaid they) every one who is to pay any Tenths or Firſt Fruits, ſhould draw another who ſueth him into the Exchequer, and ſo all Controverſies concerning Tithes and Parſonages ſhould be drawn thither, which would be a great Prejudice to the Spiritual Courts. But *Egerton* Solicitor vouched *Conier*'s Caſe, where the King gave a Parſonage to a Prior in *Frankalmoign*, and the Tithes thereof being withdrawn, the Prior impleaded him who withdrew his Tithes in the Exchequer; and in that Caſe it was holden, that the Prior ſhould have the Privilege, for the King is in Danger to loſe his Patronage, or rather his Founderſhip, if the Rectory be evicted. *Gent. Baron* ſaid, the Tenant of the King in Chief, or he who pays Firſt Fruits, or he who holds of the Queen in Fee-Farm, ſhall not have in that Reſpect Privilege. *Mich.* 32 *Eliz.* in the Exchequer, *The Dean and Chapter of Windſor*'s Caſe, 2 *Leon.* 146.

By 2 & 3 *Ed.* 6. *cap.* 13.

Note that in a Clauſe in the Statute of 2 & 3 *Ed.* 6. it is enacted, **That if any Perſon do ſubſtract or withdraw any Manner of Tithes, Obventions, Profits, Commodities, or other Duties before mentioned, or any Part of them, contrary to the true Meaning of this Act, or of any other Act heretofore made, that then the Party ſo ſubſtracting or withdrawing the ſame, may or ſhall be convented and ſued in**

the King's Eccleſiaſtical Court by the Party from whom the ſame ſhall be ſubſtracted or withdrawn, to the Intent the King's Judge Eccleſiaſtical ſhall and may then and there hear and determine the ſame according to the King's Eccleſiaſtical Laws. And that it ſhall not be lawful unto the Parſon, Vicar, Proprietor, Owner, or other their Fermors or Deputies, contrary to this Act, to convent or ſue ſuch Withholder of Tithes, Obventions, and other Duties aforeſaid, before any other Judge than Eccleſiaſtical. And if any Archbiſhop, Biſhop, Chancellor, or other Judge Eccleſiaſtical, give any Sentence in the foreſaid Cauſes of Tithes, Obventions, Profits, Emoluments, and other Duties aforeſaid, or in any of them, (and no Appeal ne Prohibition hanging) and the Party condemned do not obey the ſaid Sentence, that then it ſhall be lawful to every ſuch Judge Eccleſiaſtical to excommunicate the ſaid Party ſo as afore condemned and diſobeying; in the which Sentence of Excommunication, if the ſaid Party excommunicate wilfully ſtand and indure ſtill excommunicate by the Space of Forty Days next after, upon Denunciation and Publication thereof in the Pariſh Church, or Place or Pariſh where the Party ſo excommunicate is dwelling or moſt abiding, the ſaid Judge Eccleſiaſtical may then at his Pleaſure ſignify to the King in his Court of Chancery, of the State and Condition of the ſaid Party ſo excommunicate, and thereupon to require Proceſs De Excommunicato capiendo to be awarded againſt every ſuch Perſon as hath been ſo excommunicate. Stat. 2 & 3 Ed. 6. cap. 13.

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Proceſs in the Eccleſiaſtical Courts.

Yet 'tis ſaid, that if a Copyholder of the King's Manor pretends Preſcription for a *Modus Decimandi* againſt a Parſon, the Right of Tithes ſhall be tried in the Exchequer, and a Prohibition was granted to the Eccleſiaſtical Court in ſuch Caſe. *Paſch.* 7 *Jac.* in the Exchequer, 4 *Leon.* And when the Caſe was, that *J. S.* was Parſon of a Church, and *A.* Vicar, and the King Patron, the Court ſaid, the Debate between the Parſon and the Vicar for the Tithes ought to be in the Exchequer by *Engliſh* Bill, or by Action in the Office of Pleas. *Paſch.* 29 *Eliz.* in the Exchequer, 1 *Leon.* 59. *Trin.* 30 *Eliz.* in the Exchequer, 3 *Leon.* 204. Alſo 'tis ſaid, that where a Prior is the King's Debtor, or ought to have Tithes of another Spiritual Perſon, he may chooſe to ſue for the Subſtraction of his Tithes, either in the Eccleſiaſtical Court, or in the Exchequer, and yet the Perſons and Matter alſo were Eccleſiaſtical; for ſeeing that the Matter by a Mean concerneth the King, he may ſue for them in the Exchequer as well as in the Eccleſiaſtical Court, and there ſhall the Right of Tithes be determined. 38 *Aſſ. pl.* 20, vouched by 5 *Co. de Jure Eccleſiaſtico, fol.* 16.

Where the Exchequer ſhall have the Suit *contra.*

And in the late Times of Rebellion, when Eccleſiaſtical Courts were ſuppreſſed, and upon that Reaſon Tithes were equitably ſued for in the Exchequer, becauſe at that Time there was no Remedy for other than predial Tithes, and in effect none for them, when they were of ſo ſmall Value, that the treble Value thereof being recovered would not anſwer the Subſtracting them, and reimburſe the Coſts of Suit; and ſince the Reſtoration of the Church and its Juriſdiction, the Uſe of ſuing in the Exchequer before, and an ill Opinion of the Management of the Eccleſiaſtical Courts, have cauſed Perſons grieved to ſue more frequently in the Exchequer by *Engliſh* Bill; yet it is ſaid, that before the Statute, Tithes were antiently ſued for in the Court of Exchequer. *Hardres* 190. Tithes alſo by *Engliſh* Bill may be ſued for in *Chancery*, but not for the Forfeiture of the treble Value; but an Action of Debt upon the Statute of

Eccleſiaſtical Courts ſuppreſſed.

Of ſetting out Tithes.

2 *E.* 6. lies not in the Sheriffs Court by *Juſticies*. *Mich.* 20 *Car.* 2. *B. R. Biſhop* v. *Corbet*, 1 *Lev.* 153. 2 *Keb.* 416, 420. Yet thoſe that want to be relieved for their Tithes detained, do not take Sanctuary in theſe Courts, becauſe the Law doth not ſufficiently enable the Eccleſiaſtical Courts to give Remedy for all Sorts of Church Duties; for though they may not recover there the treble Value by Force of the firſt Clauſe of this Statute, yet by the ſecond Clauſe thereof before mentioned, they ſhall recover the double Value of the Predial Tithes in the Spiritual Court, and no Prohibition will lie; for that is given by the expreſs Words of the Statute; and ſo it was adjudged in *Manwood*'s Caſe in the Exchequer, and in the Common Pleas. *Mich.* 21 *Jac. The Dean and Canons of Windſor* and *Webb*'s Caſe, *Godbolt*. *Trin.* 44 *Eliz. B. R. Sprat* and *Heal*'s Caſe, 13 *Co.* 24. And *Coke* upon this Clauſe of the Statute ſaith, that the Reaſon why the double Value, *&c.* is by this Branch to be recovered in the Eccleſiaſtical Court, whereas by the former Branch the Parſon at the Common Law ſhall recover the treble, is for that in the Eccleſiaſtical Court he ſhall recover the Tithes themſelves; and therefore the Value recovered in the Eccleſiaſtical Court is equivalent with the treble Forfeiture at the Common Law. And upon the Words, [**Beſides the Coſts, Charges and Expences,** &c.] he addeth, that the Suit in the Eccleſiaſtical Court is more advantageous than the Suit for the treble Value at the Common Law: For at the Common Law he ſhall recover no Coſts, but he ſhall recover in the Eccleſiaſtical Court Coſts and Expences. *Co.* 2 *Inſt.* 651. An Ejectment was brought in the Exchequer *de minutis decimis*; and upon *Not Guilty* pleaded, Verdict for the Plaintiff. And Mr. *Cheſhyre* about five or ſix Years ago moved in Arreſt of Judgment, that an Ejectment would not lie for ſmall Tithes. 1. Becauſe Eggs are ſmall Tithes; and it is abſurd to ſay, that an Ejectment would lie of an Egg. 2. Becauſe the Sheriff does not know of what he is to deliver Poſſeſſion, upon an *Habere Facias Poſſeſſionem*. *Sed non allocatur*; Becauſe it has been adjudged, that an Ejectment lies of Wool, being Tithe, and by the ſame Reaſon for an Egg. And therefore by all the Barons, Judgment was given for the Plaintiff. 11 *Co.* 25. *Ex relatione m'ri Cheſhyre.* 2 *Ld. Raym.* 789. *Camell* v. *Clavering*, *Exch.*

If the Tithes themſelves and a double Value ſhall be recovered in the Eccleſiaſtical Court.

But now whereas *Coke* ſaith to this Effect, That not only the double Value of the Tithes ſubſtracted, *&c.* ſhall be recovered in the Eccleſiaſtical Court, but the Tithes themſelves ſhall alſo be recovered there; a Doubt ariſeth, How the double Value of the Tithes, and alſo the Tithes themſelves, (*viz.*) a Recompence for them, according to the ſimple Value thereof, ſhall be recovered, (*viz.*) Whether by one and the ſame Suit, or by an After-Suit, (when the double Value hath been firſt recovered) according to the ordinary Courſe of Proceedings in the Eccleſiaſtical Court for Tithes ſubſtracted, *&c.* before this Statute was made. And the Reaſon of the Doubt is, Becauſe when a Parſon having grounded his Libel upon the Statute of 2 *Ed.* 6. and obtained a Sentence in the Eccleſiaſtical Court to recover the ſingle Damages, which was ſet in certain, and farther the double Value which was alſo ſet in certain, a Prohibition was granted *per Curiam*, becauſe the Spiritual Court in effect gave treble Damages. *Hill.* 11 *Jac. C. B. Baldwin* and *Girrie*'s Caſe, *Godbolt* 341. As to which, I conceive, that *Coke*'s Meaning is, that not only double Damages, but alſo a Recompence for the Tithes themſelves ſhould be recovered in the ſame Suit, otherwiſe he could not ſay, that the Value recovered in the Eccleſiaſtical Court is equivalent with the treble Forfeiture at the Common Law: But then I conceive, that the Libel muſt be framed accordingly,

dingly, (*viz.*) not to be grounded only upon the Statute, and then upon a Sentence anſwerable to ſuch a Libel, a Prohibition will not be granted, altho' that in *Baldwin* and *Girrie*'s Caſe the Libel and Sentence being only grounded upon the Statute, the Prohibition might be granted. *Quære.*

Of ſetting out Tithes.

But if with double Damages and Coſts a Recompence may be recovered for the Tithes themſelves, according to the ſingle Value thereof, in the Spiritual Court; yet beſides the treble Value of them, neither the Tithes themſelves, nor any other Recompence for them, can be recovered in the Temporal Courts; becauſe, though as *Fitzherbert* holds in his *Nat. Brev. fol.* 30, that before the Stat. 18 *Ed.* 3. *c.* 7. the Right of Tithes were determinable in the Temporal Courts at the Election of the Party, yet now by the ſaid Statute, the Temporal Court is wholly debarred of the Juriſdiction thereof. See *Coke*'s Fifth Part *de Jure Eccleſiaſtico.* And therefore in all Suits upon Stat. 2 & 3 *Ed.* 6. *c.* 13. the Tithes are never demanded, but the Action is only perſonal, grounded meerly upon a Contempt againſt the Statute, for not ſetting forth the Tithes; and for that Reaſon it is held, that no Action lies againſt Executors upon this Statute, the Action being grounded on a perſonal Wrong, which dies with the Teſtator; but Executors may have an Action upon this Statute for Tithes not ſet forth in the Time of their Teſtator, by the Equity of the Statute, 4 *Ed.* 3. *c.* 7. by *Twiſden* Juſtice. *Mich.* 14 *Car. B. R.* in *The Caſe of Holt* v. *Bradford*, 1 *Sid.* 88, the ſame Caſe, 1 *Keb.* 344. *Raym.* 52. *Paſch.* 21 *Car.* 2. Juſtice *Morton*'s Caſe, 1 *Vent.* 30, 31. Yet where a Suit was continued againſt Executors in the Spiritual Court for double Damages, a Prohibition was denied. *Mich.* 15 & 16 *Car.* 2. *B. R. Wilks* and *Ruſſel*, 1 *Keb.* 682. *Raym.* 95, ſame Caſe, 1 *Sid.* 181. Where 'tis ſaid, the Judges were of Opinion that the Prohibition ſhould be granted, and that a Plaintiff ſhall only recover his Tithes in the Damages, and ſhall not demand them again by any Suit after a Recovery of the treble Value. *Paſch.* 3 *Jac.* Sir *Richard Campion* v. *Hill*, 1 *Brownl.* and *Gouldſb.* 86, ſame Caſe, *Yelv.* 63.

If nothing beſides the treble Value is to be recovered in the Temporal Courts.

As beſides the treble Value of the Tithes not ſet forth, the Plaintiff ſhall not recover any Thing for the Tithes themſelves in the Temporal Court, ſo ſhall he not there recover other Damages or Coſts, for that the Statute doth not give them by expreſs Words; wherefore when in an Action of Debt for Tithes upon *non Debet* pleaded, the Jury found *quod Debet* 78 *l.* and for the Reſidue *non Debet*, and Damages aſſeſſed at 1 *d.* and Coſts at 40 *s.* the Plaintiff to avoid Error releaſed the Damages and Coſts, and had Judgment for the Debt. *Trin.* 44 *Eliz. Day* v. *Peckvel*, *Moor* 915. *Paſch.* 3 *Jac.* in the Exchequer-Chamber, *Day* and *Kent* v. *Penkevon*, 2 *Croke* 70, and *Jenkins* 316.

Damages and Coſts given remitted to avoid Error.

And as the Plaintiff in an Action upon this Statute doth not recover Coſts, ſo neither hath the Defendant Coſts in caſe of Nonſuit or Diſcontinuance; for when a Plaintiff having brought Two Actions was nonſuited in one, and diſcontinued the other, by the whole Court it was denied that the Defendant ſhould have Coſts either by Statute 8 *Eliz.* or 4 *Jac. c.* 13. upon this Reaſon, that the Plaintiff, if he had recovered, ſhould have had but the treble Value without Coſts. *Mich.* 7 *Jac. B. R. Cox* v. *Small*, *Noy* 126. But now by the Statute 8 & 9 *W.* 3. *c.* 11. where the ſingle Value or Damages found by the Jury ſhall not exceed the Sum of Twenty Nobles, the Plaintiff obtaining Judgment after Plea pleaded, or Demurrer, ſhall recover his Coſts of Suit; and if the Plaintiff ſhall become nonſuit, or ſuffer a Diſcontinuance,

Where by Statute 8 & 9 *W.* 3. *c.* 11. Coſts are given.

Prohibitions, &c. ance, or a Verdict ſhall paſs againſt him, the Defendant ſhall recover his Coſts.

CHAP. LV.

Small Tithes and other Church Duties, how to be recovered. Suggeſtions to obtain Prohibitions, how made and proved. Modus Decimandi, *if ſuable for in the Spiritual Court.*

Small Tithes, &c. recoverable in Spiritual Court by 2 & 3 *Ed.* 6. *c.* 13.

THough the Two firſt Clauſes of the Statute 2 & 3 *Ed.* 6. *c.* 13. mentioned in the laſt Chapter, do give Remedy only for Predial Tithes, and the latter of them only in the Spiritual Court; yet the ſaid Statute gives Aid to the Eccleſiaſtical Courts alſo in the Recovering of all other Church Duties, *viz.* by the other Clauſe of the ſaid Statute recited alſo in the foregoing Chapter, which Clauſe was but an Affirmance of the antient Eccleſiaſtical Law, and makes no Addition thereto in any Reſpect, and was enacted to the End that the Temporal Judges, who are the Interpreters and Judges of all Acts of Parliament, though they only concern Things meerly Spiritual or Eccleſiaſtical, may not by the Occaſion of this, or any other Statute made before it, either draw to their Courts the Cognizance of Cauſes relating to Church Duties, or take Occaſion from thence by Prohibitions to ſtop Proceedings for them in Eccleſiaſtical Courts: There is alſo another Clauſe in the ſaid Statute 2 & 3 *Ed.* 6, by which it is enacted,

A Copy of the Libel to be produced, &c. before any Prohibition.

That if any Party at any Time hereafter, for any Matter or Cauſe before rehearſed, limited, or appointed by this Act, to be ſued or determined in the King's Eccleſiaſtical Court, or before the Eccleſiaſtical Judge, do ſue for any Prohibition in any of the King's Courts where Prohibitions before this Time have been uſed to be granted, that then in every ſuch Caſe the ſame Party, before any Prohibition ſhall be granted to him or them, ſhall bring and deliver to the Hands of ſome of the Juſtices or Judges of the ſame Court where ſuch Party demanded Prohibition, the very true Copy of the Libel depending in the Eccleſiaſtical Court, concerning the Matter whereof the Party demandeth Prohibition, ſubſcribed or marked with the Hand of the ſame Party; and under the Copy of the ſaid Libel ſhall be written the Suggeſtion wherefore the Party ſo demandeth the ſaid Prohibition: And in caſe the ſaid Suggeſtion by Two honeſt and ſufficient Witneſſes at the leaſt, be not proved true in the Court where the ſaid Prohibition ſhall be granted, within Six Months next following after the ſaid Prohibition ſhall be ſo granted and awarded, that then the Party that is letted or hindred of his or their Suit in the Eccleſiaſtical Court by ſuch Prohibition, ſhall upon his or their Requeſt and Suit, without Delay, have a Conſultation granted in the ſame

Case in the Court where the said Prohibition was granted, and shall also recover double Costs and Damages against the Party that so pursued the said Prohibition; the said Costs and Damages to be assigned or assessed by the Court where the said Consultation shall be so granted; for which Costs and Damages the Party to whom they shall be awarded, may have an Action of Debt by Bill, Plaint, or Information in any of the King's Courts of Record, wherein the Defendant shall not wage his or their Law, nor have any Essoin or Protection allowed or admitted. Stat. 2 & 3 Ed. 6. cap. 13. Prohibitions, &c.

This Clause was enacted to prevent needless Delays by Prohibitions in Suits commenced for Tithes, *&c.* in the Ecclesiastical Courts; and to this End, this Clause first appoints, that a Prohibition shall not be granted before the Party suing for it shall deliver a true Copy of the Libel, and under it the Suggestion written wherefore the Prohibition is demanded, that if it shall appear to the Judges that no Prohibition lies upon the Suggestion, or if there be Variance betwixt the Libel and Suggestion, no Prohibition should be granted, for that in case of Variance no Prohibition lies; and therefore, though it be granted, a Consultation is of Course to be awarded, that is, if the Variance be a material Variance. Therefore when upon a Prohibition the Suggestion was, that the Lands were Lands discharged of Tithes in the Hands of a Prior, and so ought to be discharged by the Statute 31 *H.* 8. and that the Parson sued him for 40 Fleeces of Wool, the Parson pleaded thereto, that he sued him for 400 Fleeces, and prayed a Consultation, and had it: But upon a Writ of Error it was held, that such Variance was not material in this Case, because the Plaintiff prescribes in *non Decimando*, and so wholly outed the Ecclesiastical Court of all manner of Jurisdiction for any Tithes of that Land, because it is discharged of it self without paying any Thing as a *Modus*; but if the Suggestion had been upon a *Modus Decimandi*, it had been otherwise, for in such Case the Cause of Tithes originally belongs to the Spiritual Court, was it not for the *Modus*; and therefore the Suggestion of a *Modus Decimandi* ought to agree with the Libel, because a Suggestion is ever grounded on the Libel, and the Cause is to be stayed by Prohibition upon one Cause certain: Wherefore, to prevent such Variance (as was said) 'twas enacted by this Clause, that the Copy of the Libel with the Suggestion should be delivered to the Judge granting the Prohibition; yet if notwithstanding such Prohibition a Variance be afterwards found, though in that Case a Consultation is to be granted, yet no double Costs and Damages are to be assessed by Force of this Clause, for that by the express Words thereof they are to be given only upon Default of not proving the Suggestion. *Mich.* 3 *Jac. B. R. Hutton* v. *Barns*, *Yelv.* 79. The Intent of the said Clause to prevent needless Delays.

Note further, That he that demands a Prohibition, is obliged to bring the Copy of the Libel with his Suggestion under-written, when the Suit in the Ecclesiastical Court is (as the Words of the Statute are) **for any Matter or Cause before rehearsed, limited and appointed by this Act to be sued or determined in the King's Ecclesiastical Courts.** Now, by the Second Clause of this Statute, Persons may be sued in the Ecclesiastical Court for carrying away their Corn, Hay, or other Predial Tithes before the Tithes thereof be set forth, or for withdrawing such their Tithes, or for hindring them to be carried away. And by the former of the Two Clauses last before-mentioned, Suit may be in the Ec- Libel with Suggestion under-written.

Prohibitions, &c.

ance, or a Verdict ſhall paſs againſt him, the Defendant ſhall recover his Coſts.

CHAP. LV.

Small Tithes and other Church Duties, how to be recovered. Suggeſtions to obtain Prohibitions, how made and proved. Modus Decimandi, *if ſuable for in the Spiritual Court.*

Small Tithes, &c. recoverable in Spiritual Court by 2 & 3 *Ed.* 6. *c.* 13.

THough the Two firſt Clauſes of the Statute 2 & 3 *Ed.* 6. *c.* 13. mentioned in the laſt Chapter, do give Remedy only for Predial Tithes, and the latter of them only in the Spiritual Court; yet the ſaid Statute gives Aid to the Eccleſiaſtical Courts alſo in the Recovering of all other Church Duties, *viz.* by the other Clauſe of the ſaid Statute recited alſo in the foregoing Chapter, which Clauſe was but an Affirmance of the antient Eccleſiaſtical Law, and makes no Addition thereto in any Reſpect, and was enacted to the End that the Temporal Judges, who are the Interpreters and Judges of all Acts of Parliament, though they only concern Things meerly Spiritual or Eccleſiaſtical, may not by the Occaſion of this, or any other Statute made before it, either draw to their Courts the Cognizance of Cauſes relating to Church Duties, or take Occaſion from thence by Prohibitions to ſtop Proceedings for them in Eccleſiaſtical Courts: There is alſo another Clauſe in the ſaid Statute 2 & 3 *Ed.* 6, by which it is enacted, That if any Party at any Time hereafter, for any Matter or Cauſe before rehearſed, limited, or appointed by this Act, to be ſued or determined in the King's Eccleſiaſtical Court, or before the Eccleſiaſtical Judge, do ſue for any Prohibition in any of the King's Courts where Prohibitions before this Time have been uſed to be granted, that then in every ſuch Caſe the ſame Party, before any Prohibition ſhall be granted to him or them, ſhall bring and deliver to the Hands of ſome of the Juſtices or Judges of the ſame Court where ſuch Party demanded Prohibition, the very true Copy of the Libel depending in the Eccleſiaſtical Court, concerning the Matter whereof the Party demandeth Prohibition, ſubſcribed or marked with the Hand of the ſame Party; and under the Copy of the ſaid Libel ſhall be written the Suggeſtion wherefore the Party ſo demandeth the ſaid Prohibition: And in caſe the ſaid Suggeſtion by Two honeſt and ſufficient Witneſſes at the leaſt, be not proved true in the Court where the ſaid Prohibition ſhall be granted, within Six Months next following after the ſaid Prohibition ſhall be ſo granted and awarded, that then the Party that is letted or hindred of his or their Suit in the Eccleſiaſtical Court by ſuch Prohibition, ſhall upon his or their Requeſt and Suit, without Delay, have a Conſultation granted in the ſame

A Copy of the Libel to be produced, &c. before any Prohibition.

Caſe in the Court where the ſaid Prohibition was granted, and ſhall alſo recover double Coſts and Damages againſt the Party that ſo purſued the ſaid Prohibition; the ſaid Coſts and Damages to be aſſigned or aſſeſſed by the Court where the ſaid Conſultation ſhall be ſo granted; for which Coſts and Damages the Party to whom they ſhall be awarded, may have an Action of Debt by Bill, Plaint, or Information in any of the King's Courts of Record, wherein the Defendant ſhall not wage his or their Law, nor have any Eſſoin or Protection allowed or admitted. Stat. 2 & 3 Ed. 6. cap. 13. Prohibitions, &c.

This Clauſe was enacted to prevent needleſs Delays by Prohibitions in Suits commenced for Tithes, *&c.* in the Eccleſiaſtical Courts; and to this End, this Clauſe firſt appoints, that a Prohibition ſhall not be granted before the Party ſuing for it ſhall deliver a true Copy of the Libel, and under it the Suggeſtion written wherefore the Prohibition is demanded, that if it ſhall appear to the Judges that no Prohibition lies upon the Suggeſtion, or if there be Variance betwixt the Libel and Suggeſtion, no Prohibition ſhould be granted, for that in caſe of Variance no Prohibition lies; and therefore, though it be granted, a Conſultation is of Courſe to be awarded, that is, if the Variance be a material Variance. Therefore when upon a Prohibition the Suggeſtion was, that the Lands were Lands diſcharged of Tithes in the Hands of a Prior, and ſo ought to be diſcharged by the Statute 31 *H.* 8. and that the Parſon ſued him for 40 Fleeces of Wool, the Parſon pleaded thereto, that he ſued him for 400 Fleeces, and prayed a Conſultation, and had it: But upon a Writ of Error it was held, that ſuch Variance was not material in this Caſe, becauſe the Plaintiff preſcribes in *non Decimando*, and ſo wholly outed the Eccleſiaſtical Court of all manner of Juriſdiction for any Tithes of that Land, becauſe it is diſcharged of it ſelf without paying any Thing as a *Modus*; but if the Suggeſtion had been upon a *Modus Decimandi*, it had been otherwiſe, for in ſuch Caſe the Cauſe of Tithes originally belongs to the Spiritual Court, was it not for the *Modus*; and therefore the Suggeſtion of a *Modus Decimandi* ought to agree with the Libel, becauſe a Suggeſtion is ever grounded on the Libel, and the Cauſe is to be ſtayed by Prohibition upon one Cauſe certain: Wherefore, to prevent ſuch Variance (as was ſaid) 'twas enacted by this Clauſe, that the Copy of the Libel with the Suggeſtion ſhould be delivered to the Judge granting the Prohibition; yet if notwithſtanding ſuch Prohibition a Variance be afterwards found, though in that Caſe a Conſultation is to be granted, yet no double Coſts and Damages are to be aſſeſſed by Force of this Clauſe, for that by the expreſs Words thereof they are to be given only upon Default of not proving the Suggeſtion. *Mich.* 3 *Jac. B. R. Hutton* v. *Barns*, *Yelv.* 79. The Intent of the ſaid Clauſe to prevent needleſs Delays.

Note further, That he that demands a Prohibition, is obliged to bring the Copy of the Libel with his Suggeſtion under-written, when the Suit in the Eccleſiaſtical Court is (as the Words of the Statute are) **for any Matter or Cauſe before rehearſed, limited and appointed by this Act to be ſued or determined in the King's Eccleſiaſtical Courts.** Now, by the Second Clauſe of this Statute, Perſons may be ſued in the Eccleſiaſtical Court for carrying away their Corn, Hay, or other Predial Tithes before the Tithes thereof be ſet forth, or for withdrawing ſuch their Tithes, or for hindring them to be carried away. And by the former of the Two Clauſes laſt before-mentioned, Suit may be in the Eccleſiaſtical Libel with Suggeſtion under-written.

Prohibitions, &c.

cleſiaſtical Court, as the Words thereof are: **If any Perſon do ſubſtract or withdraw any manner of Tithe, Profits, Commodities, or other Duties before mentioned, or any Part of them, contrary to the true Meaning of this Act, or any other Act heretofore made.** And this Act doth not only mention and provide for the Payment of Predial and Perſonal Tithes and Offerings by ſeveral Clauſes therein, which ſee in *Chap.* 54; but alſo the Firſt Clauſe thereof doth mention thoſe other Acts in this Caſe ſaid to be heretofore made, *viz.* 27 *H.* 8. *c.* 20; which extends not only to Tithes and Offerings, but alſo to all other Duties of Holy Church; and 32 *H.* 8. *c.* 7. which extends to Tithes and Offerings generally, and ſo to all Things under that Term comprehended; and doth alſo confirm the ſaid Statutes expreſly, and makes them to be as a Part thereof; ſo that all Tithes and Church Duties, which are alſo mentioned therein, are as particularly mentioned in this Act, and by conſequence when any Suit is brought in Court Chriſtian for any Sort of Tithes, or any other Church Duties, the Defendant in the ſaid Court, before he may have a Prohibition, is bound by the Second Clauſe mentioned in this Chapter, to bring to the Temporal Judge the Copy of the Libel againſt him, *&c.* and under the ſame his Suggeſtion written.

How this Statute extends to all Tithes and Church Duties.

Suggeſtion to be proved in Six Months.

And from hence further note, That by the Words of the Statute it ſeems, that in all Caſes in which a Defendant in the Spiritual Court is bound, before he may have a Prohibition, to deliver the Copy of the Libel, *&c.* with the Suggeſtion under-written, he is bound alſo to prove his Suggeſtion in Six Months, to avoid the granting of a Conſultation with double Coſts and Damages: For after this Clauſe hath ſaid, **That under the Copy of the ſaid Libel ſhall be written the Suggeſtion; wherefore the Party demandeth the ſaid Prohibition,** the next Words are, **And in caſe the ſaid Suggeſtion be not proved to be true within Six Months,** &c. *viz.* the ſame Suggeſtion that was in the foregoing Words, appointed to be written under the Copy of the Libel. And therefore it ſeems to be plain, that the Statute intended, whatever the Matter of the Suggeſtion be, double Coſts and Damages are to be given in all Caſes, if the ſame be not ſo proved, when the Party as aforeſaid, before a Prohibition granted, is bound to bring to the Judge the Libel againſt him, and therewith his Suggeſtion underwritten. And accordingly it hath been held, that this Clauſe requiring the Proof of a Suggeſtion is general; therefore when one that was ſued for Tithe of Hay in the Spiritual Court, upon a Suggeſtion that he was to pay upon an Arbitrament ſo much, *&c.* it was held, that this Suggeſtion ought to be proved as well as one made of a *Modus Decimandi.* And ſo a Suggeſtion upon Statute 31 *H.* 8, that Lands are Tithe-free, becauſe this Clauſe requiring the Proof of a Suggeſtion is general, and not limited to real Compoſition, *&c. Trin.* 12 *Jac. B. R. Reynolds* and *Hay*'s Caſe, 1 *Roll's Rep.* 55. So if a Perſon hath a Prohibition upon a Suggeſtion that he ought not to pay Tithes for Seven Years, for that the Lands were barren, he muſt prove his Suggeſtion. *Hill.* 6 *Car. B. R. Stroude* v. *Hoſkins*, *Jones* 231. A Prohibition was granted to a Suit in the Eccleſiaſtical Court for Tithe-Milk, upon a Suggeſtion of a *Modus* to pay from *April* to *November* the tenth Day's Milk, once ſkimmed, made into Cheeſe in lieu of all Tithe-Milk; with Intent to have the Cuſtom tried.

But a Conſultation was afterwards granted, becauſe the Plaintiff had not proved his Suggeſtion within ſix Months, according to Stat. 2 *Ed.* 6. Note; the Act extends to ſmall as well as great Tithes; the Months are

to be reckoned by the Kalendar; and through the Vacations as well as the Terms, notwithſtanding a Note *Moor* 573. to the contrary. *Foy* v. *Liſter*, 2 *Ld. Raym.* 1171, 1172. Prohibitions, &c.

Yet 'tis ſaid, that a Suggeſtion of an Agreement with the Parſon to pay a Rate for his Tithes ſued in the Spiritual Court, is not of Neceſſity to be proved in Six Months, *viz.* to avoid for that Cauſe a Conſultation, Coſts and Damages, and that ſuch Proof goes to Suggeſtions only of a *Modus Decimandi*, not of a Leaſe or Contract, and that ſo is the Practice in *B. R. Mich.* 5 *Jac. B. R. Yelv.* 104. *Trin.* 5 *Car. C. B. Johnſon*'s Caſe, *Hetley* 145. *Dubitat.* 12 *Jac. B. R. Reynolds* and *Haye*'s Caſe, 1 *Roll's Rep.* 55. *Trin.* 30 *Eliz. B. R. Woodward* and *Bugg*'s Caſe, 2 *Leon.* 29. See *Hill.* 5 *Jac. Cob.* v. *Hunt*, *Brownl.* and *Gouldsb.* 99. *Mich.* 18 *Car.* 2. *B. R. Eaton* v. *Naylor*, 2 *Keb.* 134. And tho' it be granted on all Hands, that when a Suggeſtion is of a *Modus Decimandi*, it ought to be proved in Six Months, as was adjudged in Parſon *Bugg*'s Caſe. *Mich.* 11 *Jac. C. B.* and *Hill.* 11 *Jac. C. B. Gippie*'s Caſe, *Godbolt. Paſch.* 2 *Jac. C. B. Sharpe* v. *Sharpe*, *Noy* 148. *Mich.* 5 *Jac. B. R. Cox* v. *Seymour*, *Yelv.* 104. Yet when a Prohibition was had upon a Suggeſtion of a *Modus Decimandi* for Part, and of a Contract executed for the Reſt of the Tithes ſued for, it was held by the Court, that becauſe the Prohibition is not grounded ſolely upon the *Modus Decimandi*, which needs ſuch Proof, but alſo upon the Contract between the Parties, which, as is ſaid, needs no ſuch Proof; and the Suggeſtion being intire, and Part of it needing no Proof, they could not give Coſts, for that is only to be done where the whole Matter in the Suggeſtion needs Proof; therefore the Mixing the Contract with the Manner of Tithing, privileges the whole, as to the Matter of Coſts; but they might grant a Conſultation as to that Part of the Suggeſtion which concerns the Manner of Tithing, but not for the reſt. *Hill.* 5 *Jac. Cob.* v. *Hunt*, *Brownl.* and *Gouldſb.* 99, ſame Caſe, *Yelv.* 119. And when a Prohibition was granted in a Caſe where no Prohibition did lie, and the Six Months being lapſed without Proof of the Suggeſtion, the Court ſaid, they would adviſe as to giving of double Coſts according to the Statute, becauſe *Coke* thought, that if a Conſultation be granted for not proving the Suggeſtion in Six Months, that then Coſts ſhall be given; but if it be granted, for that no Prohibition did lie of the Matter, that there no Coſts ſhall be given, and the Court did adviſe as to the Coſts (and yet the Miſchief that is provided againſt by the Statute, ſeems to be the ſame in both Caſes). *Trin.* 12 *Jac. B. R. Reynolds* v. *Hayes*, 1 *Roll's Rep.* 55. But a Prohibition being obtained upon a Suggeſtion, which was not proved within the Six Months, and the Defendant in the Prohibition took Iſſue with the Plaintiff, which was found againſt the Defendant, it was reſolved by the Court, that the Defendant ſhould not have Coſts for want of the Suggeſtion being proved; for the Statute is, That he ſhall have a Conſultation and double Coſts; but in this Caſe he could not have a Conſultation, the Matter and Iſſue being found againſt him, but ought to have prayed a Conſultation upon the Suggeſtion not being proved, and then ſhould have had his double Coſts. *Watkinſon* v. Sir *G. Pacy*, *Latch* 140. When grounded upon a *Modus*, and alſo upon a Contract, no Coſts. *Nota*;

Note alſo, That it is ſaid that the Suggeſtion muſt be proved to be true; yet it hath been adjudged, that the Suggeſtion needs not to be proved true ſtrictly, and in every Part of it, to avoid a Conſultation with Coſts and Damages: For when a Suggeſtion upon a Prohibition was, that the Defendant and all his Predeceſſors have had Twenty Acres of Paſture, and another Suggeſtion needs not to be ſtrictly proved.

Prohibitions, &c.

another Close containing Twenty Acres of Wood, in Satisfaction of Tithes, and the Witnesses proved that he had the Twenty Acres of Pasture, but not of Wood, it was adjudged, that if it appears that the Court Christian ought not to hold Plea thereof, it sufficeth. And therefore, if there be a Prescription that the Parson holds an Hundred Acres of Land in Satisfaction of Tithes, and the Proof be that he holds only Sixty Acres in Satisfaction of them, it is well enough; because the Substance of the Suggestion is proved, that he holds Land in Satisfaction of Tithes, *&c.* wherefore it was agreed in this Case, that the Plaintiff should declare, and that the Defendant should plead to Issue. *Hill.* 42 *Eliz. B. R. Austen* v. *Piggot*, 3 *Croke* 736, same Case, *Moor* 911. So if a *Modus* be alledged to be, that one shall pay Twenty Shillings in Satisfaction for Tithes, and the Proof be that the *Modus* is, that he shall pay Forty Shillings, it is a good Proof, because thereby the Court is intitled to the Jurisdiction. *Trin.* 4 *Car. C. B. Goddard* and *Tiler*'s Case, *Hetley* 100. And when a Suggestion was of a *Modus* to pay 2 *s.* 6 *d.* for Tithes, and the Witnesses proved the *Modus* to be to pay 3 *s.* the Proof was held good, by *Fenner* and *Yelverton* against *Popham*, because it ousted the Ecclesiastical Court of the Jurisdiction. *Pasch.* 43 *Eliz. B. R. Webb* v. *Petts*, *Noy* 44, and *Trin.* 4 *Car. C. B. Norton*'s Case, *Hetley* 110. And when a Suggestion was, that for Time whereof, *&c.* 2 *d.* had been paid for the Tithes of Wool and Lambs, and the Witnesses proved nothing as to the Wool, but that 2 *d.* had been paid only for the Tithes of the Lambs; a Consultation being prayed, the Court said, That there was a Difference between a Suggestion to have a Prohibition upon a Prescription comprized in it, and a Prescription made in Defence, or by Way of Plea in an original Action: For in the last Case, if a Joint Prescription be made for Two Things, and it fail in one, the whole is destroyed, because it is by Way of Title; but otherwise in this Case it is, because this Prohibition is but to give Jurisdiction to the King's Court, and here because the Prescription is proved, though but in Part, *viz.* as to the Lambs, there shall be no Consultation. *Mich.* 2 *Jac. B. R. Anonymus*, *Yelverton*, *p.* 55. So a Prohibition being prayed on Suggestion of a *Modus* to pay 3 *s.* for every Calf, which on Proof appeared to be for Cow and Calf, yet a Prohibition was granted. *Mich.* 20 *Car.* 2. *Matthew*'s Case, 2 *Keb.* 407. Yet where the Suggestion was, that the Occupiers of such a Farm paid Twenty Shillings yearly in Discharge of Tithes of that and another Farm; and the Proof was, that the Tenants of those Farms paid Forty Shillings in lieu of Tithes of the one Farm only, the Court would have granted a Consultation upon this Variance, but that the Parties agreed to amend the Suggestion, and make the *Modus* Forty Shillings. *Trin.* 18 *Car.* 2. *B. R. Lush* v. *Web*, 2 *Keb.* 57. And if the Witnesses make such Proof, which doth neither prove the *Modus* laid, nor any other *Modus* for the Tithes in Question, the Suggestion by producing of the Witnesses is not said to be proved; therefore when the Tithes of Milk and Calves were sued for in the Spiritual Court, and a Prohibition was had upon a Surmise, that every Inhabitant should pay 4 *d.* for every Cow, and 2 *d.* for every Calf, and the Witnesses proved that Tithes had not there been paid in Specie, but that every Inhabitant should pay 6 *d.* and some 7 *d. &c.* it was agreed, that no *Modus* was proved, for that it is meer Incertainty, and so a Consultation, *&c.* was awarded. *Trin.* 4 *Car. C. B. Goddard* and *Tiler*'s Case, *Hetley* 100.

Ecclesiastical Court ousted of Jurisdiction.

Prohibition proved in Part.

Witnesses must be honest and sufficient.

Note also, That by this Clause the Witnesses must be honest and sufficient; therefore when a Suggestion was proved by Two Witnesses that

that had been attainted of Felony, it was held, that the Teſtimony of ſuch was in all Caſes to be rejected, and the like of excommunicated Perſons, and Recuſants Convict, which are ſuch by Statute 3 *Jac. c.* 5, and a Conſultation was granted. *Mich.* 11 *Jac. B. R. Brown* v. *Craſhaw*, 2 *Bulſt. p.* 154. But if the Witneſſes be honeſt and ſufficient, and they affirm before one of the Judges, that they have known the Contents of the Surmiſe to be true, or that the common Fame is ſo, or that they have heard that it was ſo, this Proof is good enough. *Mich.* 15 *Jac. C. B. Noy* 28. *Paſch.* 43 *Eliz. B. R. Web* v. *Petts*, *Noy* 44. *Paſch.* 33 *Eliz. Stranſham* v. *Cullington*, 3 *Croke* 228, for ſlight Proof will ſerve, *viz.* (as he thinketh or believeth it to be ſo.) *Trin.* 4 *Car.* Sir *Nicholas Stiddar* v. *Tilar*, *Littleton Rep.* 155. Or if one ſurmiſe that the Inhabitants of *B.* (of which he is one) have paid a *Modus Decimandi*, and the Proof be that he himſelf had paid it, this is ſufficient, becauſe it ouſts the Eccleſiaſtical Court of their Conuſance. *Mich.* 15 *Jac. C. B. Noy* 28.

Prohibitions, &c.

Good Proof of Suggeſtion.

Note further, That the Suggeſtion by the ſaid Clauſe is to be proved within Six Months next following after the Prohibition ſhall be granted, that is, from the Time of iſſuing forth of the Prohibition, as was held *Trin.* 35 *Car.* 2. *B. R. Staker* v. *Baynes*; yet the Judges are ſaid to have held, that the Time of Six Months given by this Statute for the proving of a Suggeſtion, ought to be intended Six Months in Term-time, and that the Vacation ſhall not * be Part of the Time. *Mich.* 41 & 42 *Eliz. B. R. Moor* 573. Alſo the Six Months ſhall be accounted by the Kalendar, and not by Twenty-eight Days to the Month, *Mich.* 4 *Jac. Copley* v. *Collins*, *Hob.* 179, and yet this Statute was made to prevent Delays; and 'tis ſaid, that if Proof be made in Time of Vacation, it is well enough. *Paſch.* 43 *Eliz. B. R. Pottinger* and *Johnſon*'s Caſe, quoted in *Skinner*'s Caſe, *Hill.* 15 *Jac. C. B. Noy* 30. And if the Surmiſe be proved before one of the Judges within the Six Months, although that it be not recorded till after the Six Months by the Court, it is well enough. *Hill.* 15 *Jac. C. B. Skinner*'s Caſe, *Noy* 30. And Proof which is not ſufficient may be ſupplied by better Proof within the Six Months, but not after the Six Months. *Trin.* 4 *Car.* Sir *Nicholas Steddar* v. *Tylar*, *Littleton Rep.* 155.

The Six Months, how intended and to be accounted.

Q. * It hath ſince been reſolved *contra* v. *ante*, *cap.* 43.

If the Suggeſtion be not proved within Six Months according to the Statute, the Party, as hath been ſaid, ſhall have double Coſts and Damages, and may maintain an Action of Debt for the Recovery of them, and in that Action he ſhall alſo recover his Coſts and Damages. *Hill.* 22 *Jac. Cockram* v. *Davy*, *Bendloes* 143.

Coſts and Damages in the Action for Coſts and Damages.

Note alſo, That if a Conſultation hath been awarded for that the Suggeſtion of a *Modus* was not proved in Six Months, yet a Prohibition may be granted upon a Suggeſtion of the ſame *Modus* for the ſame Land, if the Tithes before in Queſtion, *viz.* of the ſame Land ariſing in another Year, be ſued for in the Spiritual Court, and ſo every Year after, though ſeveral Conſultations have been granted upon ſuch Prohibitions, for that the Suggeſtions were not proved in Six Months, and not upon the Right or Trial of the Cuſtom; for the Statute of 50 *E.* 3. *c.* 4. goes to the Suggeſtion made upon the ſame Libel, and to a Conſultation duly granted, and not to the Caſe of not having Witneſſes ready to prove the Suggeſtion through Negligence. *Mich.* 5 *Jac. B. R.* And accordingly hath it been agreed, that where a Conſultation is granted for not proving the Suggeſtion in Six Months, the Party may have a new Prohibition upon the ſame Libel; for that the Statute 50 *Ed.* 3. doth not extend to a Conſulta-

After a Conſultation a Prohibition may be upon a new Suit.

Prohibitions, &c.

tion upon not proving the Suggeſtion in Six Months, but only where the Conſultation is granted upon the Matter and Subſtance of the Suggeſtion. *Hill.* 6 *Car. B. R. Stroud* v. *Hoſkins*, *Jones* 231. 1 *Croke* 208. See *Trin.* 9 *Jac. Dorwood* v. *Brickenden*, 2 *Brownl.* 26, and the ſame Book 247. But in *Bowry* and *Wallington*'s Caſe, *Latch* 7, 'tis ſaid by the Court, that they will be ſparing in granting Prohibitions in ſuch Caſes;

Nonſuit.

but if upon the Trial of a Suggeſtion the Plaintiff be nonſuit, no new Prohibition ſhall be granted, altho' that the Nonſuit was occaſioned for want of ſome of the Plaintiff's Witneſſes, who were to prove the Truth of the Suggeſtion, and who were neceſſarily obliged to be abſent. *Paſch.* 14 *Car.* 2. *Tradeham* v.——1 *Keb.* 286, if the Defendant in a Prohibition die, his Executors may proceed in the Spiritual Court, and the Judges of the Court out of which the Prohibition was granted, will alſo in ſuch Caſe make a Rule to the Spiritual Court to proceed; but the Plaintiff may, if he pleaſe, have a new Prohibition againſt the Executors. *Trin.* 4 *Car. B. R. Walſingham* v. *Stone*, *Littleton Rep.* 155.

What Judge may proceed.

The Statute 50 *Ed.* 3. *cap.* 4, doth enact, **That where a Conſultation is once duly granted upon a Prohibition made to the Judge of Holy Church, that the ſame Judge may proceed in the Cauſe by Virtue of the ſame Conſultation, notwithſtanding any other Prohibition thereupon to him delivered; provided always, that the Matter in the Libel of the ſaid Cauſe be not ingroſſed, inlarged, or otherwiſe changed.**

Difference in the printed Statute.

Now whereas this Statute, according to the printed Statutes, (ſays the ſame Judge) that is different from the Parliament-Roll, which is *Liceatque Judici Eccleſiæ*, *Latch* 6, 76, and therefore where a Parſon libelled in the Spiritual Court for Tithes, and a Prohibition granted, and after a Conſultation was awarded, and Sentence given in the Spiritual Court for the Parſon, upon which the Defendant there appealed to the Court of the Arches, and then moved for a new Prohibition, which was granted; but afterwards a Conſultation being moved for, it was agreed by the Court, that where a Conſultation is awarded, no new Prohibition ſhall be granted upon the ſame Libel; but if there be an Appeal, a Prohibition may be granted, but with theſe Differences: 1. If he that appeals prays the Prohibition, he ſhall not have it, for then Suits ſhall be deferred *in infinitum* in the Eccleſiaſtical Courts. 2. If the Prohibition and Conſultation were upon the Subſtance of the Matter, elſe one ſhall be put to try the ſame Point many Times, which would be full of Vexation. *Paſch.* 1 *Car. B. R. Bowry* v. *Wallington*, *Popham* 159, ſame Caſe, *Latch* 6, 76. *Bendlows* 148, 150. *Paſch.* 14 *Jac. Moor* 917, ſame Caſe, 3 *Bulſt.* 182.

Not adviſeable to take Iſſue, but to get his Conſultation with Coſts and Damages.

But if when the Six Months are lapſed, the Defendant in the Prohibition will not pray a Conſultation, and Coſts and Damages at that Time, but will take Iſſue with the Plaintiff, and thereupon it ſhall be found againſt him, he ſhall never have his double Coſts and Damages, becauſe he cannot have a Conſultation, for that the Matter is paſſed againſt him. *Watkinſon* v. Sir *George Pacy*, *Latch* 140. *Hill.* 22 *Jac. B. R. Watkinſon* v. *Perry*, *Noy* 81. But it ſeems he may in ſuch Caſe have his Coſts and Damages if it go for him, for that then he is to have a Conſultation; and therefore 'tis beſt for every Defendant in a Prohibition (when the Suggeſtion is not proved in Six Months) to get his Conſultation with Coſts and Damages, and not to plead to the Matter of the Suggeſtion.

How the double Coſts and Damages are uſually aſſeſſed.

Note, That the Party that has the Conſultation upon this Clauſe, is to have double Coſts and Damages to be aſſeſſed by the Court; and the Uſe is, to ſet Coſts and Damages ſingly, and then by the Statute they

Personal Tithes.

ſhall be doubled. And though it be ſaid, that the Coſts and Damages ſhall be aſſigned or aſſeſſed by the Court, for which the Party ſhall have his Action of Debt by Bill, *&c.* in any of the King's Courts of Record, *&c.* without more, yet the Caſe was, that upon not proving of a Suggeſtion, Coſts were aſſeſſed by the Court at Fifty Shillings, and Damages at Fifty Shillings, to be doubled, and no formal Judgment was given to recover them, becauſe theſe Words [*Ideo conſideratum fuit quod recuperet, &c.*] were omitted, and the Parſon who ſo recovered the Coſts and Damages brought his Action of Debt for them, and declared upon all the Matter above, and that Damages were aſſeſſed, *&c.* and that the Coſts were not paid, *per quod actio, &c.* and adjudged, that he ſhould recover, and had a Judgment in this Action of Debt by *non ſum informatus:* Whereupon a Writ of Error being brought as well upon the Record and Proceſs, *&c.* of the Prohibition, as of the Record and Proceſs in the Action of Debt for the Coſts; this Error in ſpecial was aſſigned, that there was no Judgment in the Prohibition for the Recovery of the Coſts, but only an Aſſeſſment of the Coſts without any more, which is but Matter of Office, but no Judgment in Court to bind; which was confeſſed by the whole Court; and Judgment was reverſed. *Hill.* 5 *Jac. C. B. Cob* v. *Hunt*, *Brownl.* and *Gouldsb.* 1 *Part*, 99.

As to Perſonal Tithes.

Though by the former of the Two Branches of this Statute laſt beforementioned it be generally provided, That all Church Duties ſhall be recovered in the Eccleſiaſtical Court, yet it is before ſpecially, as to Perſonal Tithes, enacted thus: **And be it alſo enacted by the Authority aforeſaid, That if any Perſon refuſe to pay his Perſonal Tithes in Form aforeſaid, that then it ſhall be lawful to the Ordinary of the ſame Dioceſe, where the Party that ſo ought to pay the ſaid Tithes is dwelling, to call the ſame Party before him, and by his Diſcretion to examine him by all lawful and reaſonable Means, other than by the Party's own Corporal Oath, concerning the true Payment of the ſaid Perſonal Tithes.** Stat. 2 & 3 Ed. 6. c. 13. This Clauſe hath Relation to a Clauſe foregoing it, which ſee in *Chap.* 54.

2 & 3 *Ed.* 6. *c.* 13.

7 & 8 *W.* 3. *c.* 6. of Small Tithes.

It hath alſo been enacted, **For the more eaſy and effectual Recovery of Small Tithes, and the Value of them, where the ſame ſhall be unduly ſubſtracted and detained, where the ſame do not amount to above the yearly Value of Forty Shillings from any one Perſon; Be it enacted by the King's moſt Excellent Majeſty, by and with the Advice and Conſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, that all and every Perſon and Perſons ſhall henceforth well and truly ſet out and pay all and ſingular the Tithes commonly called Small Tithes, and Compoſitions and Agreements for the ſame, with all Offerings, Oblations and Obventions to the ſeveral Rectors, Vicars, and other Perſons to whom they are or ſhall be due in their ſeveral Pariſhes within this Kingdom of** England, **and Dominion of** Wales, **and Town of** Berwick **upon** Tweed, **according to the Rights, Cuſtoms and Preſcriptions commonly uſed within the ſaid Pariſhes reſpectively. And if any Perſon or Perſons ſhall hereafter ſubſtract or withdraw, or any Ways fail in the true Payment of ſuch ſmall Tithes, Offerings, Oblations, Obventions, or Compoſitions, as aforeſaid, by the Space of Twenty Days at moſt after Demand thereof, then it ſhall and may be lawful for the Perſon or Perſons to whom the ſame ſhall be due, to make his or their Complaint in Writing unto Two or more of his Majeſty's Juſtices of the Peace within**

Recovery of Small Tithes.

within that County, Riding, City, Town Corporate, Place, or Division, where the same shall grow due, (neither of which Justices of Peace is to be Patron of the Church or Chapel whence the said Tithes do or shall arise, nor any Ways interessed in such Tithes, Offerings, Oblations, Obventions, or Compositions aforesaid.)

Justices may summon the Substractor, &c.

And be it further enacted by the Authority aforesaid, That if hereafter any Suit or Complaint shall be brought to Two or more Justices of the Peace, as aforesaid, concerning small Tithes, Offerings, Oblations, Obventions, or Compositions, as aforesaid, the said Justices are hereby authorized and required to summon in Writing under their Hands and Seals by reasonable Warning, every such Person or Persons against whom any Complaint shall be made, as aforesaid; and after his or their Appearance, or upon Default of their Appearance, the said Warning or Summons being proved before them upon Oath, the said Justices of Peace, or any Two or more of them, shall proceed to hear and determine the said Complaint, and upon the Proofs, Evidences and Testimonies produced before them, shall in Writing under their Hands and Seals adjudge the Case, and give such reasonable Allowance and Compensation for such Tithes, Oblations and Compositions so substracted or withheld, as they shall judge to be just and reasonable, and also such Costs and Charges not exceeding Ten Shillings, as upon the Merits of the Cause shall appear just.

Distress upon Non-payment.

And be it farther enacted, That if any Person or Persons shall refuse or neglect, by the Space of Ten Days after Notice given, to pay or satisfy any such Sum of Money as upon such Complaint and Proceeding shall by Two or more Justices of the Peace be adjudged as aforesaid, in every such Case the Constables and Church-wardens of the said Parish, or one of them, shall by Warrant, under the Hands and Seals of the said Justices to them directed, distrain the Goods and Chattels of the Party so refusing or neglecting as aforesaid, and after detaining them by the Space of Three Days, in case the said Sum so adjudged to be paid, together with reasonable Charges for making and detaining the said Distresses, be not tendred or paid by the said Party in the mean Time, shall and may make Sale of the same, and pay to the Party complaining so much of the Money arising by such Sale, as may satisfy the said Sum so adjudged, retaining to themselves such reasonable Charges for making and keeping the said Distress, as the said Justices shall think fit, and shall render the Overplus (if any be) to the Owner.

Oath to Witnesses.

Provided always, and be it enacted, That it shall and may be lawful for all Justices of Peace, in the Examination of all Matters offered to them by this Act, to administer an Oath or Oaths to any Witness or Witnesses, where the same shall be necessary for their Information, and for the better Discovery of the Truth.

London, &c. excepted.

Provided also, and be it enacted, That this Act, or any Thing therein contained, shall not extend to any Tithes, Oblations, Payments or Obventions within the City of London, or Liberties thereof, nor to any other City or Town Corporate where the same are settled by any Act of Parliament, in that Case particularly made and provided.

Provided always, and it is enacted, That no Complaint for or concerning any small Tithes, Offerings, Oblations, Obventions, or Compositions, hereafter due, shall be heard and determined by any

Justices of the Peace by Virtue of this Act, unless the Complaint shall be made within the Space of Two Years next after the Times that the same Tithes, Oblations, Obventions, and Compositions, did become due or payable; any Thing in this Act contained to the contrary notwithstanding.

Recovery of small Tithes.

Complaint to be within Two Years.

Provided also, and be it enacted, That any Person finding him, her, or themselves aggrieved by any Judgment to be given by any Two Justices of the Peace, shall and may appeal to the next General Quarter-Sessions to be held for that County, Riding, City, Town Corporate, or Division, and the Justices of the Peace there present, or the major Part of them, shall proceed finally to hear and determine the Matter, and to reverse the said Judgment, if they shall see Cause; and if the Justices then present, or the major Part of them, shall find Cause to confirm the Judgment given by the first Two Justices of the Peace, they shall then decree the same by Order of Sessions, and shall also proceed to give such Costs against the Appellant, to be levied by Distress and Sale of the Goods and Chattels of the said Appellant, as to them shall seem just and reasonable; and no Proceedings or Judgment had, or to be had, by Virtue of this Act, shall be removed or superseded by Virtue of any Writ of Certiorari, or other Writ out of his Majesty's Courts at Westminster, or any other Court whatsoever, unless the Title of such Tithes, Oblations or Obventions shall be in Question; any Law, Statute, Custom or Usage to the contrary notwithstanding.

Appeal to the Quarter-Sessions.

Certiorari.

Provided always, and be it enacted, That where any Person or Persons complained of for substracting or withholding any small Tithes, or other Duties aforesaid, shall before the Justices of the Peace to whom such Complaint is made, insist upon any Prescription, Composition, or Modus Decimandi, Agreement or Title, whereby he or she is or ought to be freed from Payment of the said Tithes, or other Dues in Question, and deliver the same in Writing to the said Justices of the Peace, subscribed by him or her, and shall then give to the Party complaining reasonable and sufficient Security to the Satisfaction of the said Justices, to pay all such Costs and Damages, as upon a Trial at Law to be had for that Purpose, in any of his Majesty's Courts having Cognizance of that Matter, shall be given against him, her or them, in case the said Prescription, Composition, or Modus Decimandi, shall not upon the said Trial be allowed, that in that Case the said Justices of the Peace, shall forbear to give any Judgment in the Matter; and that then and in such Case the Person or Persons so complaining, shall and may be at Liberty to prosecute such Person or Persons for their said Substraction in any other Court or Courts whatsoever, where he, she, or they might have sued before the making of this Act; any Thing in this Act to the contrary notwithstanding.

If the Party insist upon a Prescription or *Modus Decimandi*.

And be it further enacted by the Authority aforesaid, That every Person and Persons, who shall by Virtue of this Act obtain any Judgment, or against whom any Judgment shall be obtained before any Justices of the Peace out of Sessions, for small Tithes, Oblations, Obventions, or Compositions, shall cause or procure the said Judgment to be inrolled at the next General Quarter-Session, to be holden for the said County, City, Riding, or Division; and the Clerk of the Peace for the said County, City, Riding, or Division, is hereby required, upon Tender thereof, to inrol the same; and

The Judgment out of Sessions to be inrolled.

Recovery of small Tithes.

that he shall not ask or receive for the Inrolment of any one Judgment, any Fee or Reward exceeding One Shilling; and that the Judgment so inrolled, and Satisfaction made by paying the same Sum so adjudged, shall be a good Bar to conclude the said Rectors, Vicars, and other Persons, from any other Remedy for the said small Tithes, Oblations, Obventions, or Compositions, for which the said Judgment was obtained.

If the Party after Judgment remove out of the County.

And be it further enacted by the Authority aforesaid, That if any Person or Persons against whom any such Judgment or Judgments shall be had, as aforesaid, shall remove out of the County, Riding, City, or Corporation, after Judgment had as aforesaid, and before the levying the Sum or Sums thereby adjudged to be levied, the Justices of the Peace who made the said Judgment, or one of them, shall certify the same under his or their Hands and Seals to any Justice of Peace of such other County, City, or Place, wherein the said Person or Persons shall be Inhabitants; which said Justice is hereby authorized and required by Warrant under his Hand and Seal, to be directed to the Constables or Church-wardens of the Place, or one of them, to levy the Sum or Sums so adjudged to be levied as aforesaid, upon the Goods and Chattels of such Person or Persons, as fully as the said other Justices might have done, if he, she, or they had not removed as aforesaid, which shall be paid according to the said Judgment.

Provided always, and be it enacted, That no Vicar or other Person shall have Remedy to recover small Tithes, or other Dues aforesaid, which became or were due before the making of this Act, unless Complaint be made to the Justices of the Peace, in Form aforesaid, before the First Day of October, which shall be in the Year of our Lord 1696.

Costs against the Complainer.

And it is hereby declared and enacted, That the said Justices of the Peace who shall hear and determine any of the Matters aforesaid, shall have Power to give Costs, not exceeding Ten Shillings, to the Party prosecuted, if they shall find the Complaint to be false and vexatious; which Costs shall be levied in Manner and Form aforesaid.

Double Costs upon Discontinuance, &c.

Provided also, and be it further enacted, That if any Person or Persons shall be sued for any Thing done in Execution of this Act, and the Plaintiff in such Suit shall discontinue his Action, or be nonsuit, or a Verdict pass against him, that then in any of the said Cases, such Person or Persons shall recover double Costs.

If a former Suit was began in the Exchequer, &c.

Provided always, That any Clerk, or other Person or Persons, who shall begin any Suit for Recovery of small Tithes, Oblations or Obventions, not exceeding the Value of Forty Shillings, in his Majesty's Court of Exchequer, or in any the Ecclesiastical Courts, shall have no Benefit by this Act, or any Clause in it, for the same Matter for which he or they have so sued.

Provided always, and be it farther enacted, That this Act shall continue for the Space of Three Years, and from thence to the End of the next Session of Parliament, and no longer. Stat. 7 & 8 W. 3. cap. 6.

The Statute continued for Seven Years, &c.

And by the Statute 10 & 11 *W.* 3. It is enacted, Whereas an Act made in Seventh and Eighth Years of his present Majesty's Reign, Intitled, An Act for the more easy Recovery of Small Tithes, has been by Experience found very useful and necessary; And whereas the

said Act was to continue but Three Years, and to the End of the next Session of Parliament, and is now near expiring; Be it therefore enacted by the King's most excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the Authority of the same, that the said recited Act, with all the Clauses and Powers contained, shall continue and be in Force for the Space of Seven Years from and after the Expiration thereof, as aforesaid, and from thence to the End of the next Session of Parliament, and no longer. Stat. 10 & 11 W. 3. c. 15.

Quakers to pay Tithes.

And the said Act 7 & 8 *W.* 3. *c.* 6. is made perpetual by Stat. 3 & 4 *Ann. c.* 18.

It hath also been enacted concerning divers Dissenters commonly called *Quakers*, That whereas by reason of a pretended Scruple of Conscience Quakers do refuse to pay Tithes and Church-Rates, Be it enacted by the Authority aforesaid, that where any Quaker shall refuse to pay or compound for his great or small Tithes, or to pay any Church-Rates, it shall and may be lawful to and for the Two next Justices of Peace of the same County (other than such Justice of the Peace as is Patron of the Church or Chapel, whence the said Tithes do or shall arise, or any ways interessed in the said Tithes) upon the Complaint of any Parson, Vicar, Farmer or Proprietor of Tithes, Church-warden or Church-wardens who ought to have, receive or collect the same, by Warrant under their Hands and Seals, to convene before them such Quaker or Quakers neglecting or refusing to pay or compound for the same, and to examine upon Oath, which Oath the said Justices are hereby impowered to administer, or in such Manner as by this Act is provided, the Truth and Justice of the said Complaint, and to ascertain and state what is due and payable by such Quaker or Quakers to the Party or Parties complaining, and by Order under their Hands and Seals to direct and appoint the Payment thereof, so as the Sum ordered, as aforesaid, do not exceed Ten Pounds; and upon Refusal by such Quaker or Quakers to pay according to such Order, it shall and may be lawful to and for any one of the said Justices, by Warrant under his Hand and Seal, to levy the Money thereby ordered to be paid, by Distress and Sale of the Goods of such Offender, his Executors or Administrators, rendring only the Overplus to him, her or them, necessary Charges of Distraining being thereout first deducted and allowed by the said Justice; and any Person finding him, her or themselves aggrieved by any Judgment given by such Two Justices of the Peace, shall and may appeal to the next general Quarter-Sessions to be held for the County, Riding, City, Liberty or Town Corporate; and the Justices of the Peace there present, or the major Part of them, shall proceed finally to hear and determine the Matter, and to reverse the said Judgment, if they shall see Cause; and if the Justices then present, or the major Part of them, shall find Cause to continue the Judgment given by the first Two Justices of the Peace, they shall then decree the same by Order of Sessions, and shall also proceed to give such Costs against the Appellant, to be levied by Distress and Sale of the Goods and Cattels of the said Appellant, as to them shall seem just and reasonable; and no Proceedings or Judgment had or to be had by Virtue of this Act, shall be removed or superseded by any Writ of Certiorari or other Writ, out of his Majesty's

7 & 8 *W.* 3. *c.* 34. to cause *Quakers* to pay Tithes.

Distress upon Non-payment.

Appeal to the Sessions.

Quakers to pay Tithes.

jesty's Courts at Westminster, or any other Court whatsoever, unless the Title of such Tithes shall be in Question.

No Distress till Appeal determined.

Provided always, that in case any such Appeal be made as aforesaid, no Warrant of Distress shall be granted until after such Appeal be determined.

Continuance of this Act.

Provided that this Act shall continue in Force for the Space of Seven Years, and from thence to the End of the next Session of Parliament, and no longer. Stat. 7 & W. 3. c. 34. And this Act is continued by Stat. 13 W. 3. c. 4, for Eleven Years, after the Determination of the said Act, and from thence to the End of the next Session of Parliament. The said Act of 7 & 8 *W.* 3. *c.* 34. is made perpetual by Stat. 1 *Geo.* 1. *sess.* 2. *c.* 6. which recites, that

Q. For it is oddly penned, the first Clause seems to annex the Continuance only to the Part relating to the Oaths.

By the said Act made in the seventh Year of King *William* the third, a Remedy is provided for the Recovery of Tithes and Church-Rates, where any Quaker should refuse to pay the same; then it is enacted, that such Remedy shall be extended, and the like Remedy shall and may be had and used against any Quaker or Quakers, for the Recovering of any Tithes or Rates, or any Customary, or other Rights, Dues, or Payments belonging to any Church or Chapel, which of Right by Law and Custom ought to be paid for the Stipend or Maintenance of any Minister or Curate officiating in any Church or Chapel; and any two or more Justices of the Peace of the same County or Place, other than such Justice of the Peace as is Patron of any such Church or Chapel, or any ways interested in the said Tithes, upon Complaint of any Parson, Vicar, Curate, Farmer, or Proprietor of such Tithes, or any Church-warden or Chapel-warden, or other Person who ought to have, receive, or collect any such Tithes, Rates, Dues, or Payments, as aforesaid, are authorized and required to summon in Writing, under their Hands and Seals, by reasonable Warning, such Quaker or Quakers, against whom such Complaints shall be made, and after his or their Appearance, or upon Default of Appearance, the said Warning or Summons being proved before them upon Oath, to proceed to hear and determine the said Complaint, and to make such Order therein, as in the said Act is limited or directed, and also to Order such Costs and Charges, as they shall think reasonable, not exceeding ten Shillings, as upon the Merits of the Cause shall appear just; which Order shall and may be so executed, and on such Appeal may be reversed or affirmed by the general Quarter-Sessions of the County or Place, with such Costs and Remedy for the same, and shall not be removed into any other Court, unless the Title of such Tithes, Dues, or Payments, shall be in Question, in like Manner as in and by the same Act is limited or provided.

Sanchee and others, Quakers, were cited into the Ecclesiastical Court, to answer there upon their solemn Affirmation, *&c.* concerning Tithes withheld by them from the Parson of the Parish; and for not answering, the Commissary, according to the Statute 27 *H.* 8. *c.* 20. who certifies their Contumacy to two Justices of Peace, by whose Warrant they were seised, and committed to Prison; and being brought by *Habeas Corpus* into the King's Bench, Mr. *Robert Eyre* moved, that they might be discharged. Because the new Act concerning the Affirmation of Quakers gives the Parson a Remedy to recover such Tithes by Distress, by Virtue of a Warrant of a Justice of Peace; then where a Statute gives Remedy, the Jurisdiction of the Spiritual Court is taken away, unless it be saved by the same Statute. 5 *Co.* 73. *b.* *Jones* 320. And he cited several Statutes, where the Jurisdiction of the Spiritual Court was saved, as 23 *Eliz.* *c.* 1. 1 *Eliz.* *c.* 2. In the same Manner in the Statute against Usury. 3 *Inst.*

152. 2 *Inſt.* 657. And from thence he inferred, that it was the Opinion of thoſe Parliaments, that the Spiritual Juriſdiction would have been taken away by theſe Acts, if it had not been ſaved by them. But *per Curiam* this laſt Act ſeems to be only an accumulative Remedy, and not to repeal the Act of *H.* 8. And in many Caſes the Common Law and Eccleſiaſtical Courts have concurrent Juriſdiction; as if a Penſion be payable out of a Parſonage by Preſcription, the Remedy for this is either in the Spiritual Court, or Annuity lies for it at Common Law; though *Coke* ſays the contrary in his ſecond Inſtitute in his Comment upon the Statute *de Circumſpecte Agatis*. But where the Nature of the Offence is altered by a Statute, and a new Penalty inflicted; then after the Party has been tried at Common Law and condemned, the Eccleſiaſtical Court ſhall not proceed againſt him. As if a Man be convict at Common Law for having two Wives, or hath been adjudged the reputed Father of a Baſtard, *&c.* But then *Northey* took Exception to the Return, becauſe it is ſaid, that *Sanchee*, *&c.* were impriſoned for a Contempt in a Suit for Detention of Tithes or other Eccleſiaſtical Duties; and it ought to appear, for which the Suit was, ſpecially. For though the Statute that gives this Remedy is in general Words, yet in the Return the Cauſe of Impriſonment ought to be certainly expreſſed, to the End that it may appear to the Court that it was an Eccleſiaſtical Duty, for which they are impriſoned. And of this Opinion was the whole Court, and therefore the Quakers were diſcharged out of Cuſtody. 1 *Ld. Raym.* 323. *Rex* v. *Sanchee.*

Quakers to pay Tithes.

Note laſtly, That the Statute of 2 & 3 *Ed.* 6. and the Two others before-mentioned, made for the due Payment of Tithes and other Church-Duties, *viz.* of 27 *H.* 8. and of 32 *H.* 8. do not only extend to Tithes due in Kind, but alſo all accuſtomary Payments that ought to be made in lieu of Tithes or other Things not in themſelves titheable, as Houſes, Rabits, Fiſh, *&c.* For by the aforeſaid Statute of 27 *H.* 8. *c.* 20, it is provided and enacted, **That every one of his Subjects of this Realm of** England, Ireland, Wales **and** Caleis, **and Marches of the ſame, according to the Eccleſiaſtical Laws and Ordinances of his Church of** England, **and after the laudable Uſages and Cuſtoms of their Pariſh, or other Place where he dwelleth or occupieth, ſhall yield and pay his Tithes and Offerings, and other Duties of Holy Church, and that for ſuch Subſtractions of any of the ſaid Tithes, Offerings or other Duties, the Parſon, Vicar, Curate, or other Party in that behalf grieved may by due Proceſs of the King's Eccleſiaſtical Laws of the Church of** England, **convent the Perſon or Perſons ſo offending before his Ordinary or other competent Judge of this Realm, having Authority to hear and determine the Right of Tithes, and alſo to compel the ſame Perſon or Perſons offending, to do and yield their ſaid Duties in that behalf**; that is, as well *Modus Decimandi* by laudable Uſage and Cuſtoms of the Pariſh, as Tithes in Kind. And with that in Effect agrees the Statute of 32 *H.* 8. *c.* 7. And by the Statute of 2 & 3 *Ed.* 6. *c.* 13. it is enacted, **That every of the King's Subjects ſhall from henceforth truly and juſtly, without fraud or Guile, divide, ſet out, yield and pay, all Manner of their Predial Tithes, in their proper Kind, as they riſe and happen, in ſuch Manner and Form as hath been of Right yielded and paid within Forty Years next before the making of this Act, or of Right or Cuſtom ought to have been paid.** And after, there is another Branch in the ſaid Act: **And be it further enacted, That if any Perſon do ſubſtract, or withdraw any Manner of Tithes, Obven-**

Accuſtomary Payments in lieu of Tithes.

Tithes ſubſtracted.

tions, Profits, Commodities, or other Duties before-mentioned, or any Part of them, contrary to the true Meaning of this Act, or of any other Act heretofore made, (which extends to the Cuſtom of Tithing, that is, *Modus Decimandi* mentioned before in this Act, *&c.*) that then the Party ſo ſubſtracting or withdrawing the ſame, may or ſhall be convented and ſued in the King's Eccleſiaſtical Court, &c. And this was ſaid and agreed by *Coke* and the other Judges concerned in the Caſe *de Modo Decimandi*, debated before King *Jac.* I. *Trin.* 7 *Jac.* 13 *Co.* 41. So that it plainly appears, theſe cuſtomary Payments may, as other Tithes and Church Duties, be recovered in the Eccleſiaſtical Court by Force of the ſaid Statutes, and therefore that all Suits there for ſuch Payments ſhall partake of the Privileges granted by theſe Statutes, as if the Suit were for the Tithes in Kind.

If a Perſon living in one Dioceſe ſubſtracts his Tithes within another Dioceſe. *Vide ante*, c. 53.

And it ſeems, that if any Perſon inhabiting within one Dioceſe doth ſubſtract and withhold his Tithes within another Dioceſe, that a Suit may be commenced and proſecuted in the Court of the Biſhop, *&c.* in whoſe Dioceſe the Tithes are ſo ſubſtracted, and the Party ſo ſubſtracting his Tithes may be there cited and ſummoned (although inhabiting within another Dioceſe) to appear and anſwer to the ſaid Suit notwithſtanding the Statute of 23 *H.* 8. *c.* 9, which prohibits, That no Manner of Perſon ſhall be from henceforth cited or ſummoned, or otherwiſe called to appear by himſelf or herſelf, or by any Procurator before any Ordinary, Archdeacon, Commiſſary, Official, or any other Judge Spiritual, out of the Dioceſs or peculiar Juriſdiction where the Perſon which ſhall be cited, ſummoned, or otherwiſe (as is aforeſaid) called, ſhall be inhabiting and dwelling, at the Time of Awarding, or going forth of the ſame Citation or Summons, (except in Caſes mentioned in the ſame Statute:) And this by the ſaid Statute of 32 *H.* 8. *c.* 7, whereby it is enacted, That in caſe it ſhall happen any Perſon or Perſons of his or their ungodly and perverſe Will and Mind, to detain and withhold any of the ſaid Tithes or Offerings, or any Part or Parcel thereof, then the Perſon or Party being Eccleſiaſtical or Lay Perſon, having Cauſe to demand or have the ſaid Tithes or Offerings, being thereby wronged or grieved, ſhall and may convent the Perſon or Perſons ſo offending before the Ordinary, his Commiſſary, or other competent Miniſter or lawful Judge of the Place where ſuch Wrong ſhall be done, according to the Eccleſiaſtical Laws: And in every ſuch Caſe or Matter of Suit, the ſame Ordinary, Commiſſary, or other Competent Miniſter or lawful Judge, having the Parties or their lawful Procurators before him or them, ſhall and may by Virtue of this Act proceed to the Examination, Hearing and Determination of every ſuch Cauſe or Matter ordinarily or ſummarily, according to the Courſe and Proceſs of the ſaid Eccleſiaſtical Laws, and thereupon may give Sentence accordingly. So that this Clauſe of the Statute 32 *H.* 8. *cap.* 7, ſeems to repeal the Stat. 23 *H.* 8. *c.* 9, as to this particular Caſe: See *Rogers* and *Harding*'s Caſe, 1 *Keb.* 481; but the contrary to this ſeems to be held and agreed in the Caſe of *Jones* v. *Boyer*, *Trin. Jac.* 2. *C. B.* that the Suit in ſuch Caſe is to be brought in the Dioceſe where the Defendant inhabits, and not where the Tithes are payable. But *Paſch.* 15 *Car.* 2. *C. B.* in the Caſe, *Weſtcote* v. *Harding*, Prohibition was granted for citing the Party out of the Dioceſe; but it appearing to be in a Suit for Tithes of Land lying within the Dioceſe, a Conſultation was awarded by the Court, for that the Suit can be in no other Place than in the Dioceſe where the Lands

Lands lie, let the Party live where he will; and it was held this was not a Caſe within the Statute 21 *H.* 8. 1 *Lev. Rep.* 96, as in the like Caſe, a Suit for a Legacy may be in the Dioceſe where the Will is proved, altho' the Defendant live in another Dioceſe, he may be cited there notwithſtanding the ſaid Statute. *Hill.* 24 & 25 *Car.* 2. *B. R.* 1 *Vent.* 233, and ſo the Caſe of *Etheridge* v. *Etheridge*, *Hill.* 27 & 28 *Car.* 2. *B. R.* 3 *Keb.* 619. *Vide ante*, *c.* 53.

Modus Decimandi.

And that a *Modus Decimandi* may be ſued for in the Spiritual Court, alſo further appears; for the Act *Circumſpecte Agatis* giveth Power to the Eccleſiaſtical Judge to ſue for Tithes due in Kind, or by Cuſtom, (that is a *Modus Decimandi*); ſo as by Authority of that Act, (altho' that the yearly Sum ſoundeth in the Temporalty which was paid by Cuſtom in Diſcharge of Tithes,) yet becauſe the ſame cometh in the Place of Tithes, and by Conſtitution the Tithes are changed into Money, and the Parſon hath no Remedy for the ſame (which is the *Modus Decimandi*) at the Common Law, this Act makes the *Modus* recoverable in the Eccleſiaſtical Court, as was agreed in the Caſe *de Modo Decimandi*, *Trin.* 7 *Jac.* 13 *Coke* 41. And whereas it hath been urged by the Civilians, that the Cuſtom *de Modo Decimandi* is of Eccleſiaſtical Juriſdiction and Conuſance; for it is a manner of Tithing, and all manner of Tithing is of Eccleſiaſtical Juriſdiction; and therefore as they ſaid, the Judges in their Anſwer to certain Objections made by the Archbiſhop of *Canterbury*, have confeſſed that Suits may be had in the Spiritual Courts *pro Modo Decimandi*, *&c.* It was anſwered thereunto, and reſolved by the Temporal Judges, That *Satisfactio pecuniaria* of it ſelf is Temporal: But foraſmuch as the Parſon hath not Remedy *pro Modo Decimandi* at the Common Law, the Parſon by Force of the Acts cited before, might ſue *pro Modo Decimandi*, in the Eccleſiaſtical Court: Caſe *de Modo Decimandi*, 13 *Coke*, *fol.* 44. See Dr. *Grant*'s Caſe, 11 *Coke* 16, and 2 *Roll's Abr.* 305. Accordingly, when a Prohibition was prayed to ſtay Proceedings in the Spiritual Court upon a Suit there for a *Modus Decimandi*, becauſe the Defendants there ſuggeſted another *Modus Decimandi*, and that they refuſed to receive it; *Dodderidge* Juſtice ſaid, the *Modus Decimandi* is as well due to the Parſon, as Tithes are at the Common Law; and if the Parſon doth libel in the Spiritual Court for a *Modus Decimandi*, (as he may do) and another *Modus* is there ſuggeſted, and this refuſed, they may there try and determine this Matter touching this *Modus*, and no Cauſe to grant a Prohibition for this Refuſal: But if they do there refuſe the Suggeſtion for the *Modus*, upon a Matter wherein their Law and our Law do differ, as in the Point of Proof, for Default of Two Witneſſes, whereof one being allowable in our Law, but not with them; in this Caſe a Prohibition is to be granted; but otherwiſe they may as well try the *Modus Decimandi* as the Right of Tithes. To which *Haughton* Juſtice replied, That they were not to be ſuffered by the Common Law to try a *Modus Decimandi* there, but that they were to be prohibited. But *Dodderidge* ſaid as before, That if there were a Difference in their Proceedings betwixt their Law and the Common Law, and this be the Ground of the Refuſal of the Allegation, they are to be prohibited. But being moved at another Time, *Dodderidge* held as before; but granted, that if the Difference be touching the Matter of the Proof wherein their Law and the Common Law differs in the Manner of the Proof by Witneſſes, and they will not allow of the Proof allowable by the Common Law, (*viz.*) of one Witneſs as ſufficient, they are to be prohibited; and ſo, ſaid he, is, 1 *R.* 3. and 10 *H.* 7. Alſo he ſaid, if a Parſon doth libel there for a *Modus*, whereas in

Wherefore a *Modus Decimandi* may be ſued for in the Eccleſiaſtical Court.

If upon a Suit there for a *Modus*, another *Modus* being ſuggeſted and refuſed, a Prohibition lies or not.

Modus Decimandi.

in Verity there was no *Modus*, but only a Compoſition of late Time between the Parſon and Pariſhioners to pay ſo much yearly for Tithes, and not otherwiſe; in this Caſe, becauſe that their Law and our Law do differ in Point of Preſcription, for with them 10 Years Continuance (as he ſaid) being a good Preſcription, but not ſo by our Law, they are to be prohibited. But *Haughton* held as before, That a *Modus Decimandi* is properly to be tried and determined at the Common Law, and not by them in the Spiritual Court; for that their Law and the Common Law differ in Point of Proof of a *Modus*, and in the Point of Preſcription. Yet *Croke* held with *Dodderidge*, ſaying, A ſpecial *Modus* being libelled for there, is there to be tried; but if they differ there in a Temporal Matter, they are then to be prohibited, this being triable by the Common Law. So the Court declared they would ſee the Suggeſtion; and by the Rule of the Court they were to make their Suggeſtion, and to ſhew the ſame to the Court as they would ſtand by it; and in the mean Time the Suit in the Spiritual Court to be ſtayed. *Mich.* 14 *Jac. B. R. Harding & al'* againſt *Goſling*, 3 *Bulſt.* 251.

It ſeems a Prohibition lies, if the Spiritual Court refuſe the other *Modus* alledged.

The Reaſon given.

But this Caſe is reported differently by *Rolle* who ſaith, that the whole Court agreed, that a Parſon may libel in the Spiritual Court upon a ſpecial *Modus*, and that no Prohibition lies; but becauſe the Spiritual Court had rejected the Proof of another *Modus* which was alledged, a Prohibition was granted, and alſo becauſe the Parſon had miſtaken his *Modus:* And further that it was agreed, that the Spiritual Court ſhall not try the *Modus* for the Reaſon mentioned by *Haughton*, (*viz.*) That if one libel upon a different *Modus*, and the Defendant pleads there is another *Modus*, that is triable at the Common Law, becauſe otherwiſe the Temporal Court will be defeated of all Juriſdiction; for the Parſon may ſuggeſt one falſe *Modus* to a great Value on Purpoſe to take away the Temporal Juriſdiction. *Mich.* 14 *Jac. B. R. Goſling* v. *Harding*, 1 *Roll's Rep.* 419. To which Reaſon given by *Haughton*, it may be anſwered, That if a Parſon libel for a *Modus* which he cannot prove, he will fail of his Purpoſe, and be condemned in Coſts, otherwiſe an Appeal may be had; and if the Defendants there ſuggeſt, and prove another *Modus* 'tis fit it ſhould be allowed; and if thereby the Temporal Juriſdiction loſe the Trial of the true *Modus*, they have no Wrong, for that the Trial of ſuch a *Modus*, by four Acts of Parliament, (as was confeſſed by the Judges when before the King and Council) doth belong to the Eccleſiaſtical Juriſdiction, as is before ſhewed; but if the Suggeſtion of a different *Modus* from what is ſet forth in the Libel, ſhall ouſt the Eccleſiaſtical Courts of the Juriſdiction, this may be done by every Defendant that is ſued for any *Modus* there; and ſo no ſpecial *Modus*, how true and notorious ſoever it be, may with Effect be ſued for there, unleſs the Defendant pleaſe; which may be more prejudicial to the Eccleſiaſtical Courts than the other Practice can be to the Temporal; becauſe (as is ſaid) the Right of hearing and determining Suits for a *Modus* doth belong to the Spiritual Courts, and ſo the Temporal Courts loſe nothing which they originally had.

Anſwer to the Reaſon on behalf of the Spiritual Court.

CHAP.

CHAP. LVI.

Cuſtoms, &c. for Tithes.

Cuſtom or Preſcription, if triable in Spiritual Court. Prohibitions, if to be granted to prevent ſuch Trials.

ALthough the Eccleſiaſtical Courts be confirmed and aided by the aforeſaid Statutes as to their Authority of holding Plea of Tithes of all Sorts, and of all other Church-Duties; yet theſe Statutes do provide, that the ſaid Courts ſhould keep within the Bounds of Juſtice and due Limits of Juriſdictions; and accordingly by the Statute of 27 *H.* 8. *c.* 20, it is provided; **That every Perſon and Perſons, being Party or Parties to any ſuch Suit, ſhall and may make and have his and their lawful Action, Demand or Proſecution, Appeals, Prohibitions, and all other their lawful Defences and Remedies in every ſuch Suit, according to the ſaid Eccleſiaſtical Laws, and Laws and Statutes of this Realm, in as ample and liberal Manner and Form as they or any of them might have had, if this Act had never been made: Any Thing in this Act above written notwithſtanding.** And alſo by the Statute of 2 & 3 *Ed.* 6. *c.* 13, by which the former Statute is confirmed, 'tis provided and enacted, **That this Act, or any Thing therein contained, ſhall not extend to give any Miniſter or Judge Eccleſiaſtical, any Juriſdiction to hold Plea of any Matter, Cauſe or Thing, being contrary or repugnant to or againſt the Effect, Intent or Meaning of the Statute of** Weſtminſter **Second, the fifth Chapter, the Statutes of** Articuli cleri, Circumſpecte agatis, Silva cædua, **the Treatiſe,** De regia prohibitione, **ne againſt the Statute of** Anno primo Edwardi tertii, **the tenth Chapter, or any of them, ne yet hold Plea in any Matter whereof the King's Court of Right ought to have Juriſdiction; any Thing therein contained to the contrary in any wiſe notwithſtanding.**

Eccleſiaſtical Courts to keep within their juſt Bounds, by 27 *H.* 8. *c.* 20.

In the 16 *Jac.* a *Modus* being ſued for in the Eccleſiaſtical Court, a Prohibition was granted, becauſe the Defendant there denied the *Modus*: And the Court ſaid that the *Modus Decimandi* muſt be ſued for in the Eccleſiaſtical Court as well as the very Tithe, 2 *R.* 3. 3. *a.* and if it be allowed between the Parties, they ſhall proceed there; but if the Cuſtom be denied, it muſt be tried at the Common Law; and if it be found for the Cuſtom, then a Conſultation muſt go, otherwiſe the Prohibition ſtandeth, *Trin.* 16 *Jac. Rot.* 3110. *Scot* v. *Wall*, *Hob.* 245; and the like was reſolved by the Court upon a Suit for a *Modus* by the Shock, and not by the Sheaf. *Hill.* 22 *Jac. B. R. Steward's* Caſe, *Noy* 81. *Hill.* 4 *Car. C. B. Hetley* 133. And in the 3 *Car.* when one libelled in the Eccleſiaſtical Court for Tithe of Fiſh, (which is due meerly by Cuſtom) and the Defendant pleaded, that Time out of Mind they had paid no Tithe of Fiſh; and a Prohibition being prayed, *Richardſon* replied, that it is meerly an accuſtomary Tithe, as Rabbets, *&c.* whereof no Tithes are due by the Law of the Land, ſee 1 *Keb.* 602, and that a Prohibition ſhall not be granted; yet the other Juſtices ſaid, a Prohibition ſhall be

Prohibition where the Party denied that *Modus* ſued for, *&c.*

Tithe for Fiſh, *&c.* due meerly by Cuſtom.

Cuſtoms for Tithes.

granted, becauſe the Cuſtom ought to be tried by the Common Law; and they made a Difference between *Modus Decimandi*, which is alſo cuſtomary where the Cuſtom only makes the Duty, and where there is a Tithe precedent due, and that *Modus* converts it into another Duty, there no Prohibition ſhall be granted, but it ſhall be tried in the Eccleſiaſtical Court whether there be ſuch *Modus Decimandi* or not, which Difference was agreed by *Twiſden* Juſtice, *Hill.* 20 & 21 *Car.* 2. in the Caſe of *Philips* v. *Clever*, 3 *Keb.* 452. But if a Parſon libel for a *Modus* to pay 3 *d.* and it be alledged that the *Modus* is but for 2 *d.* this ſhall be tried by the Common Law; but when the Cuſtom is tried, then they in the Eccleſiaſtical Court may proceed upon it. *Paſch.* 3 *Car. B. Anonymus*, *Hetley*, *p.* 13. And about the 3 *Car.* when a *Modus* to have Two Shillings in the Pound for every Houſe and Shop in the Town was ſued for in the Spiritual Court; a Prohibition being prayed, the Court ſaid, that a Parſon may ſue for a *Modus Decimandi* in the Eccleſiaſtical Court; but if it be denied, ſaid the Chief Juſtice and *Jones*, they cannot proceed, becauſe they cannot try the Matter of the Preſcription there; and if they proceed, a Prohibition lies: But in this Caſe no Prohibition was granted, becauſe the Defendant had only anſwered to the Cuſtom, *quod non Credit eſſev eram.* And (as *Dodderidge* ſaid) this is no Denial of the Preſcription, for that that ought to be done by Way of Allegation; and *Noy* ſaid, that their Form of anſwering to Articles, is (as before) *non Credit*, *&c.* but if the Defendant there will deny the Preſcription, he ought to come by Way of Allegation, and *Jones* accorded, *Clark* v. *Prowſe*, *B. R. Latch* 210. So when the Parſon of *B.* in *London* libelled in the Spiritual Court upon a Cuſtom, that if a Pariſhioner of *B.* dies in *B.* and is carried and buried in another Pariſh in *London*, there ought to be given to the Parſon thereof a Gown, Pulpit-Cloth, and a Pair of Gloves; 'twas held that a Prohibition lies to try this Cuſtom, if it be denied, becauſe a Cuſtom may be made in a ſhorter Time according to the Spiritual Law than at the Common Law. *Trin.* 15 *Car. B. R. Cooker* Parſon of St. *Thomas Apoſtles* and *Goale*, 2 *Roll's Abr.* 307. *nu.* So that by theſe laſt Caſes, a Parſon may only begin a Suit in the Eccleſiaſtical Court for a *Modus*, but not purſue it, or recover any Thing there, unleſs his Adverſary conſent to it; for that a Cuſtom *de modo Decimandi* is not of Eccleſiaſtical Juriſdiction, or Cognizance; that is, though a *Modus* may be ſued for there, yet they may not try it there: And if the Caſe be ſo, no one that claims a *Modus*, has any ſufficient Reaſon to begin in the Spiritual Court for it, becauſe (as is declared in the aforeſaid Caſes) when the Defendant ſhall by way of Allegation, either deny the *Modus* ſued for, or ſuggeſt another *Modus*, the Eccleſiaſtical Judge is bound to ceaſe his Proceedings; and if he do this, (as they ſay by their Law he ought to do, to avoid a Contempt) as no Inhibition lies upon an Appeal for the Plaintiff for this Cauſe, ſo no Prohibition lies for the Defendant; or if there did, he has no Reaſon to ſue for one, ſeeing the Plaintiff's Suit is at an End, and he has no Means to recover any Thing of him. Upon a Motion for a Prohibition, the Caſe was, the Defendant libelled in the Spiritual Court for Tithes of Faggots made of Loppings of Trees; and the Suggeſtion for a Prohibition was, that theſe Loppings were cut from the Stumps of Timber-Trees above the Growth of twenty Years. And it was alledged, that Sentence was given in the Spiritual Court, and therefore the Plaintiff comes here too late, to have a Prohibition. But *per Holt* C. J. the Sentence will not hinder the having a Prohibition in any Caſe, but in Caſe of Prohibitions grounded upon 23 *H.* 8. *c.* 9. for citing out of the

When after a Cuſtom tried, the Spiritual Court may proceed.

If the *Modus* be denied, Spiritual Court cannot proceed.

Denial ought to be by Way of Allegation.

Dioceſe. But becauſe the Plaintiff had not pleaded this Matter in the Spiritual Court, they denied the Prohibition, becauſe the Spiritual Court has general Juriſdiction of Tithes, and if any ſpecial Matter deprives them of their Juriſdiction, it muſt be pleaded there; and if it had been pleaded there, and Iſſue joined upon it, and upon the Trial it had been found not to be *Silva cædua*, it had been well; but if they had refuſed to admit the Plea, a Prohibition ſhould have been granted. 2 *Ld. Raym.* 835. *Dike* v. *Brown.*

Cuſtoms for Tithes.

But it is to be obſerved, that the firſt of theſe Caſes, in which a Power to try ſuch *Modus* is denied to Eccleſiaſtical Courts, in the 14 *Jac.* at the latter End of *Mich. Term*, and at the Beginning of the ſaid Term it was otherwiſe held in the ſame Court in *Reynolds* and *Newberry*'s Caſe, 1 *Roll's Rep.* 420, when *Mountague* was made Lord Chief Juſtice in the Room of *Coke*, (*viz.*) about Seven Years after the Debate was before the King and Council betwixt the Spiritual and Temporal Judges, and above Sixty Years after the laſt of the Statutes before-mentioned was made in favour of the Eccleſiaſtical Courts in this Point. And when the Debate was betwixt the Judges Spiritual and Temporal upon this Queſtion, Whether when a Suit is begun in the Spiritual Court for Tithes in Kind, and a *Modus Decimandi* is ſuggeſted, by which the Lands are diſcharged, a Prohibition lies to try the ſame at Common Law; it ſeems the *Civilians* had never known or heard of Prohibitions, when a Suit is begun for a *Modus*; for if otherwiſe, they would not have ſaid (as they did) that the Cuſtom *de Modo Decimandi* is of Eccleſiaſtical Juriſdiction and Conuſance, and ſhall be tried before the Eccleſiaſtical Judges, and argued from thence as from an unqueſtioned and granted Ground or Principle. And the Temporal Judges, if they had held and adjudged the contrary before, would not have anſwered by Way of Conceſſion (as *Coke* reports they did,) *viz.* that a Parſon, by Force of the Acts cited before, might ſue *pro modo Decimandi*, and compel the Defendant to yield as well the *Modus Decimandi*, as if the Suit were for the Tithes in Kind, and only denied the Conſequence the *Civilians* would draw from thence, ſaying, that this did not prove that if a Suit be for Tithes in Kind, which are extinct, and the Land diſcharged, that upon a Suggeſtion *de Modo Decimandi* a Prohibition ſhould not lie; but rather they would have replied, (as the late Caſes ſpeak) that a Cuſtom *De Modo Decimandi* is not of Eccleſiaſtical Cognizance, and that if they did try a *Modus* when denied, a Prohibition did lie. And what the Judges did declare upon ſo ſolemn an Occaſion, is much to be depended upon in judging what the Law then was, eſpecially when ſome of the Judges, who being eminent for their Learning in the Law, and Knowledge of the Practice of the Courts, if Prohibitions had been uſually granted, and ought to be, could not in ſo common a Caſe but know thereof, have gainſaid againſt the Intereſt of their Courts, and againſt the Opinion of others that did grant them, as *Dodderidge* and *Croke* in *Hardin* and *Goſlin*'s Caſe, 3 *Bulſt.* 241, and *Richardſon* in the *Anonymus* Caſe, *Hetley*, *p.* 13.

Obſervations upon the Cuſtom *de Modo Decimandi.*

Nor may it be ſaid, that theſe Judges by their Conceſſions did only intend, that a Parſon by Force of the ſaid Acts might ſue *pro Modo Decimandi*, but not that the Judge ſhould proceed in the Suit in caſe the *Modus* be denied; for firſt, 'tis granted by them that the Statutes before cited, in the Clauſe declaring that all manner of Tithes and other Church-Duties ſhall be ſued for in the Eccleſiaſtical Courts, do extend as well to a *Modus Decimandi* as to Tithes in Kind. And the Statute of 27 *H.* 8. ſaith, **That Tithes ſhall be paid according to the laudable Uſages and**

2d Obſervation from the *Modus* being denied.

Customs for Tithes.

and Customs of the Parish, and that for subtracting any of the said Tithes, Offerings or other Duties, the Parson may not only convent the Offender before the Ordinary, but also compel him to yield the said Duties, (that is, as the said Judges expounded the said Words,) as well *Modus Decimandi*, as the Tithes in Kind; and with that in Effect agrees the Statute of 32 *H.* 8. *c.* 7. So that what is enacted thereby, in their Judgments, extends also to a *Modus Decimandi*, as well as to Tithes in Kind; and 'tis plain that it doth so; for the Words thereof are, That all and singular the Tithes shall be paid according to the lawful Customs and Usages of the Parishes and Places where such Tithes or Duties shall grow, arise, come or be due, and that the Party grieved may convent the Person offending before the Ordinary, and also (which come close to this Doubt) that in every such Case or Matter or Suit, the same Ordinary, &c. (as the Words are) shall or may by Virtue of this Act proceed to the Examination, hearing and Determination of every such Cause or Matter ordinarily or summarily according to the Course and Process of the said Ecclesiastical Laws, and thereupon may give Sentence accordingly. And by Statute of 2 & 3 *Ed.* 6. 'tis said, as to all manner of Predial Tithes, That they shall be paid in such Manner, &c. as of Custom and of Right they ought to have been paid. And after, in another Branch thereof, 'tis enacted, That if any Person do subtract or withdraw any manner of Tithes, Obventions, Profits, Commodities or other Duties before-mentioned, or any Part of them, which (say the aforesaid Judges) extends to Custom of Tithing, that is *Modus Decimandi* mentioned in this Act, *&c.* contrary to the true Meaning of this Act or any other Act heretofore made, viz. 27 & 32 H. 8. that then the Party so subtracting shall be convented and sued in the Ecclesiastical Court, &c. to the Intent the King's Judge Ecclesiastical shall and may then and there hear and determine the same according to the King's Ecclesiastical Laws, (*viz.*) the same Suit, as well for a *Modus*, as Tithes in Kind; for by the said Judges these Clauses in these Statutes intirely extend as much to the one as to the other.

Customs and Prescriptions tried in the Spiritual Court.

When a Parson libelled in the Spiritual Court for a Way, and it was suggested that the Libel set forth, That by the Custom of the County of *Devon*, when the Grass is cut and put into Grass-Cocks, the Tenth Cock ought to be assigned to the Parson for his Tithe, and that he might by the Custom make it into Hay upon the Land of the Party, and that he was hindred by the Defendant, the Owner of the Land, of his Way to come to make it into Hay; the Court adjudged that no Prohibition did lie, for that it is an Accessary to the Thing that is Spiritual, and *Fitz. Nat. Br.* is, that the Parson may have his Action upon the Case for the Disturbance. But in this Case it was alledged further for a Prohibition, that the Custom of the County is, that the Parson shall not make his Tithe-Hay upon the Land, but carry it away presently, and by this Libel in the Spiritual Court they would alter the Custom, which is to be tried at the Common Law; but notwithstanding the Court would not grant a Prohibition. *Mich.* 14 *Jac. B. R. Reynolds* v. *Newberry*, 1 *Roll's Rep.* 420. Now this Case seems to prove that when the Ecclesiastical Court hath Jurisdiction of the Principal, the Accessory, though it be a Prescription, may there be sued for, and if denied shall be tried there; it being granted in the Books, that not only Suits for stopping of Ways to carry Tithes may be in Court Christian, *Trin.* 43 *Eliz. Blackwell's* Case, 3 *Cro.* 843. *Mich.* 14 *Jac. B. R. Reynolds* v. *Newberry*, *Roll's Rep.* 420; but also

Customs of Church-Duties.

Of Ways.

if the Queſtion be, which of Two Ways is the uſual and accuſtomary Way? that ſhall be tried there. *Hill.* 6 *Car. B. R. Halſey* v. *Halſey*, *Jones* 230. Which alſo proves, that a Preſcription upon which a Libel may be grounded in the Eccleſiaſtical Court, may alſo be tried there, for to try whether the Defendant hath ſtop'd the right Ways, or which of Two Ways is the accuſtomary Way, is to try the Cuſtom or Preſcription, for they can go upon nothing but the Examination and Proof of long Uſage, which makes the Preſcription that gives the Right, and accordingly is the Sentence to be given. See *Chap.* 57.

Concerning a Cuſtom to have ſuch Things for a Mortuary.

Beſides in the Statute of *Circumſpecte Agatis* made 13 *Ed.* 1. where it is determined that ſeveral Things are meerly Spiritual, and are to be demanded in the Spiritual Court, and the Spiritual Judge ſhall have Power to take Knowledge thereof, notwithſtanding the King's Prohibition: One Article is, **If a Parſon demand Mortuaries in a Place where a Mortuary hath been uſed to be given by Force of this Article,** (and before the Statute of 21 *H.* 8. *c.* 6. was made) if Doubt did ariſe, whether there was a Cuſtom in a Place to have ſuch Things for a Mortuary, this Cuſtom was triable in the Spiritual Court. *F. N. B.* 51 & 53. 10 *H.* 4. 2. 13 *R.* 1. 2. *Juriſdiction* 20. & *Kelway*, *fol.* 110. *b.* and that this was the Law before the ſaid Statute of 21 *H.* 8. was granted on all Hands, and by *Jones* and *Whitlock* held to be ſo now notwithſtanding the ſaid Statute. *Mich.* 7 *Car. B. R. Margaret Hind* v. *Epiſcopum Ceſtriæ*, 1 *Cro.* 237. See *Articuli Cleri*, 9 *Ed.* 2. *c.* 1. *Trin.* 17 *Car.* 2. *Mark* v. *Guilbert*, 1 *Sid.* 263, the ſame Caſe, 1 *Keb.* 919. & *Mich.* 24 *Car.* 2. *John* v. *Lloyd*, 3 *Keb.* 75. 2 *Keb.* 835, 867.

Concerning the Demand of a Penſion.

Another Article in the ſaid Statute of *Circumſpecte Agatis*, is, **That if a Prelate of a Church or Patron demands a Penſion due to him, all ſuch Demands are to be made in the Spiritual Court**; and accordingly it hath been held, that though the Libel ſhews, that *tam per realem compoſitionem quam per antiquam & laudabilem conſuetudinem ipſe & Prædeceſſores ſui habuerunt & habere conſueverunt annualem penſionem, &c.* And ſo as was urged, the Penſion was demanded upon Temporal Grounds, *viz.* Preſcription, and real Compoſition; yet *Coke* and the reſt of the Juſtices held, that a Prohibition ought not to be granted. *Trin.* 10 *Jac. C. B. Sprat* v. *Nicholſon*, *Godbolt*. *Trin.* 41 *Eliz. B. R. Collier's* Caſe, 3 *Cro.* 675. See 11 *H.* 4. 85. *F. N. B.* 41. *Paſch.* 35 *Eliz. Croker* and *York* v. *Dormer*, *Popham's Rep.* 23. *Goodwin* v. *The Dean and Chapter of Wells*, *Noy* 16. *Bulbrook* v. *Brigs*, 2 *Cro.* 217. And a Prohibition was denied, for that a Penſion is a Spiritual Thing recoverable in the Spiritual Court; and yet a Title to a Penſion, if ſuable at all in the Spiritual Court, muſt depend upon Preſcription; and if denied, the Preſcription muſt be tried there before the Penſion can be recovered. And ſo upon a Motion for a Prohibition to the Spiritual Court in a Suit there for a Penſion, it was held by the Court, that the Law is according to *F. N. B.* 51. *b.* that if the Penſion be by Preſcription, 'tis in the Election of the Party to ſue for it in the Spiritual Court as for a Penſion, or at the Common Law as for an Annuity. And it was further ſaid, that the Opinion of the Lord *Coke*, 2 *Inſt.* 491, 492, is not warranted by the Books by him there cited; but *Windham* and *Twiſden* Juſtices ſaid, that in the Time of King *James* it was adjudged that for a Penſion by Preſcription, Remedy ſhall be only at the Common Law, therefore the Reporter makes a *Quære* of it. *Trin.* 15 *Car.* 2. 1 *Sid.* 146. But afterwards it was reſolved by *Keeling* and *Twiſden* Juſtices, that Penſions by Preſcription may be ſued for in the Spiritual Court at the Election of

Suits between Parsons, &c.

the Party; and although in the Case then before them the Prescription was denied, yet would they grant no Prohibition. *Mich.* 26 *Car.* 2. *Smith* v. *Bishop of Lincoln*, 2 *Keb.* 439, 802, and 1 *Vent.* 3. But afterwards it was held, that although a Suit may be in the Spiritual Court for a Pension, yet if it be denied to be Time out of Mind, *&c.* a Prohibition shall go, for that the Prescription shall be tried by the Temporal Courts. *Mich.* 26 *Car.* 2. 1 *Vent.* 265. See the same Book 120, and 3 *Keb.* 562. See before *Chap.* 53.

That all Prescriptions are not to be tried in the Temporal Courts.

By all which it appears that Prescriptions in all Cases are not to be tried in the Temporal Courts, in regard that by the said Statute of *Circumspecte Agatis*, Prescriptions for the Payment of Mortuaries and Pensions are triable and determinable in the Spiritual Court; and this hath been owned, and allowed by several Judgments in the Temporal Courts, and Opinions of the Judges; it will be difficult therefore to apprehend the Reason why a *Modus Decimandi* may not be tried also in the Spiritual Court, especially there being this Article in the said Statute of *Circumspecte Agatis*, **That if a Parson demand of his Parishioners Oblations or Tithes due and accustomed, the Spiritual Judge shall have Power to take knowledge notwithstanding the King's Prohibition.** And by *Coke* and the other Justices, *Mich.* 7 *Jac.* in the Case *de Modo Decimandi*, this Statute is acknowledged and expounded to give Authority to sue for a *Modus Decimandi* in the Ecclesiastical Courts, and by the said Act their Proceedings are not to be stopt by a Prohibition to bring the Trial of the *Modus* to the Common Law. And *Keeling* and *Twisden* Justices would not grant a Prohibition in a Suit for a *Modus* where the *Modus* was denied. *Smith* v. *Bishop of Lincoln*, 2 *Keb.* 439, 802. 1 *Vent.* 3. Yet afterwards we find the Court of Opinion, that wherever the Custom is denied, a Prohibition shall go. 3 *Keb.* 523, 527, same Case, 1 *Vent.* 274. See 1 *Vent.* 120, 265. 2 *Keb.* 41, and 3 *Keb.* 562.

Concerning Suits between Two Spiritual Persons for Tithes.

And it is further to be observed, that in the same Article concerning Tithes in the said Statute of *Circumspecte Agatis*, it is ordained and established, **That if any Parson doth sue against another Parson for Tithes greater or smaller, so that the Fourth Part of the Value of the Benefice be not demanded, the Spiritual Judge shall have Power to take knowledge notwithstanding the King's Prohibition;** and with this agreeth the 38 *Ed.* 3. 6, where it is said, that where the Right of Tithes comes in Debate between Two Spiritual Persons, the one claiming the Tithes as of common Right within his Parish, and the other claiming to be discharged by real Composition, the Ecclesiastical Court shall have Jurisdiction of it: Which Case was vouched by *Bacon*, and agreed by *Coke*, *Mich.* 7 *Jac.* in the Case *de Modo Decimandi*. *Coke* 13 *Rep.* 39. And in an Action of Trespass by one Parson against another Parson, if the Defendant claim as Tithes appertaining to his Parsonage, the Court shall be ousted of Jurisdiction; for the Debate being between Two Parsons, it shall be intended that it is for the Right of Tithes. 38 *Ed.* 3. 5. *b.* 2 *Roll's Abr.* 308. *nu.* 2. And *Richardson* said, the Books make a Doubt where the Suit is between the Servant of the Vicar and the Parson, but it seemed to him to be all one. *Mich.* 3 *Car. C. B. Gomin*'s Case, *Hetley* 60. So when a Vicar sued for Tithes against a Parson appropriate (who was a Lay-man) in the Ecclesiastical Court for the Tithes of Saffron, and alledged that Time out of Memory, *&c.* the Vicars have had Tithes of Saffron within that Parish: And the Parson pleaded, that he and his Predecessors had used to have Tithes of Hay and Corn of this Land till within 40 Years last past, when it was sowed with

So upon an Action of Trespass between Two Parsons.

Between Vicar and Parson no Prohibition.

Saffron; it was ſaid that no Prohibition ſhall be granted to try this Cuſtom, but it ſhall be tried in the Eccleſiaſtical Court; for that it is between the Parſon and the Vicar, although the Farmer was made Party, for they may well judge of it, and of the Compoſition; and this very Point was adjudged between *Hunt* and *Buſh*, 30 *Eliz.* and that the Party ſhould have a Conſultation. *Hill.* 43 *Eliz. Beneſield* v. *Feek*, *Gouldſb.* 149. 2 *Roll's Abr.* 310. *nu.* 5. So when the Parſon of *Great Fakenham* brought an Action of Treſpaſs againſt the Parſon of *Harmington*; and the Queſtion was, If the Parſon of one Pariſh claim by Preſcription a Portion of Tithes out of the Pariſh of another, if the Spiritual Court ſhall have Juriſdiction for the Trial of it? And the Opinion of the whole Court was, that it ſhould, becauſe that the Matter is betwixt Two Spiritual Perſons, and concerning the Right of Tithes. *Paſch.* 29 *Eliz. C. B. The Parſon of Fakenham*'s Caſe, 1 *Leon* 59. *Trin.* 11 *Jac. B. R.* and *per Cur.* 2 *Roll's Abr.* 310. *nu.* 2. *vide* 35 *H.* 6. 39, and *Br. Juriſdict.* 3. Where in Treſpaſs for taking of Tithes, the Defendant claimed them as Parſon and within his Pariſh, and the Plaintiff preſcribed that he and his Predeceſſors, Vicars there, have had the Tithes of that Place Time out of Mind, *&c.* And the Opinion of the Court was, that the Debate being between the Vicar and the Parſon, who are Spiritual Perſons, that may try the Right of Tithes, therefore the Temporal Court ſhall be ouſted of the Juriſdiction. See alſo 6 *Ed.* 4. 3. 22 *Ed.* 4. 23, 24. 31 *H.* 6. 11, between a Parſon and the Servant of another Parſon, *&* 7 *H.* 7. 35. 35 *H.* 6. 39. *b.* between a Parſon and a Parſon's Tenant in Treſpaſs, where the Lay-man ſet forth his Title as Tenant, and pleaded to the Juriſdiction of the Court: And by *Gaſcoign*, the Suit ſhall be in the Spiritual Court, becauſe that the Right of Tithes ſhall be tried only in the Spiritual Court betwixt Spiritual Perſons, ſee *Mich.* 11 *Jac. B. R.* 2 *Bulſt.* 157. *Mich.* 5 *Jac.* 2 *Roll's Abr.* 310. *nu.* 1. *Trin.* 11 *Jac. B. R. per Cur' ibidem, nu.* 2, and *Mich.* 14 *Jac.* between *Adams* and Sir *Thomas Vavaſour* v. *Hubertſon*, *ibid. nu.* 4. *Mich.* 28 *&* 29 *Eliz.* between the Vicar of *Pankridge* and *Buſſey*, *ibid. nu.* 6, and *Godbolt*, *Trin.* 31 *Eliz. Botham* v. *Cooper*, 3 *Cro.* 136. *Mich.* 29 *&* 30 *Eliz. B. R. Savell* v. *Wood*, 3 *Cro.* 71, and 1 *Leon.* 94. *Trin.* 30 *Eliz. B. R. Gatehouſe* and *Penn*'s Caſe, 1 *Leon.* 128. *Paſch.* 2 *Jac. C. B. Randal* v. *Knowles*, *Noy* 147. *Mich.* 35 *&* 36 *Eliz. B. R. Sherborn*'s Caſe, 3 *Cro.* 306.

Suits between Parſons, &c.

Now in regard that the Words of the ſaid Statute of *Circumſpecte Agatis* as to this Point only are, **If any Parſon doth ſue againſt another Parſon for Tithes greater or ſmaller, ſo that the Fourth Part of the Value of the Benefice be not demanded, the Spiritual Judge ſhall have Power,** &c. and ſo only gives the Spiritual Court the Cognizance of the Right of Tithes betwixt Spiritual Perſons, not of Preſcriptions expreſly; and yet by the Judgments relating to this Matter both Antient and Modern, the Spiritual Courts have been allowed to try, and finally to determine the Right of Tithes between Spiritual Perſons, though they ground their Titles upon Preſcription (as for the moſt part they muſt) and ſo to try the Preſcription; but it is ſaid by *Coke*, that the Reaſon why Prohibitions are not granted in Suits between Spiritual Perſons, as Parſon and Vicar, is becauſe the *Modus* ſuggeſted to be paid comes not in Queſtion, but only the Right of Tithes to which of the Spiritual Perſons they do belong. *Draiton* and *Cotterel* v. *Smith*, 2 *Bulſt.* 158. But other Words in the ſame Statute are, **If a Parſon demands of his Pariſhioner Oblations or Tithes due and accuſtomed,** (that is due in Kind or by Cuſtom, as the Judges, I have ſhewed, expounded them) **the Spiritual**

Wherefore Prohibitions are not granted in Suits between Spiritual Perſons.

Jurisdiction of Spiritual Courts, &c.

Spiritual Judge shall have Power to take Knowledge, &c. and so ſeems more expreſly to give Trial of a Cuſtom or Preſcription for Tithes, *viz.* a *Modus Decimandi* to the Eccleſiaſtical Judges, than the former Words do, which give the Trial of the Right of Tithes to that Court betwixt Spiritual Men: Yet notwithſtanding all that has been before ſaid, and the Caſes cited to the contrary, I conceive that the Law and Practice is ſettled in this Point, that if a *Modus Decimandi* be ſued for in the Eccleſiaſtical Courts, a Prohibition lies to ſtop the Trial of it, if the *Modus* be denied. The Reaſon given is, not upon the Account that the Spiritual Court wants Juriſdiction, but in regard of the Notion their Law has of Cuſtom different from ours: And being that every *Modus* is due by Cuſtom, 'tis the Common Law only that can determine what Time and Uſage with us ſhall be ſufficient to create ſuch Cuſtom; that is, Time beyond all Memory to the contrary; whereas by their Law ſometimes 10 Years, ſometimes 20, they will adjudge ſufficient to create a Cuſtom, as is ſaid 3 *Keb.* 527, in the Caſe of *Andrews* v. *Simſon*; and Prohibitions in ſuch Caſes are not granted, for that the Spiritual Court hath not a Juriſdiction of the Matter, but in reſpect of the Trial which is to be by our Law only; and if upon the Trial it be found for the *Modus*, the Proceedings ſhall go on in the Spiritual Court; if againſt the *Modus*, the Prohibition ſhall ſtand. See the aforeſaid Caſe of *Andrews* v. *Simpſon*, 3 *Keb.* 523, 527.

CHAP. LVII.

Where, and by what Plea the Spiritual Court ſhall be ouſted of Juriſdiction, and upon what Suggeſtions Prohibitions are granted.

Tho' a Parſon may ſue for a *Modus*, &c. originally.

ALthough it may be granted, that a Parſon may ſue in the Eccleſiaſtical Court for a *Modus Decimandi* originally, or for Money or other Thing due and payable by Cuſtom in lieu of Tithes, or otherwiſe for Things not in their Nature Titheable; and alſo if it be admitted that a *Modus* may be proved and examined there, when the Libel is grounded thereupon; yet if the Proprietor of the Tithes of a Pariſh doth ſue in the Spiritual Court for Tithes in Kind, of Lands diſcharged thereof by Preſcription, &c. and the Defendant doth alledge the Cuſtom or Preſcription *de Modo Decimandi* in Bar, that Cuſtom or Preſcription ſhall not be tried and determined before the Judge Eccleſiaſtical, but a Prohibition lieth to try the ſame at the Common Law, for that the Suit is not originally for the *Modus* (as it might be), but for the Tithes in Kind of Lands, by a *Modus* or Preſcription diſcharged of the Payment of Tithes; and in ſuch Caſe to ſue for Tithes in their Kind is prohibited by this Proviſo in the Statute of 2 & 3 *Ed.* 6. *c.* 13. **Provided always, and be it enacted by the Authority aforeſaid, That no Perſon ſhall be ſued, or**

otherwiſe compelled to yield, give or pay any manner of Tithes for any Manors, Lands, Tenements or Hereditaments, which by the Laws and Statutes of this Realm, or by any Privilege or Preſcription, are not chargeable with the Payment of any ſuch Tithes, or that be diſcharged by any Compoſition real.

Jurisdiction of Spiritual Courts, &c.

And always when an Act of Parliament commands or prohibits any Court, be it Temporal or Spiritual, if the Statute be not obeyed, a Prohibition lieth, of which the Judges gave ſeveral Inſtances. *Trin.* 7 *Jac.* in the Caſe *de Modo Decimandi*, 13 *Coke's Rep.* 12 & 37, and by *Doderidge* in *Harding* and *Goſling*'s Caſe, 3 *Bulſt.* 241. So if a Biſhop or his Farmer (who ſhall alſo have the Privilege) doth ſuggeſt, that a Suit is in the Eccleſiaſtical Court for Tithes in Kind, where the Lands are diſcharged by a Preſcription *de Non Decimando*, a Prohibition lies by the ſaid Prohibitory Clauſe. *Paſch.* 38 *Eliz. The Biſhop of Wincheſter*'s Caſe, 2 *Coke* 44.

Yet Prohibition upon a Statute commanding or prohibiting.

But though it be ſaid, that where the original Suit is for Tithes in Kind of ſuch Lands, which by Act of Parliament, Preſcription or Compoſition real are diſcharged of Tithes abſolutely, a Prohibition lies by Force of the ſaid Prohibitory Clauſe in the Stat. 2 *Ed.* 6. yet from thence it ſeems not to follow, that if the Tithes in Kind be ſued for of Lands which be not diſcharged of Tithes by any of the aforeſaid Means, and the Defendant doth alledge a *Modus Decimandi*, which relates to the Manner or Circumſtances of paying ſome particular Tithes of ſuch Lands only, that a Prohibition lies to try ſuch *Modus* at the Common Law; for in the firſt Caſe the Lands themſelves are diſcharged of the Payment of Tithes, and ſo the original Suit is prohibited by the Clauſe of the ſaid Statute 2 *Ed.* 6. but in the later, the Lands are titheable, and therefore the original Suit for the Tithes in Kind is warranted (as hath been ſhewed) by the before-mentioned Statutes: And alſo in the former Caſe, the Plea of a *Modus Decimandi* cannot be ſaid Acceſſory to the Right of Tithes upon the Reaſons given by the Judges in the Caſe *de Modo Decimandi*, *viz.* becauſe the Tithes are extinct, and the *Modus* is the only Thing with which the Land is chargeable; and therefore by the ſaid Clauſe in the Statute, which is in the Negative, the Principal, *viz.* the Tithes, are not to be ſued for there; and the Rule, That when the Eccleſiaſtical Court hath Juriſdiction of the Principal, *&c.* cannot hold Place in ſuch Caſe: But in the later Caſe, the *Modus* is but Acceſſary to the Right of Tithes, and the Reaſons given by the Judges in the Caſe *de Modo Decimandi* are not applicable to it; for here, the Tithes in Kind of the Land are not abſolutely extinct; for we ſuppoſe the Caſe to be, that when the Lands are ſown, Tithes of Corn are to be paid in Kind, when mowed, of Hay, when depaſtured, of the Stock; yet for ſome of theſe Tithes, a *Modus* as to the Manner of Tithing is ſuggeſted, not for the reſt, as that the Eighth Sheaf, Shock or Cock, ſhall be paid inſtead of the Tenth; that the Tenth of the Cheeſe made betwixt certain Days, ſhall be paid for the Milk of Cows; 2 *d.* for a Lamb, Pig, *&c.* In theſe Caſes the Lands are not diſcharged of Tithes in Kind, but only a Recompence comes in the Place of a particular Tithe by Preſcription, or a Preſcription doth direct the Circumſtances or Manner of paying the Tithe in Kind, as that the Tithe of young Beaſts ſhall be paid at a certain Age, though uncapable of living then without a Dam, *&c.* Now in theſe Caſes, when the Tithes of Land are not extinct, but the Lands are chargeable therewith, the Caſe ſeems to be out of the Prohibitory Clauſe in the Statute, and the Principal, (*viz.*) the Right of Tithes, remains of Eccleſiaſtical Cognizance, and that

Tho' a Prohibition lies where Lands are abſolutely diſcharged. yet *non ſequitur*, *&c.*

That where the Tithes are extinct, the *Modus* cannot be acceſſory.

Jurisdiction of Spiritual Courts, &c.

The *Modus* is dependant and acceſſory.

by Force of the ſame Statute; and ſo the *Modus* that comes in by Allegation, and is dependant thereupon, is acceſſory thereunto; and being ſo acceſſory, is alſo of the ſame Juriſdiction: And this was not denied to be the Rule of Law by the Temporal Judges, when 'twas argued by the *Civilians* in the Caſe of Lands abſolutely diſcharged of Tithes in Kind, and indeavoured to be proved by *Bacon* Solicitor General, (who was on the Part of the Clergy) from ſeveral Authorities, but only it did not come up to the Caſe then under Debate; in which, by reaſon of the ſaid Clauſe, they had not Cognizance of the Right of Tithes in Kind, but only of the *Modus Decimandi*. And the Authorities vouched by *Bacon* to prove the ſaid Rule were theſe; 1 *Ric.* 3. 4, the Opinion of *Huſſey*, that when the Original ought to begin in the Spiritual Court, and afterwards a Thing cometh in Iſſue which is triable in our Law, yet it ſhall be tried by their Law: As if a Man ſueth for a Horſe deviſed to him, and the Defendant ſaith, that the Deviſor gave to him the ſaid Horſe, the ſame ſhall be tried there. And the *Regiſter* 57 & 58, If a Man be condemned in Expences in the Spiritual Court for laying violent Hands upon a Clerk, and afterwards the Defendant pays the Coſts, and gets an Acquittance, and yet the Plaintiff ſueth him againſt the Acquittance for the Coſts, and he obtains a Prohibition; for that Acquittances and Deeds are to be determined by our Law; yet he ſhall have a Conſultation, becauſe the Principal belongeth to them, (but they muſt proceed according to the Rules of the Common Law;) 38 *Ed.* 3. 5. Right of Tithes between Two Spiritual Perſons ſhall be determined in the Eccleſiaſtical Court; and 38 *Ed.* 3. 6,

Upon Rights of Tithes between Spiritual Perſons.

where the Right of Tithes comes in Debate between Two Spiritual Perſons, the one claiming the Tithes as of common Right within his Pariſh, and the other claiming to be diſcharged by real Compoſition, the Eccleſiaſtical Court ſhall have Juriſdiction of it; to which may be added ſome modern Caſes, as if a Suit be in the Spiritual Court for a *Modus Decimandi*, and the Defendant plead Payment, this ſhall be tried there, (they allowing ſuch Proof of the Payment as is ſufficient at Common Law) for that the original Suit was well commenced there. *Mich.* 14 *Jac. B. R. Goſling* and *Harding*, *per Cur'*. *Hob.* 314. 2 *Roll's Abr.* 305. So if a Man ſue for a Legacy in the Spiritual Court, and the Defendant pleads a Releaſe in Bar, and the Plaintiff denies it, this ſhall be tried there, and no Prohibition ſhall be granted, for that this is a Matter ariſing from an original Cauſe of which they have the Juriſdiction. *Mich.* 15 *Jac. C. B.* between *Percher* and *Wheeble*, *per Curiam*. *Hob.* 255. *Anonymus*. 2 *Roll's Abr.* 307. *nu.* 14. So it is, if Payment be pleaded in a Suit in the Eccleſiaſtical Court whereof they have original Cognizance. 12 *Jac. B. R.* 1 *Roll's Rep.* 12. & 2 *Abr.* 305, 306. So if an Adminiſtrator ſue for a Legacy due to his Inteſtate in the Spiritual Court, and the Defendant pleads the Releaſe of the Inteſtate in Bar, and the Plaintiff will avoid it, for that his Inteſtate was an Ideot, this Ideocy ſhall be tried there, and no Prohibition ſhall be granted, for that they have Juriſdiction of the original Matter. *Mich.* 15 *Jac. Percher* v. *Wheeble*, 2 *Roll's Abr.* 307. *nu.* 15.

Simoniacal Contract.

Or if a Parſon ſues in the Eccleſiaſtical Court, and the Defendant there pleads that the Plaintiff was preſented upon a Simoniacal Contract againſt the Statute of 31 *Eliz.* this ſhall be tried there, for that they have Juriſdiction of the original Matter. *Mich.* 8 *Jac. C. B. Penn*'s Caſe, 2 *Roll's Abr.* 307. *nu.* 16.

When they may try the Acceſſory.

To all which I will add Two other Judgments reported by *Coke*, which ſeem to favour this Opinion, that the Spiritual Court having Juriſdiction

riſdiction of the Principal, ought not to be prohibited in judging the Acceſſory, though the Acceſſory is of itſelf beyond Queſtion of Temporal Cognizance. Jurisdiction of Spiritual Courts, &c.

The former of which is *Robert*'s Caſe, *Mich.* 8 *Jac.* which is as followeth: A Prohibition had been granted in a Caſe of Subſtraction of Tithes, upon Surmiſe, that the Plaintiff (being Defendant in the Spiritual Court) had but one Witneſs to prove in that Court his Demiſe, which that Court would not allow for Proof, for that *ſingularis Teſtis* is not allowable by their Law. And upon Conſideration and Sight of a Prohibition granted in the ſame Cauſe, in *Hill.* 3 *Eliz. in Banco Regis*, it was reſolved by *Coke* Chief Juſtice & *totam Curiam*, that a Conſultation ſhould be granted, and that for divers Cauſes. *Firſt*, It appeareth by the *Regiſter*, *fol.* 15, that it is a Rule, *Quod non eſt conſonum rationi quod Cognitio Acceſſoriæ in Curia Chriſtianitatis impediatur ubi cognitio Cauſæ Principalis ad forum Eccleſiaſticum noſcitur pertinere*; and with this agrees 1 *R.* 1. 3, 4. *Secondly*, If ſuch Surmiſe ſhall be allowed, then in every Caſe for meer Delay ſuch a Surmiſe may be made; for when the Defendant in the Spiritual Court ſhall ſurmiſe that he hath but One Witneſs, the Plaintiff there cannot deny it, and ſay, that he hath Two or more, for then he affirms Matter againſt himſelf, and when the Spiritual Court hath Juriſdiction of the principal Cauſe they determine the Acceſſory. But it was objected, That if *A.* claiming by a Leaſe from *B.* of a Rectory, libels for Subſtraction of Tithes, and the Defendant pleads a former Leaſe made by *B.* to *C.* and the Defendant hath but one Witneſs in the Caſe to prove the former Leaſe; if no Prohibition ſhall be granted, the Defendant ſhall be charged; and if *C.* ſue him upon the Statute of 2 *Ed.* 6. at the Common Law, the Teſtimony of One Witneſs only will there be ſufficient, and ſo he ſhall be twice charged. To which it was anſwered, That firſt the Fault was the Defendant's, that he would not ſet forth his Tithes, for then he ſhall not be charged whoever takes them. But in ſuch a Caſe, thoſe in the Eccleſiaſtical Court will upon One good Witneſs and any concurrent vehement Preſumption, as Poſſeſſion or the like, allow of ſuch a Proof; and the Teſtimony of One Witneſs in our Law is no concluſive Evidence, but ought to be left to the Conſcience of the Jury, and ſo the Validity or Invalidity of Proof of Matters of Fact ſhall be left to them. But if a Queſtion at the Common Law ariſe from the Party upon the Conſtruction of a Statute, or the like, and thoſe of the Eccleſiaſtical Court will take upon them to judge of it againſt the Rule of Law; there, upon ſpecial Surmiſe of it, and upon the Shewing of the Anſwer or other Pleadings of the Parties, by which it appears to the Court that ſuch Surmiſe is a good Ground for a Prohibition, it ſhall be granted; for Matter in Law ariſing upon Eſtates or Intereſts created by the Common Law, and Conſtruction of Statutes, ought to be made according to the Rules of Common Law, & *non debet trahi ad aliud examen.*

(1.) *Robert*'s Caſe.

But if they will proceed upon the Conſtruction of a Statute, &c.

The other Judgment that proves, that the Acceſſory is to be tried in the Eccleſiaſtical Court, when it hath Juriſdiction of the Principal, was vouched by *Coke*, and reported by him in the ſaid Caſe of *Roberts*; which is this. *Paſch.* 35 *Eliz.* in *B. R. Fuller* brought a Prohibition againſt *Clements* and *Wiſkard*, and *Fuller* counted that he himſelf was Owner of the Rectory of *A.* and libelled in the Spiritual Court againſt *Clements* for Subſtraction of Tithes, pendant which Suit the ſaid *Wiſkard* intervening *pro intereſſe ſuo* made theſe Allegations againſt the ſaid *Fuller*, That the ſaid Rectory was impropriate to the Monaſtery of *Wendling*, and granted by Queen *Elizabeth* to *M.* and *Hall*, who infeoffed *Bozome*, who

2. *Fuller*'s Caſe vouched.

Jurisdiction of Spiritual Courts, &c.

who let it to *Wiſkard* for Forty Years, and proved theſe Allegations by Witneſſes, and had Sentence againſt *Fuller*, who was condemned in Coſts Eight Pounds and Ten Shillings to *Clements*, and Thirteen Pounds and Six Shillings to *Wiſkard*; and after *Fuller* did appeal to the Court of the *Arches*, and there *Fuller* claimed the ſaid Rectory by reaſon that *Hall* was ſeiſed of it, and by his Deed did give and grant the ſaid Rectory, and all Lands and Tithes to it appertaining, to Sir *Edward Cleve* before the Feoffment ſuppoſed to be made to *Bozome*, and that Sir *Edward Cleve* by his Deed did infeoff *Fuller*, and although that he offered to prove the Delivery of the Deed of the ſaid Feoffment made to Sir *Edward Cleve* by one ſole Witneſs, the Eccleſiaſtical Court would not allow it, without producing another Witneſs. And *Fuller* further ſaid, that although he had alſo alledged there, that theſe were Matters determinable at Common Law, notwithſtanding they gave Sentence. The Defendants to have a Conſultation pleaded, that *Fuller* in the ſaid Court of the *Arches* proved the Delivery of the Deed aforeſaid by Sir *Edward Cleve* and *Mouſe*, but could not prove Livery and Seiſin according to the Deed, and for this Cauſe Sentence was given, without that, that the Judges of the *Arches* would not admit of the ſaid Proof, unleſs he proved the Deed by other Witneſſes; upon which *Fuller* demurred in Law: And it was objected by the Counſel of *Fuller*,

That the Court would not allow One Witneſs, &c.

1. Argument for Trial at Law, as for an Inheritance.

1. That *Wiſkard* (who is a meer Stranger to the Suit, and who comes in *pro intereſſe ſuo* in the ſaid Rectory) pleads Matter meerly determinable at the Common Law, *ſcilicet*, Letters Patent, Feoffment and Leaſe for Years; and on the other Part, *Fuller* claims an Eſtate in the ſaid Rectory by Conveyance at the Common Law. And now the Queſtion in the Eccleſiaſtical Court being only who hath the beſt Eſtate in the ſaid Rectory by the Common Law, this ought to be tried by the Common Law, and not in the Eccleſiaſtical Court; for this is the Birthright of the Subject to have his Inheritance and Freehold tried and determined by the Common Law, for the Civil Law differs much in the Trial of Inheritances.

2. Concerning Livery.

2. It was objected, That all Matters in Law ought to be determined by the Judges of the Law; and in this Caſe Matter of Law ariſing, (*ſcil.*) If a Man hath a Rectory impropriate which conſiſts in Glebe and Tithes, and by his Deed gives and grants the ſaid Rectory, and all Lands and Tithes any ways belonging or appertaining to it, to another and his Heirs, and no Livery is made; in this Caſe, whether the Tithes ſhall paſs or no, (for the Tithes may paſs without any Livery) this Queſtion is not fit to be determined by the Eccleſiaſtical Judges, but by the Judges of the Common Law; *Quod quiſque novit in hoc ſe exerceat.*

3. That all the Allegations were Temporal.

3. It was objected, That *Wiſkard* was a meer Stranger to the Suit, and all his Allegation is Temporal, and for that, it is a ſtronger Caſe to maintain a Prohibition, foraſmuch as betwixt him and *Fuller* nothing is in Queſtion, but to whom the Inheritance of the Rectory belongs; but *Clements*, who is ſued for Subſtraction of Tithes, hath greater Colour in his Defence, being lawfully ſued in the Eccleſiaſtical Court; but all his Allegations, as hath been ſaid, is Temporal.

4. That *Fuller* had but One Witneſs.

It was objected, That *Fuller* had but One Witneſs to prove the Delivery of the Deed, and in the Eccleſiaſtical Law *unus Teſtis eſt nullus Teſtis*; for all which Cauſes it was prayed that Prohibition may ſtand, and that no Conſultation may be granted.

To which it was anſwered and reſolved by Sir *Chriſtopher Wray* Chief Juſtice, and *per Curiam totam*,

{1.} The Reſolution of the Court.

As to the firſt Objection: That foraſmuch as the Original belongs to the Eccleſiaſtical Court, the Determination of all that which depends

upon it belongs to the Judges of the ſame Court, although that the Matter be triable by the Common Law; but where the original Matter belongs to the Common Law, and there commenced, and Iſſue be taken upon Matter triable by the Eccleſiaſtical Law, there the Judges of our Law ſhall write to the Judges of the Eccleſiaſtical Court to try it, and to certify, *&c.* And the Reaſon of this Diverſity, is that our Judges have Authority to write and command them by the King's Writ to certify them of their Law, but they cannot write to the Judges of our Law to try any Thing and to certify them, for that they have no ſuch Authority to command by Writ, *&c.* And at the End of this Anſwer to the firſt Objection it is further ſaid, That if in the Eccleſiaſtical Court the Suit is for a Legacy, and the Defendant pleads a Releaſe, if in the admitting or rejecting of Proofs concerning this Releaſe, which is Matter determinable at Common Law, they do Wrong to the Plaintiff or Defendant, they have no Remedy but by Way of Appeal. But *Quære* as to this, for I take the contrary to be Law; and ſo adjudged in the Caſe of *Armiger Brown* v. *Wentworth*, *Yelv.* 92, before-mentioned, *Chap.* 54. 2. To the Second it was anſwered and reſolved, That if upon Conference with Men learned in the Law they give Sentence according to Law, this is well done, and no Prohibition ought to be granted; but if they take upon them to draw the Intereſt of any Man *ad aliud examen*, and to judge againſt the Rule of Law concerning the Inheritance or Intereſt of any, there a Prohibition lies. And in the Caſe at the Bar, they well reſolved the Law; for by the ſaid Livery of the Charter, the Tithes did not paſs as in Groſs, for that the Intention of the Parties was to paſs the intire Rectory by Feoffment, and not to paſs the Tithes only ſeparate from it, for that would be to diſmember the Rectory into Fractions by a Conſtruction of Law contrary to the Intention of the Parties. 3. As to the Third Objection, it was anſwered and reſolved, That by the Eccleſiaſtical Law a Stranger may come in *pro intereſſe ſuo*, and when they have Juriſdiction of the original Cauſe of Suit, we ought not to draw in Queſtion their Order or Proceeding; but if they proceed *inverſo ordine*, not obſerving Form, this ought to be redreſs'd by Appeal; and although that the Matter depending upon the original Cauſe be determinable by the Common Law, yet it ſhall be determined, as hath been ſaid, in the Eccleſiaſtical Court. 4. As to the Fourth Objection, it was anſwered and reſolved, That ſuch a Surmiſe that he hath but One Witneſs, is not ſufficient to have a Prohibition, for that the Eccleſiaſtical Court hath Juriſdiction of the Principal; and if ſuch a Surmiſe ſhall be ſufficient, all Suits in the Eccleſiaſtical Court ſhall be either delayed or quite taken away; for ſuch a Surmiſe may be made in every Caſe, and the Plaintiff in the Eccleſiaſtical Court cannot have any good Anſwer to it to have a Conſultation; which agrees, ſaith *Coke*, with the Reſolution in the principal Caſe, *viz. Robert*'s Caſe before-mentioned, which is reported 2 *Cro.* 269, and 12 *Co.* 65. So it hath alſo been held, that if a Parſon ſued upon the Statute of 2 *Ed.* 6. in the Spiritual Court for the double Value for not ſetting forth of Tithes, and the Defendant to have a Prohibition ſurmiſed, that he ſet them forth, and that they would not admit the Proof thereof by One Witneſs, that no Prohibition lies, for that they have Cognizance of the Matter. *Hill.* 9 *Car. B. R.* *Yolle* and Sir *Edward Powel*, 2 *Roll's Abr.* 299. So by the Reſolution of all the Judges of *England*, *Paſch.* 4 *Jac.* 1. under their Hands delivered to the Lords of the Council, it was agreed, That if the Queſtion be upon Payment or Setting out of Tithes, or upon Proof of a Legacy, or Marriage, or ſuch like Incidents, it was to

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2. They may give Sentence according to Law, *&c.*

3. That a Stranger may come in *pro intereſſe ſuo.*

4. A Surmiſe that he hath but One Witneſs is not ſufficient.

Surmiſe that he ſet forth his Tithes, and had but One Witneſs, no Prohibition.

Incidents left to the Eccleſiaſtical Law.

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be left to the Trial of their Law, though the Party have but One Witneſs; but where the Matter is not determinable in the Eccleſiaſtical Court, there lieth a Prohibition either upon or without ſuch a Surmiſe. 2 *Inſt.* 608. Yet 'tis to be obſerved, That the very next Term after this Reſolution of the Judges is ſaid to be given, that the Proof of the Revocation of a Will by One Witneſs being refuſed in the Eccleſiaſtical Court, for that very Reaſon a Prohibition was granted by the Court of *King's Bench*, as appears *Trin.* 4 *Jac. B. R. Armiger Brown* v. *Wentworth*, *Yelv.* 92. Nor is it material to ſay, that a Preſcription by the Common Law is to be tried at the Common Law. See 9 *H.* 6. 46. For when one preſcribed, (being ſued in the Spiritual Court for not paying towards the Repair of a Mother Church) that there was a Chapel within the ſaid Village, in which they had at all times *Sacramenta & Sacramentalia*, and that he, nor the Inhabitants that uſed to reſort to the ſaid Chapel, have ever uſed to repair the ſaid Church, it was held that a Preſcription, which is incident to Eccleſiaſtical Things, ſhall be tried in the Eccleſiaſtical Court. *Mich.* 20 *Jac. B. R.* 2 *Roll's Rep.* 265. And when a Prohibition was prayed upon the like Suggeſtion, by the Opinion of the whole Court a Prohibition lieth not, in regard that this Preſcription is meerly Spiritual; ſo the Prohibition was denied. *Hill.* 7 *Jac. B. R.* 1 *Bulſt.* 17. *Hill.* 12 *Jac. B. R.* betwixt the Church-wardens of *Aſhton* and *Bromage*, 2 *Roll's Abr.* 311.

Prohibitions granted againſt the former Points.

Now one might have thought, that the Law as to the Points determined in theſe Caſes was fully ſettled, *viz.* that the Court which hath Juriſdiction of the Principal hath the Juriſdiction of the Acceſſory, and that a Surmiſe of but One Witneſs is no Ground of a Prohibition; yet in a Prohibition obtained upon a Surmiſe, that whereas a Parſon had ſued in the Spiritual Court for the Tithe of Pigeons, the Defendant there had paid the ſaid Tithe, and proved it by One Witneſs, and the Court Chriſtian would not allow the Proof without Two Witneſſes; the Prohibition was affirmed. *Paſch.* 41 *Eliz. Moor* 909. And ſo a Prohibition was granted for the ſame Cauſe upon a Suit for the Tithes of Lambs. *Warner* v. *Barret*, *Hetley* 87, and ſo *Dodderidge* held in 14 *Jac. B. R.* in *Harding*, *&c.* and *Goſlin*'s Caſe, 3 *Bulſt.* 241.

So when Defendant ſuggeſted an elder Leaſe.

And when a Suggeſtion was, that the Defendant in the Spiritual Court claimed the Tithes by a Leaſe from the Parſon, of an elder Date than that the Plaintiff had, that ſued him for them there by Force of a later Leaſe by the ſame Parſon, ſo that the Queſtion was, which of the Two Leaſes ſhould be preferred; a Prohibition was awarded; and though *Croke* held that a Conſultation ſhould be granted upon 1 *R.* 3. 4, that where the Spiritual Court hath Juriſdiction of the Principal, there if an Acceſſory come triable at the Common Law, that alſo ſhall be tried there; yet *Coke* ſaid, that in one *Futter*'s Caſe, there was a Suit in the Spiritual Court for Tithes, and Title made by the Grant of the Rectory, and the other made Title by a former Grant, and a Prohibition was granted, yet he agreed, 1 *R.* 3. 4, unleſs the Spiritual Law differs from our Law, as their Law is, that a Gift of Goods is not good without Tradition, but otherwiſe it is at our Law; and *Dodderidge* ſaid, that the principal Matter here, which is the Leaſe, is Temporal not Spiritual, therefore is not within the Rule, 1 *R.* 3. but true it is, that if the Original be Spiritual, then the Acceſſory ſhall be tried there alſo, otherwiſe not; all which was granted by *Coke*, who alſo ſaid, that if a Man make Title in the Spiritual Court by Force of a Leaſe of the Proprietor, and the Defendant deny the Leaſe, a Prohibition ſhall be granted; and in the Caſe then before the Court,

a Prohibition was granted *per Curiam. Mich.* 12 *Jac. B. R. Worts* v. *Clifton*, 1 *Roll's Rep.* 61. So a Prohibition was prayed to the Eccleſiaſtical Court on a Suggeſtion, That the Trial of all Letters Patent and Grants of the King ought to be at the Common Law, and not in the Eccleſiaſtical Court; and that the Defendant had libelled in the Eccleſiaſtical Court for Tithes, and that his Tithes were by the King's Letters Patent, whereas the Plaintiff (who prayed the Prohibition) had a more antient Right to the ſaid Tithes by other former Letters Patent of the King; but the Libel in this Caſe in the Spiritual Court, was only in the common Form, (*viz.* That he was Proprietor of the Tithes, without making any other Title; but upon the Proceedings, the Title did appear to be by Letters Patent on both Sides); and by *North*, *Windham* and *Charleton*, a Prohibition was granted; for that the Eccleſiaſtical Court was not to try the Validity of the Letters Patent; but *Levinz contra*, the Suit in the Eccleſiaſtical Court being grounded only upon the Wrong in ſubſtracting the Tithes; and if the Tithe come in Queſtion there, 'tis only as an Incident, and ſaid that when the Foundation of the Libel is for a Spiritual Matter, and a Temporal Thing falls in incidently to be queſtion'd there, the Eccleſiaſtical Court ſhall try ſuch Temporal Matter, ſo that they proceed according to the Rules of the Common Law, and cited 12 *Coke* 65, 66. 1 *R.* 3. 4. *Regiſt.* 57, 58. 3 *Croke* 466, 788, and *Trin.* 24 *Car.* 2. *B. R.* Sir *William Juxton* v. *Seignior Byron*, adjudged accordingly by *Hale* Chief Juſtice and the whole Court; but the Prohibition was granted in this Caſe by the Three other Judges. 3 *Lev.* 71.

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If the Validity as to Priority of Letters Patent may be tried there upon a Libel for Tithes.

I will here alſo cite ſome Caſes mentioned by *Roll* in his *Abridgment*, where Prohibitions have been denied to the Spiritual Court upon Trial of Temporal incident Matters, the Principal being proper to their Juriſdiction. As firſt,

Other Caſes where Prohibitions have been denied.

If a Parſon compounds with a Pariſhioner for his Tithes, and grants them by Deed to him for a certain Sum by the Year according to the Agreement, and afterwards he ſhall ſue the Pariſhioner in the Eccleſiaſtical Court for the Tithes in Kind, no Prohibition ſhall be granted upon this Diſcharge by Deed, for they may well try it, having Conuſance of the Principal, 8 *Ed.* 4. 14. *Paſch.* 16 *Jac. B. R.* reſolved betwixt *Griffin* and *Bulſuſt*, and a Prohibition denied, although that once before it was reſolved *econtra* for the Church of *Wakerly*.

Where a Parſon granted Tithes by Deed, and after ſued for them in Kind.

So if a Parſon leaſe all the Tithes of his Benefice to one Pariſhioner, and after ſues him for his own Tithes, no Prohibition ſhall be granted, for that this Leaſe is a good Diſcharge there. 8 *Ed.* 4. 14. *per Choke.*

So after he leaſed them out.

So if a Parſon leaſe by Deed the Tithes of his Pariſh, and after ſues for the Tithes in the Spiritual Court, and there this Leaſe is pleaded, where the Queſtion betwixt them is, whether the Tithes of all the Pariſh, or only of ſome particular Things, are let; yet no Prohibition lies, for that they have Cognizance of the Original, and they ought to take Advice of them that be learned in the Common Law for their Direction, as the Judges of the Common Law take Advice of them; but if they Judge contrary to the Common Law, a Prohibition lies after Sentence. *Mich.* 13 *Car. B. R.* betwixt Dr. *Pocklington* and Sir ——— *St. John*, 2 *Roll's Abr.* 306, 307.

So where the like Leaſe was pleaded.

So if *A.* the Parſon of *B.* ſues for Tithes in the Spiritual Court againſt *B.* who pleads a Leaſe for Years made to him by the Parſon, and the Parſon replies, that he was Non-reſident and abſent by the Space of Eighty

Where the Acceſſory ariſes upon a Statute.

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ty Days and more, in ſuch a Year, *&c.* from his Benefice, by which the Leaſe became void; no Prohibition lies upon this Plea, although that it be grounded upon the Statute of 13 *Eliz.* and although it was objected, that the Judges of the Spiritual Court ſhall not have the Expoſition of a Statute; yet becauſe they have Juriſdiction of the originial Cauſe, they ſhall have Power to try that which is the Acceſſory ariſing thereupon. *Hill.* 14 *Car. B. R.* Sir *Thomas Lucy* v. Dr. *Lucy*, *per Curiam*, 2 *Roll's Abr.* 308. *nu.* 22.

The Proof of the Caſes.

Theſe Caſes ſerve to prove, that if upon a Suit for Tithes in Kind a Leaſe be pleaded and denied, the Validity thereof is to be tried in the Eccleſiaſtical Court, which alſo are in Proof of the Rule of Law, that when the Eccleſiaſtical Court hath Juriſdiction of the Principal, it hath alſo Juriſdiction of the Acceſſory, though the Acceſſory be otherwiſe of Temporal Cognizance.

The Concluſion, That if a Temporal Matter coming as Acceſſory may be tried in the Spiritual Court, much more a *Modus Decimandi*, when that comes in as an Acceſſory, *&c.*

From all which we may conclude, That the Law formerly was taken to be, or at leaſt no Judgments or Reſolutions were to the contrary, that if a Suit be for Tithes in Kind not extinct by Preſcription, or of Lands not Tithe-free, and a Preſcription as to the Manner of rendring ſuch Tithes be ſuggeſted, and ſo comes in as an Acceſſory upon the Suit for the Tithes, though it be to be granted, that the Trial of a Preſcription is otherwiſe Temporal, and to be tried at Common Law; yet when it comes in as an Acceſſory only to the principal Matter of which the Spiritual Court hath Juriſdiction, it may be tried there, and no Prohibition lies. And it hath been before ſhewed to have been held, that a Suit for a *Modus Decimandi* may be well commenced in the Spiritual Court, and that the *Modus* may be tried there, as being purely of Spiritual Cognizance, and no Suit can be brought for a *Modus* in the Temporal Court; therefore if a Temporal Matter coming in as an Acceſſory ſhall be tried in the Spiritual Court, much more, as it might be urged, ſhall a *Modus Decimandi*, which is of Eccleſiaſtical Cognizance originally, be tried there, when that comes in as an Acceſſory only. Yet when a Parſon libelled in the Spiritual Court for the Tithe of Lambs, and the Defendant to have a Prohibition ſuggeſted a Cuſtom to be, That if one hath Lambs under the Number of Seven, he ought to pay an Half-penny for every Lamb under that Number in lieu of all Tithes of Lambs; and if he had but Seven, the Parſon ſhould have the Seventh Lamb, and ſhould pay Three Pence; and if he had Eight, he ſhould pay Two Pence; and if he had Ten, the Parſon ſhould have the Tenth Lamb without paying any Thing. *Berkley* and *Jones* held, that the Canon Law is ſo, and ſo received in the Spiritual Court, and it is ſurmiſed that the Spiritual Court allows of it, and therefore there needs not any Prohibition. But becauſe it was alledged that it was a Cuſtom, and that the Parſon would ſtay until the Tenth did ariſe, and would refuſe to accept according to the Cuſtom, and that in the Spiritual Court this Surmiſe was not allowed; *Bramſton* and *Croke* conceived that a Prohibition was grantable, and ſo *Jones* and *Berkley* agreed that it ſhould be granted, and that the Party might demur, if he would. *Paſch. Car. B. R. Anonymus*, 1 *Cro.* 403. But whether an Appeal or Prohibition lies, if ſuch Plea be refuſed, yet a *Modus Decimandi* may be, and frequently hath been allowed to be tried in the Eccleſiaſtical Court; and the *Civilians*, when the Debate was before King *James* I. ſaid, that they would allow of a *Modus*, it being duly proved; for though it be ſaid in *Linwood* in his Title *de Decimis cap. Quoniam propter*, *fol.* 139. *b. Quod Decimæ ſolvantur, &c. abſque ulla diminutione*, and in the Gloſs it is ſaid, *Quod conſuetudo de non Decimando aut de non bene Decimando non valet*;

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valet; yet this being againſt the Law and Cuſtoms of the Realm, is void by the Statute of 25 *H.* 8. *c.* 19, and the Spiritual Judges ought not to have reſpect thereunto, but judge for a *Modus* proved, whether originally ſued for, or if coming in by Way of Plea upon a Suit for the Tithes, to allow of the Plea. From all theſe ſeveral Caſes and different Opinions of the Judges, one may conclude, that the Law was very much unſettled in the Time of *Jac.* I. and before, about granting Prohibitions to the Spiritual Courts, in caſe they took upon them to try any Temporal Matter, or refuſed Evidence allowable at Common Law, as by One Witneſs or the like; but ſince the Time of *Car.* I. the Spiritual Courts have been allowed to try all Temporal collateral Matters incident to the principal Thing there ſued for, and proper to the Juriſdiction of the Spiritual Courts without being prohibited; but ſo, as they try ſuch Temporal incident Matter according to the Rules of the Common Law to which it belongs, elſe a Prohibition ſhall go, as if they refuſe Proof by One Witneſs, *&c.* See *Chap.* 54.

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Since what Time, and how the Spiritual Courts have been allowed to try all Temporal collateral Matters.

If one be ſued for Tithes of Lands not Tithe-free, and pleads a Preſcription for a ſpecial Manner of Tithing, which is not refuſed, or if ſued for a *Modus Decimandi* originally, pleading another *Modus*, and his Plea is *bona fide* allowed, ſhall ſurmiſe falſly a Refuſal of his Plea, and for that Cauſe only a Prohibition ſhall be granted; the Queſtion is, whether ſuch Surmiſe of a Refuſal may be traverſed, that is, when the Matter or Ground of the Prohibition is only the Refuſal. And it is ſaid, though the Temporal Courts will take Notice that no *Modus* is allowed in the Spiritual Courts, yet a *Modus* muſt be ſuggeſted to have been pleaded there in Time. *Mich.* 22 *Car.* 2. *Meſſenger* v. *Jennings*, 2 *Keb.* 721. And generally, where a Suit is properly commenced in the Spiritual Court, Prohibitions are not granted till after the Plea there pleaded. *Mich.* 14 *Car.* 2. *B. R.* 1 *Keb.* 387. *Hill.* 14 & 15 *Car.* 2. *Parker* v. *Williams*, *Sid.* 100. 1 *Keb.* 433. *Paſch.* 16 *Car.* 2. *Batty* v. *Smith*, 1 *Keb.* 721.

Q. If a falſe Suggeſtion of a *Modus*, *&c.* being refuſed is traverſable.

As to the Refuſal of a Plea being traverſable, if the Suggeſtion for a Prohibition doth contain other Matter upon which a Prohibition may be duly granted, as upon a Suit for Tithes in Kind, that the Lands are Tithe-free by Preſcription, *&c.* though it be alſo ſuggeſted, that this was pleaded in the Eccleſiaſtical Court, and refuſed; yet whether the Plea was refuſed or not, is not traverſable, for the Party may have a Prohibition before any ſuch Plea pleaded by him in Diſcharge of Tithes, therefore in ſuch Caſes the Allegation of the Refuſal of the Eccleſiaſtical Judge are Words more of Courſe than Effect or Subſtance, *Paſch.* 38 *Eliz.* *The Biſhop of Wincheſter*'s Caſe, 2 *Co.* 44, the ſame called *Wright*'s Caſe, *Moor* 525, and is no Part of the Matter iſſuable or material in the Plea, but put in only to aggravate the Contempt, and many Times falſly, and therefore the *Modus Decimandi* is proved by Two Witneſſes according to the Statute of 2 *E.* 6. *c.* 13, and not the Refuſal, *Mich.* 7 *Jac.* in the Caſe *de Modo Decimandi*. Yet it is granted that in ſome Caſes the Refuſal is traverſable, as it was adjudged *Mich.* 30 & 31 *Eliz. B. R.* between *Morris* and *Eaton*, vouched in the Biſhop of *Wincheſter*'s Caſe, 2 *Co.* 45, where the Caſe was, that *Morris* was ſued by *Eaton* in the Spiritual Court for Tithes, and *Morris* did alledge that *Eaton* did not read the Nine and thirty Articles according to the Statute, and that the Eccleſiaſtical Judge did refuſe to allow the ſame; and this Refuſal was traverſable by the Judgment of the Court, for otherwiſe upon ſuch Surmiſe all Matters might be prohibited in the Spiritual Court, al-

Not where it contains other Matter fit for a Prohibition.

Suits on 2 & 3 Ed. 6.

though that the Spiritual Judge did all that belongeth to Law and Juſtice; and in the ſame Caſe the Party grieved may have his Remedy by Way of Appeal.

In what Caſes the Refuſal is traverſable.

From all which it may be collected, that if the Suggeſtion contains no other Matter upon which a Prohibition ought to be granted to the Spiritual Court, beſides the Refuſal of a Plea there, which by the Common Law is a good Plea, and ought to have been allowed, that in ſuch Caſe the Refuſal is traverſable. See *Trin.* 26 *Car.* 2. *B. R. Peters* v. *Prideaux*, 3 *Keb.* 332. Therefore, ſuppoſing that a *Modus Decimandi*, or a Preſcription of a Manner of Tithing is triable in the Spiritual Court, if in a Suit there for a *Modus Decimandi*, another *Modus* be pleaded, or that there is no ſuch *Modus*, and that Plea is refuſed; or if in a Suit for Tithes of Lands not Tithe-free, a Preſcription is pleaded as to the Manner of Tithing, and that Plea is refuſed, and a Prohibition being moved for upon Suggeſtion of ſuch Refuſal, the Refuſal being the principal Matter of the Suggeſtion, is therefore traverſable; and in all Caſes where the principal Matter is proper to the Spiritual Court, there no Prohibition ſhall be granted till Plea refuſed. The Courts of Common Law alſo, upon Suggeſtion of ſuch Refuſal, do oblige the Party to make Oath of the Truth of ſuch his Suggeſtion, and will not grant any Prohibition without ſuch Oath. *Mich.* 25 *Car.* 2. *B. R. Kendal* v. *Pearm*, 3 *Keb.* 217.

CHAP. LVIII.

Vide Chap. 54.

Actions upon the Statute of 2 & 3 Ed. 6. cap. 13, *for not ſetting forth of Tithes, by whom, and againſt whom to be brought. Of Declarations, Pleas, Evidences, Verdicts, and Judgments in ſuch Actions.*

Actions in the Common Law Courts upon the Statute 2 *Ed.* 6. *c.* 13.

HAVING ſhewed what Remedy the Law gives the Owner of Tithes for the Recovery of them, or Satisfaction for them being detained, and in what Courts ſuch Remedy is to be had; I will here ſubjoin in what Manner Actions are to be brought in the Common Law Courts upon the Statute of 2 *Ed.* 6. *c.* 13, to recover Damages for the Subſtraction of Tithes; and by whom, and againſt whom ſuch Actions are to be brought; how the Declarations in ſuch Action are to be framed; what Pleas the Defendants may make for their Defence; and what Evidence is proper, and may and ought to be given both by Plaintiffs and Defendants in ſuch Actions.

By Huſband and Wife.

Firſt, If an Huſband be ſeiſed or poſſeſſed of Tithes in the Right of his Wife, or jointly with his Wife, the Huſband and Wife muſt join in bringing the Action upon this Statute for the Subſtraction of ſuch Tithes. *Hill.* 34 *Eliz. Wentworth* v. *Criſpe*, *Moor* 912. *Mich.* 39 & 40 *Eliz. Bedel* v. *Sherman*, 2 *Inſt.* 650. 13 *Coke* 48. *Hill.* 7 *Jac. Foord* v. *Pomroy*,

Pomroy, *Noy* 136, ſame Caſe, 2 *Brownl.* 9, but yet, *Paſch.* 12 *Jac.* in *Babbington*'s Caſe, 1 *Roll's Rep.* 13, it ſeems to be admitted, that the Action may be brought by the Huſband alone without joining the Wife with him. Suits on 2 & 3 Ed. 6.

If the Huſband dies, the Wife, and not the Executors of the Huſband, ſhall bring the Action. *Foord* v. *Pomroy*, *Noy* 136. But if the Tithes be once ſet out and ſevered from the Nine Parts, they then become a Chattel veſted in the Huſband, *Ley* 70; therefore if after ſuch Severance they be taken away by a Stranger, the Huſband alone may bring an Action of Treſpaſs for ſuch taking away of his Tithes, without joining his Wife with him. *Mich.* 9 *Car.* *Anonymus*; *Jones* 325. *Foord* v. *Pomroy*, *Noy* 136. 2 *Brownl.* 9. But an Action of Treſpaſs in ſuch Caſe lies not againſt the Owner, who ſet out the Tithes. *Webb* v. *Pitts*, *Noy* 44. *Leigh* v. *Wood*, *Moor* 912. 3 *Cro.* 607. Nor may any other Action be brought againſt him; if it be, he may plead the ſpecial Matter in Bar of ſuch Action. 26 *Eliz.* *Gerrard*'s Caſe, 4 *Leon.* 7. But if after Severance the Owner of the Corn himſelf, or any other by his Command, takes the Tithes away, the Huſband and Wife, in ſuch Caſe, may join in an Action upon the Statute of 2 *Ed.* 6. againſt the Owner, for not ſetting out his Tithes, notwithſtanding that they were once ſevered by him from the Nine Parts, for that ſuch Severance is to be looked upon as fraudulent, only to evade the Law. *Noy* 136. But it ſeems to me, that the Huſband in this Caſe hath an Election either to charge the Owner of the Corn in an Action of Treſpaſs at Common Law, to be brought by himſelf alone for taking away his Tithes after they were ſevered, or in an Action upon the Statute, to be brought by himſelf and his Wife for taking away the Corn, the Tithes not ſet out, even as before the Statute; in ſuch Caſe the Party grieved might either have brought an Action of Treſpaſs at Common Law, or have commenced a Suit for the Tithes in the Eccleſiaſtical Court: But *Quære*, if there be not a Difference, when the Tithes are immediately taken away by the Owner of the Corn after they are ſever'd, and when they are ſuffered to continue for ſome Time upon the Land after ſuch Severance. By the Wife, if the Huſband dies.

If one be poſſeſſed of Tithes by ſeveral Titles, as where Part of them belong to the Parſon, and Part to the Vicar, who ſeverally make Leaſe of their Parts to one Perſon, ſuch Leſſee may bring one Action for the Subſtraction of theſe Tithes. *Paſch.* 3 *Jac.* Sir *Richard Champernoon* v. *Hill*, 2 *Cro.* 68, ſame Caſe, *Noy* 63, and 1 *Brownl.* 86. So if the Land out of which Tithes are demanded lie in ſeveral Pariſhes, yet one Action may be brought for the Subſtraction of them; and the Plaintiff need not ſet forth how much of the Lands lie in one Pariſh, and how much in the other, the Action being in nature of an Action of Treſpaſs grounded upon the Wrong, not obſerving the Statute. *Paſch.* 23 *Car.* 2. *Pellow* v. *Kingſford*, 1 *Vent.* 126, ſame Caſe, 2 *Keb.* 765, and 2 *Lev.* 2. But if the Plaintiff only ſay, that the Tithes belonged to him, and ſets not forth in what Pariſh the Lands lie, out of which Tithes are demanded, this is nought if the Defendant demur to the Declaration; but if it go to Trial, and a Verdict be found for the Plaintiff, this Omiſſion of the Pariſh is help'd by the Verdict; by *Roll's Trin.* 1650. *Cane* v. *Pell*, *Stile* 229. When one is poſſeſſed by ſeveral Titles.

Two ſeveral Perſons, who have Right to Tithes, by ſeveral Titles, cannot join in one Action for the Subſtraction of them, as the Parſon and Vicar in the Caſe aforeſaid cannot join in bringing an Action. Sir *Richard Champernoon* v. *Hill*, 1 *Brownl.* 86. Yet it is ſaid, that Joint-tenants or Tenants in Common of Tithes muſt join in an Action for the Subſtraction of Where Two Perſons may not join.

Suit on 2 & 3 Ed. 6.

of them. *Clayton's Rep. Caſe* 48. But *Quære* as to Tenants in Common, for that it ſeems contrary to the Reſolution of Sir *Richard Champernoon*'s Caſe laſt before cited.

If he muſt be named Parſon.

If the Action be brought by a Parſon by Plaint, he need not name himſelf Parſon in the *Queritur*, for if it appear by the Declaration that he is Parſon, 'tis ſufficient; but it is ſaid by *Fleming* Juſtice, that if the Action be brought by Writ, he muſt name himſelf Parſon, although he need not where it is by Plaint. *Mich.* 9 *Jac. Willot* v. *Spencer*, 1 *Brownl.* 98. If the Action be brought *tam pro Domino Rege quam pro ſeipſo*, it is not good. *Mich.* 40 *Eliz. Jones* v. *Carn*, 3 *Cro.* 621, ſame Caſe, *Moor* 911. Yet it is agreed, *Mich.* 4 *Car. Luvered* and *Owen*'s Caſe, *Hetley* 121, 122. That an Action upon this Statute may be brought *tam pro Domino Rege quam pro ſeipſo*; the Reaſon there given is, becauſe the King ſhall have a Fine, and the *Parſon's Counſellor* 404 takes this Caſe in *Hetley* to be Law rather than the Caſe in 3 *Cro.* 621. *Moor* 911. Upon that Account only, becauſe the King is to have a Fine, if Judgment be given againſt the Defendant, and mentions Actions brought upon the Statute of *Hue and Cry*, *&c.* to be within the ſame Reaſon, upon which Statute Actions are ſo brought: But the Reaſon that the King is to have a Fine, ſeems to be no Reaſon at all to bring the Action in the King's Name, for in many Actions the King hath a Fine, and yet the Action not brought in his Name. And I take both the Precedents and Practice to be generally againſt the *Parſon's Counſellor*, and according to *Jones* and *Carn*'s Caſe, *viz.* to bring the Action in the Name of the Party injured only, and not *tam pro Domino Rege*, *&c.* for a certain Duty being given by the Statute which may be ſued for by Action of Debt, I ſee no Reaſon why the Action ſhould not be brought in the Name of the Party only injured by Subſtraction of the Tithes, and unto whom the Duty is given in Recompence and Satisfaction of ſuch his Injury; and the Caſe ſeems to differ from Actions upon the Statute of *Hue and Cry*, *&c.* which demand Damages only, but not any certain Duty veſted in the injured Party by the Statute. But it is admitted in *Jones* and *Carn*'s Caſe, *Moor* 911, that an Information may be brought in the King's Name, grounded upon this Statute, againſt any Perſon for not ſetting out his Tithes; and *Paſch.* 26 *Eliz. Savil* 62, we find ſuch an Information brought.

King's Fine ſeems to be no Reaſon to ground the Action *tam quam.*

How againſt Joint-tenants, *&c.*

If Two be Joint-tenants, or Tenants in Common, of Land, the Action muſt be brought againſt them both; but if one of them only doth occupy the Land, the Action is to be brought againſt him: Or if one Joint-tenant or Tenant in Common, ſets forth the Tithes, and the other takes them away, the Action is to be brought againſt the wrong Doer only. *Mich.* 8 *Car. Cole* v. *Wilks*, *Hutton* 121, 122. Sir *Richard Champernoon*'s Caſe, 2 *Cro.* 86. *Mich.* 12 *Jac. Moyl* v. *Ewer*, 2 *Cro.* 362. *Hughes Abr.* 687. But if the Owner of Land ſells the Corn thereon growing, and the Vendor by the Command of the Vendee reaps it, and carries it away without ſetting out Tithes, the Action lies againſt the Owner of the Land. *Hill.* 5 *Jac. Rocheſter* v. *Porter*, *Noy* 152. *Hele* v. *Fretenden*, 1 *Brownl.* 34. And I ſuppoſe the Action may alſo be brought againſt the Vendee at the Election of the Plaintiff.

Needs only ſay he is the Owner or Proprietor.

It is not neceſſary for the Plaintiff in his Declaration to make any ſpecial Title to the Tithes, or to ſhew any Deed to maintain his Right to them; for the Action is but in the Nature of Treſpaſs to recover Damages, and to puniſh the Wrong and Injury the Plaintiff hath ſuſtained by taking away his Tithes contrary to the Statute, and the Plaintiff's Title only is an Inducement and Conveyance to the Action; but it is

ſufficient to purſue the Words of the Statute, and to ſet forth in the Declaration that the Plaintiff is the Owner or Proprietor of the Tithes, *&c.* 12 *Jac.* *Babbington*'s Caſe, 1 *Roll's Rep.* 13. *Pellow* and *Kingsford*'s Caſe, 1 *Vent.* 126. Suits on 2 & 3 Ed. 6.

It is not neceſſary to ſet forth in the Declaration by whom the Corn was ſown, the Action being brought againſt him who is Owner of the Corn at the Time of Reaping thereof; but the Time and Place where and when the Corn was carried away muſt be alledged. *Moly* v. *Ewer*, 2 *Croke* 362. And although the Severance of the Corn be ſhewed to be before the Sowing thereof, yet becauſe the Mentioning of the Time when the Corn was ſown is ſuperfluous and unneceſſary, the Declaration is good notwithſtanding. *Parſon's Counſellor* 404. So if the Taking away the Corn is alledged to be after the Defendant's Intereſt in the Land determined, yet 'tis good; for the Defendant continues to be Owner of the Corn, notwithſtanding that his Intereſt in the Land be ended before it be ſevered. *Trin.* 11 *Jac.* 2 *Croke* 325, ſame Caſe, 1 *Brownl.* 123. Neither is it neceſſary for the Plaintiff to ſet forth what Eſtate the Defendant hath in the Land, or by what Right or Title he occupies it; but to ſay generally, that the Defendant is Occupier is ſufficient. *March* 21, 22. Nor need the Plaintiff expreſs in the Declaration the Quantities or Loads of Corn, *&c.* carried away, 1 *Brownl.* 72, nor the ſeveral Kinds of it. 2 *Inſt.* 650. 13 *Coke* 47. *Townſend* v. *Clark*, 3 *Keb.* 307. But in an *Ejectione firmæ* brought for Tithes, there the ſeveral Kinds ought to be ſet forth, *Henry Harper*'s Caſe, 11 *Coke* 25. *b.* and where in a Declaration the Plaintiff ſet forth, that he was *Proprietarius Decimarum Garbarum & fæni*, *&c.* And that the Defendant did ſow certain Land containing ſo many Acres in that Pariſh with Grain, and carried the ſame away, not ſetting out the Tithes; after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that *Proprietarius Decimarum Garbarum* was incertain, and no Grain in particular was demanded by the Declaration, therefore the Declaration was not good: But it was reſolved, that *Garba* in its proper Signification is intended of Corn. And *Rolle* ſaid, that it had been ſo reſolved in one *Baxter*'s Caſe upon Conſultation had with the Civilians, where upon a Grant of *Decimas Garbarum* the Party claimed to have Tithe-Hay; but agreed, that although the Word *Garba* in its Latitude did comprehend any Thing that uſeth to be bundled, as Wood, *&c.* yet after Verdict it is to be intended of Corn only; and though the Demand was of ſo many Acres of Grain generally, it was held to be certain enough, it being mentioned to be ſown on a certain Number of Acres; this Action upon the Statute not being brought to recover the Tithes themſelves, but Damages for them only. And it was alſo reſolved by *Rolle*, that the Word Grain by common Conſtruction ſhall be meant Corn, and not other Seeds not titheable. *Mich.* 24 *Car.* *Southcote* v. *Southcote*, *Allen* 80. *Stile* 103, 108. *Mich.* 1650. *Fairfax* v. *Fairfax*, *Stile* 237, 238. And in *Hill.* 40 *Eliz.* it was reſolved, that the general Allegation that the Defendant *Grano ſeminavit* 20 *Acras terræ*, *&c.* without ſhewing what Kind of Grain, was good. 2 *Inſt.* 650. *Coke*, *lib. intrat.* 162. And it is ſaid to be beſt Way in Actions brought upon this Statute to declare generally, that the Plaintiff is Parſon, *&c.* of ſuch a Pariſh, and that the Defendant had ſuch Tithes within that Pariſh, the ſingle Value whereof is ſo much, by which the Action accrues to the Plaintiff, to demand the treble Value according to the Form of the Statute; it is alſo ſaid that the Plaintiff need not ſet forth, that he or the Defendant is *Subditus Domini Regis* (although the Words of the Statute extend only to Subjects,) for that ſhall be intended.

Needs not ſhew by whom the Corn was ſown, *&c.*

Needs not ſhew the Quantities, *&c.* carried.

How beſt to declare.

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1 *Sid.* 265. 1 *Keb.* 922, nor need the Plaintiff ſhew that the Tithes were not compounded for before the Corn carried away, for this lies on the Defendant's Part to be made out. *Paſch.* 18 *Car.* 2. *Owen* v. *Evans*, 2 *Keb.* 34. But where the Plaintiff in an Action upon this Statute for not ſetting out the Tithe of Wood declared, that the Defendant had cut down Wood to the Value of Two Hundred Pounds, and demanded Six Hundred Pounds as the treble Value of the Tithes of the ſaid Wood, this Declaration was held not to be good; the Plaintiff of his own Shewing demanding more for Tithe than the whole Wood was worth. *Paſch.* 5 *Jac. Man* v. *Somerton*, 1 *Brownl.* 94. Yet where the Plaintiff declared, that the Defendant was Occupier of Twenty Acres of Land, *quas quidem prædict'* Thirty Acres he did ſow, and carried the Corn away without ſetting out the Tithes; there the Word [Thirty] was held to be void, and that the Declaration was to be taken of the ſame Twenty Acres which before he was ſaid to be Occupier of. *Paſch.* 15 *Car.* 2. *B. R. Fanſhaw* v. *Mildmay*, 1 *Lev. Rep.* 97.

This Action not within the Statute of Limitations.

Note, That an Action grounded on this Statute 2 *E.* 6. for not ſetting out of Tithes, is held not to be within the Statute 21 *Jac. c.* 16, of Limitations, that Statute not extending to Actions grounded on Acts of Parliament, therefore the Plaintiff is not by Law confined to Six Years, or to any other Time certain within which to bring his Action. *Mich.* 14 *Car. Talory* v. *Jackſon*, 1 *Croke* 513. *Mich.* 18 *Car.* 2. *Jones* v. *Pope*, 1 *Sand.* 38. 1 *Sid.* 305. 1 *Keb.* 93. *Paſch.* 21 *Car.* 2. *Hodſden* v. *Harridge*, 1 *Sid.* 415. 2 *Keb.* 462, 497. 2 *Sand.* 66.

As to the Plea.

The next Thing to be conſidered is, What Plea the Defendant ought or may plead in an Action brought againſt him grounded on the Statute 2 *E.* 6. As to this, the Declaration being a Demand of a Debt or Duty due to the Plaintiff from the Defendant, and veſted in him by the Statute in Satisfaction of, or Recompence for the Tithes ſubſtracted, the moſt common and uſual Plea is, *Nil Debet*, which is a direct Anſwer to, and Denial of the Plaintiff's Demand; but Not guilty is alſo held to be a good Plea in this Action, that being a Denial of the Offence, and Breach of the Law charged upon the Defendant in not ſetting out the Tithes according to the Statute, which Offence is the Ground and Foundation of the Plaintiff's Demand: See the Caſe of *Bowtry* v. *Iſted*, *Hob.* 218. *Trin.* 42 *Eliz. Wortley* v. *Herpingham*, 3 *Cro.* 766. *Mich.* 40 *Eliz. Johns* v. *Carne*, 3 *Croke* 621. *Mich.* 33 & 34 *Eliz. Langley* v. *Haynes*, *Moor* 302. *Hill.* 2 *Jac.* Sir *Richard Champernoon* v. *Hill*, *Moor* 914. And both theſe Pleas are the general Iſſue in this Action; but we find alſo that Defendants have pleaded ſpecial Pleas, as a *Modus*, or other Diſcharge, and the ſame held good, as in *Southcote* and *Southcote*'s Caſe, *Allen* 80, and *Bernard* and *Evan*'s Caſe, *Raym.* 14, ſame Caſe, 1 *Keb.* 5, where a Parol Diſcharge of Tithes for Years was pleaded; but it ſeems not uſual to plead ſuch ſpecial Matter, neither is it ſo ſafe as the general Iſſue, where any Diſcharge of Tithes may be given in Evidence, and may alſo admit of ſome Queſtion, Whether upon a ſpecial Demurrer for that Cauſe ſuch ſpecial Pleas are good, as amounting only to the general Iſſue?

Special Pleas, as a *Modus*, &c.

As to the Evidence to be given.

The Cauſe being at Iſſue, and brought to Trial, it is alſo neceſſary to be ſhewed, what Evidence is requiſite and material to be given by the Plaintiff to maintain his Action ſo as to obtain a Verdict; and alſo what Evidence the Defendant may or ought to give to excuſe or juſtify himſelf from the Penalty given by the Statute.

Evidence by a Parſon, &c. Plaintiff, to prove his Inſtitution and Induction, &c.

Firſt, If the Plaintiff be Parſon, Vicar, or other Eccleſiaſtical Perſon, and claims the Tithes in the Right of the Church or Benefice whereof he

is Incumbent, he is in Strictneſs bound to prove his Inſtitution and Induction, and all Things elſe required by Law to qualify himſelf to be Incumbent of that Church whereunto the Tithes do belong; but if the Plaintiff hath been for ſeveral Years in Poſſeſſion of his Living, he is not ordinarily put to prove theſe Matters, unleſs the Defendant in his Defence ſhew ſome Reaſons why theſe Things ought to be proved and made out; but the Law doth not determine how many Years the Plaintiff ought to be in Poſſeſſion of his Benefice to excuſe him from being put to prove theſe Things, but that ſeems to be left to the Diſcretion of the Judge who tries the Cauſe. We find it reported, that in a Suit of Tithes brought in the Spiritual Court the Defendant pleaded, that the Plaintiff being Parſon had not read the Nine and thirty Articles, and the Court put the Defendant to prove that Matter, although it was a Negative, whereupon the Defendant moved for a Prohibition, which was denied: For by *Coke* and *Dodderidge*, the Law doth preſume that a Parſon hath read the Articles, becauſe otherwiſe he is to loſe his Benefice; and where the Law preſumes the Affirmative, there the Negative ſhall be proved. *Mich.* 12 *Jac. Monk* v. *Butler*, 1 *Roll's Rep.* 83. So it is ſaid to have been ruled upon Evidence at the Aſſizes, that all Things requiſite to make the Plaintiff Compleat Incumbent ſhall be preſumed, unleſs the Defendant by ſome Evidence to the contrary, give Occaſion to the Plaintiff to prove thoſe Matters. *Clayton's Rep.* 83. Yet in an *Ejectione firmæ* for a Rectory, it was inſiſted on by the Defendant's Counſel, (after the Plaintiff had made Proof of his Admiſſion, Inſtitution and Induction) that the Plaintiff ought to prove his Reading and Subſcribing the Articles, and the Declaration of his Aſſent to all Things contained in the Book of Common Prayer, and that ſuch Declaration of his Aſſent was made within the Time appointed by the Statute: And by the Report of the Caſe one may collect, that the Opinion of the Court ſeemed to be, that all theſe Things ought to be proved; but it is there ſaid, that Admiſſion, Inſtitution and Induction upon the Preſentation of an Eſtranger is ſufficient Evidence to bar the Plaintiff in an *Ejectione firmæ*, and to put him to his *Quare Impedit. Mich.* 16 *Car.* 2. *Snow* Leſſee of Dr. *Crawley* v. *Philips*, 1 *Sid.* 220. But according to the Opinions of *Coke* and *Dodderidge* before-mentioned, for that the Plaintiff having once a legal Title by Inſtitution and Induction, the other Matters appointed by the Statute to be after performed by him, the Omiſſion of any of which, although it make the Living void, yet being as a Condition ſubſequent to the Plaintiff's Title, ſhall be preſumed to be performed by him, and therefore the Non-performance ought to be made out and proved by the Defendant.

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Negative to be proved.

If in Ejectment, the Plaintiff muſt prove his Reading the 39 Articles, &c.

The Plaintiff muſt alſo prove that the Lands lie within his Pariſh, and that the Corn, &c. growing thereupon was carried away, and he muſt alſo prove the Value of the Corn, &c. and if the Plaintiff be a Leſſee, he muſt prove his Leaſe, but after a long Poſſeſſion he need not, nor need he prove what Eſtate his Leſſor had at the Time of the Leaſe made. 1 *Sid.* 220.

That the Lands lie in the Pariſh, &c.

The Plaintiff having made out his Caſe, and proved his Title to the Tithes, it is then incumbent on the Defendant to juſtify or excuſe himſelf. In order to which, the Defendant muſt prove that the Tithes were juſtly ſet out according to Law, and the Cuſtom of Tithing uſed within that Pariſh; and if the Tithes be once ſo duly ſet out, and after that taken away by a Stranger, the Defendant Owner of the Land ſhall not be chargeable. So the Defendant may prove an Agreement or Compoſition made with the Plaintiff for the Tithes, and though it be a Parol Agree-

Defendant's Proof of ſetting out the Tithes, &c.

ment

Suits on 2 & 3 Ed. 6.

ment only, which by Law is not ſufficient to grant the Intereſt of the Tithes, eſpecially for more Years than one, yet ſuch a Parol Agreement is ſaid to be good to excuſe the Defendant from the Forfeiture given by the Statute. *Paſch.* 13 *Car.* 2. *Bernard* v. *Ewers*, *Raym.* 14, ſame Caſe, 1 *Keb.* 21. 1 *Lev.* 24. *Paſch.* 24 *Car.* 2. *Knight & al'* v. *Peepes*, 3 *Keb.* 24. And if there be Two Plaintiffs who bring the Action, an Agreement with one of them only is ſufficient, and ſhall bind his Companion. *Moor* 915. The Defendant may alſo prove that another Perſon hath the Right to the Tithes, to whom he has paid them, or compounded for them.

The Defendant may prove Simony, or other Act or Omiſſion, &c.

The Defendant may alſo prove that the Plaintiff obtained his Living by Simony, or did not read the Articles, or is guilty of ſome other Act or Omiſſion which makes his Benefice void; or he may prove a Leaſe, Grant, or other Title from the Plaintiff, or from ſome other Perſon under whom the Plaintiff claims, who had Right to leaſe or grant ſuch Tithes. And as it ſeems, the Defendant may prove that the Benefice is above 8 *l. per Ann.* Value, and that the Plaintiff hath accepted another Living without Diſpenſation, contrary to the Statute 21 *H.* 8. *c.* 13. 1 *Croke* 357. So may the Defendant prove a *Modus Decimandi*, or any other Diſcharge of the Tithes, or the Payment of them, by Preſcription, Privilege, Unity, *&c.* and a Non-payment of Tithes Time out of Memory is good Evidence of ſuch Diſcharge. *Hob.* 300, 311. *Savil* 62. 3 *Keb.* 217. *Dyer* 349. *b.* *Parſon's Counſellor* 338. But if the Diſcharge be by the Pope's Bull or Compoſition, a Copy of ſuch Bull or Compoſition is not Evidence without ſhewing the Bull or Compoſition it ſelf. *Bret* v. *Ward*, *Winch* 70. So Depoſitions taken in the Eccleſiaſtical Court in a Suit there for Tithes, (although the Witneſſes be dead) are not Evidence in an Action brought at Common Law; but a Sentence given in the Eccleſiaſtical Court in a Suit for Tithes, (it being a judicial Act) may be given in Evidence in an Action brought in the Temporal Courts. *Mich.* 13 *Car.* *The Earl of Sarum* v. Sir *Brocket Spencer*, 2 *Roll's Abr.* 679. *March* 120.

Where the Jury muſt find the Value.

If the Jury give a Verdict for the Plaintiff, they muſt find the real Value of the Tithes, which ſhall be trebled by the Court; as if the Jury find the real and ſingle Value to be Twenty Pounds, *&c.* they ought to give the Plaintiff only ſo much, and the Court ſhall treble it, and make that Sum given by the Jury to be Sixty Pounds, which is the treble Value; ſo it was done *Hill.* 11 *Jac.* *Baldwin* v. *Gerreys*, *Godbolt* 341. But if the Iſſue be upon the Cuſtom of Tithing, or any other collateral Point, the Jury then need not find any Value of the Tithes, for that in ſuch Caſe the Defendant ſhall pay the Value expreſſed by the Plaintiff in his Declaration, becauſe by the collateral Matter pleaded in Bar, the Value of the Tithes ſet forth in the Declaration is confeſſed, as was reſolved in *Coſterdam*'s Caſe, cited in *Oliver* and *Collin*'s Caſe, *Paſch.* 6 *Jac.* 1 *Brownl.* 100, ſame Caſe, *Yelv.* 127. Therefore in all Actions brought upon this Statute, if the Defendant plead any collateral Matter in Bar of the Action, he muſt take the Value of the Tithes mentioned in the Declaration by Proteſtation, *viz.* he muſt by the Form of a Proteſtation aver, that the Tithes were not of that Value as is declared, otherwiſe he will be charged with the Value the Plaintiff hath by his Declaration ſet upon them. *Mich.* 24 *Car.* 2. Dame *Bowles* v. *Broadhead*, *Allen* 88. *Paſch.* 16 *Car.* 2. *Williams* v, *Inhabitants of Upwood*, *&c.* 1 *Keb.* 706. And by *Jones* Juſtice, the ſame Law it is, if Judgment be given for the Plaintiff by *Nihil dicit*, *Non ſum informatus*, or upon Demurrer, for in

thoſe Caſes the Plaintiff ſhall have Judgment for the whole Value by him demanded. *Parſon's Counſellor* 410.

Of Parochial Libraries.

Regula.

But the Plaintiff ſhall not recover any other Damages or Coſts, but only the treble Value of the Tithes, *Moor* 915. 2 *Croke* 70, and *Jenkins* 316,, for it ſeems to be a Rule, that where a Statute gives a certain Penalty, there in an Action to recover that Penalty, Damages and Coſts ſhall alſo be recovered; but where no certain Penalty is given, (as by this Statute for not ſetting out the Tithes) there 'tis otherwiſe. *Mich.* 5 *W. & M. C. B. Sedgwick, Qui tam, &c.* v. *Richardſon*, 3 *Levinz* 374.

If the Action be brought againſt two or more Defendants, and the Verdict finds for the Plaintiff againſt one of the Defendants only, and acquits the reſt, the Plaintiff ſhall have Judgment againſt him, againſt whom the Verdict paſſeth, the Action being grounded upon a Statute, although it be otherwiſe in Actions grounded upon Joint Contracts at Common Law; by *Rolle* Chief Juſtice, in *Brown* and *Nelſon*'s Caſe. *Stile* 317, 318. But if the Action be brought for Predial Tithes, for which an Action lies upon the Statute, and alſo for ſmall or other Tithes, for which no Action lies upon the Statute, and the Plaintiff obtains a Verdict for the whole, yet he ſhall not have Judgment upon ſhewing this Matter to the Court, for that the Plaintiff ought not to recover in an Action upon the Statute for any other Tithes but for Predial Tithes only. *Trin.* 8 *Jac. Pain* v. *Nichols*, 1 *Brownlow* 65. *Hill.* 9 *Jac. Mortimer* v. *Freeman*, 1 *Brownlow* 70.

If the Action be againſt Two, and one is acquitted.

In Actions grounded on the Statute of 2 *E.* 6. if Judgment be given for the Plaintiff, the Judgment ſhall be, *Quod Defendens ſit in miſericordia*, and not *Quod capiatur*, becauſe the Action is to recover a Debt given by the Statute as a Recompence for the Tithes. 1 *Roll's Abr.* 223. *Mich.* 16 *Car.* 2. *B. R. Probee* v. *Marquis de Dorcheſter*, 1 *Sid.* 233, and *Mich.* 1 *W. & M. B. R. Bickerſtaff* v. *Holden*. And a Recovery by the Plaintiff in an Action upon this Statute of 2 & 3 *E.* 6. is a good Plea in Bar to any other Suit brought after for the ſame Tithes. *Paſch.* 3 *Jac.* Sir *Richard Champion* v. *Hill*, 1 *Brownlow* 87, ſame Caſe, *Yelverton* 63.

Defend' in miſericordia.

Recovery in this Suit a Bar to any other, &c.

CHAP. LIX.

Of Parochial Libraries.

An Act for the better Preſervation of Parochial Libraries, in that Part of *Great Britain* called *England*.

7 *Annæ, cap.* 18.

§. 1. Whereas in many Places in the South Parts of Great Britain called England and Wales, the Proviſion of the Clergy is ſo mean, That the neceſſary Expence of Books for the better Proſecution of their Studies cannot be defrayed by them; And whereas of late Years ſeveral charitable and well diſpoſed Perſons have

Parochial and other Libraries for ſupplying the poor Clergy with Books.

Of Parochial Libraries.

have by charitable Contributions erected Libraries within several Parishes and Districts in England and Wales; But some Provision is wanting to preserve the same, and such others as shall be provided (or erected) in the same Manner, from Imbezilment; Be it therefore Enacted by the Queen's most excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the Authority of the same, That in every Parish or Place where such a Library is or shall be erected, the same shall be preserved for such Use and Uses as the same is and shall be given, and the Orders and Rules of the Founder or Founders of such Libraries shall be observed and kept.

To be preserved for the Uses and by the Rules appointed by the Founders.

§. 2. And for the Encouragement of such Founders and Benefactors, and to the Intent they may be satisfied, That their pious and charitable Intent may not be frustrated, be it also enacted by the Authority aforesaid, That every Incumbent, Rector, Vicar, Minister or Curate of a Parish, before he shall be permitted to use and enjoy such Library, shall enter into such Security by Bond or otherwise, for Preservation of such Library, and due Observance of the Rules and Orders belonging to the same, as the proper Ordinaries within their respective Jurisdictions in their Discretion shall think fit. And in case any Book or Books belonging to the said Library shall be taken away and detained, it shall, and may be lawful for the said Incumbent, Rector, Vicar, Minister or Curate, for the Time being, or any other Person or Persons, to bring an Action of Trover and Conversion in the Name of the proper Ordinaries within their respective Jurisdictions, whereupon treble Damages shall be given, with full Costs of Suit, as if the same were his or their proper Book or Books; which Damages shall be applied to the Use and Benefit of the said Library.

For which every Incumbent, &c. shall give such good Security, as the Ordinary thinks fit.

And may bring Actions for Books imbezled in the Ordinary's Name, and recover treble Damages, &c.

2.

§. 3. And it is enacted by the Authority aforesaid, That it shall and may be lawful to and for the proper Ordinary, or his Commissary or Official in his respective Jurisdiction, or the Archdeacon, or by his Direction, his Official or Surrogate, if the said Archdeacon be not the Incumbent of the Place where such Library is, in his or their respective Visitation, to inquire into the State and Condition of the said Libraries, and to amend and redress the Grievances and Defects of and concerning the same, as to him or them shall seem meet. And it shall and may be lawful to and for the proper Ordinary, from Time to Time, as often as shall be thought fit, to appoint such Person or Persons as he shall think fit, to view the State and Condition of such Libraries; and the said Ordinaries, Archdeacons, or Officials respectively, shall have free Access to the same at such Times as they shall respectively appoint.

And Ordinaries, &c. may visit such Libraries, by Commission or in Person, and redress Defects, &c.

§. 4. And be it also further enacted by the Authority aforesaid, That where any Library is appropriated to the Use of the Minister of any Parish or Place, every Rector, Vicar, Minister, or Curate of the same, within six Months after his Institution, Induction or Admission, shall make, or cause to be made, a new Catalogue of all Books remaining in or belonging to such Library, and shall sign the said Catalogue, thereby acknowledging the Custody and Possession of the said Books, which said Catalogue so signed, shall be delivered to the proper Ordinary within the Time aforesaid, to be kept or registred in his Court, without any Fee or Reward for the same.

Catalogues of the Books to be taken and sign'd by Incumbents, &c. and registe'rd in the Bishop's Court.

2

Of Parochial Libraries.

Of Libraries in Being by 29 *September* 1709, and of those that shall be within six Months after their Erection.

§. 5. And be it further enacted by the Authority aforesaid, That where there are any parochial Libraries already erected, the Incumbent, Rector, Vicar, Minister or Curate, of such Parish or Place, shall make, or cause to be made, a Catalogue of all Books in the same, thereby acknowledging the Custody and Possession thereof. Which Catalogue so signed, shall be delivered to the proper Ordinary on or before the 29th Day of September, which shall be in the Year of our Lord 1709. And where any Library shall at any Time hereafter be given and appropriated to the Use of any Parish or Place, where there shall be an Incumbent, Rector, Vicar, Minister or Curate in Possession, such Incumbent, Rector, Vicar, Minister or Curate, shall make, or cause to be made, a Catalogue of all the Books, and deliver the same as aforesaid, within six Months after he shall receive such Library.

Libraries on Death or Removal of the Incumbent to be shut up, and not opened till a new Incumbent inducted.

§. 6. And to prevent any Imbezilment of Books upon the Death or Removal of any Incumbent; Be it also enacted by the Authority aforesaid, That immediately after the Death or Removal of any Incumbent, Rector, Vicar, Minister or Curate, the Library belonging to such Parish or Place, shall be forthwith shut up and locked, or otherwise secured by the Churchwarden or Churchwardens for the Time being, or by such Person or Persons as shall be authorized or appointed by the proper Ordinary or Archdeacon respectively; so that the same shall not be opened again till a new Incumbent, Rector, Vicar, Minister or Curate, shall be inducted or admitted into the said Parish or Place.

Except for Vestries or other Parish Business.

§. 7. Provided always, That in case the Place where such Library is or shall be kept, shall be used for any publick Occasion for the meeting of the Vestry, or otherwise for the Dispatch of any Business of the said Parish, or for any other publick Occasion for which the said Place hath been ordinarily used, the Place shall nevertheless be made Use of as formerly for such Purposes, and after such Business dispatch'd shall be again forthwith shut and lockt up, or otherwise secured as is before directed.

Benefactions and Books given, to be registred by the Minister.

§. 8. And be it also further enacted by the Authority aforesaid, That for the better Preservation of the Books belonging to such Libraries, and that the Benefactions given towards the same may appear, a Book shall be kept within the said Library for the entring and registring of all such Benefactions, and such Books as shall be given towards the same, and therein the Minister, Rector, Vicar or Curate of the said Parish or Place, shall enter or cause to be fairly entred such Benefaction, and an Account of all such Books as shall from Time to Time be given, and by whom given.

And additional Rules and Orders may be made by the Ordinary, &c.

§. 9. And for the better governing the said Libraries, and preserving of the same, it is hereby further enacted by the Authority aforesaid, That it shall and may be lawful to, and for the proper Ordinary, together with the Donor of such Benefaction (if living) and after the Death of such Donor, for the proper Ordinary alone, to make such other Rules and Orders concerning the same over and above, and besides, but not contrary to such as the Donor of such Benefaction shall in his Discretion judge fit and necessary; which said Orders and Rules so to be made, shall from Time to Time be entered in the said Book, or some other Book, to be prepared for that Purpose, and kept in the said Library.

No Books, but Duplicates, may be alienated.

§. 10. And it is further enacted and declared by the Authority aforesaid, That none of the said Books shall in any case be alienable, nor any

Of Parochial Libraries.

any Book or Books that shall hereafter be given by any Benefactor or Benefactors shall be alienated without the Consent of the proper Ordinary, and then only where there is a Duplicate of such Book or Books: And that in case any Book or Books be taken, or otherwise lost out of the said Library, it shall and may be lawful to and for any Justice of Peace within the County, Riding or Division, to grant his Warrant to search for the same, and in case the same be found, such Book or Books so found, shall immediately by Order of such Justice be restored to the said Library; any Law, Statute or Usage to the contrary in any wise notwithstanding.

And if any are lost, to search for 'em by Warrant, if found, to be restored.

§. 11. Provided always, That nothing in this Act contained shall extend to a publick Library lately erected in the Parish of Ryegate in the County of Surrey, for the Use of the Freeholders, Vicar and Inhabitants of the said Parish, and of the Gentlemen and Clergymen inhabiting in Parts thereto adjacent; the said Library being constituted in another Manner than the Libraries provided for by this Act.

This Act not to extend to the Library at *Ryegate*.

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2 *Geo.* 2. *c.* 30. *Stepney* Pariſh. *ibid.*

3 *Geo.* 2. *c.* 3. *St. Mary, Stratford.* *ibid.*

3 *Geo.* 2. *c.* 17. *Limehouſe.* *ibid.*

3 *Geo.* 2. *c.* 19. *Bloomſbury, St. Giles*'s. *ibid.*

3 *Geo.* 2. *c.* 33. *Deptford* Church. *ibid.*

4 *Geo.* 2. *c.* 20. *Graveſend* Church. *ibid.*

5 *Geo.* 2. *c.* 4. *Woolwich* Church. *ibid.*

6 *Geo.* 2. *c.* 8. *St. George, Southwark.* *ibid.*

6 *Geo.* 2. *c.* 11. *Horſlydown* Church. *ibid.*

6 *Geo.* 2. *c.* 19. *Tiverton* Chapel. *ibid.*

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FINIS.

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